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.: 1826586
1826586-OSAH-DOE-SE-44-Schroer

FILED
OSAH
MAY 14 2018
Kevin Westray, Legal Assistant

FINAL DECISION

I. SUMMARY OF PROCEEDINGS

On January 26, 2018, Petitioners filed a due process hearing request pursuant to the Individuals with Disabilities Education Act ("IDEA"), alleging violations of the IDEA by Respondent DeKalb County School District (hereinafter "the District"). The due process hearing took place on March 7 and 8, 2018. Petitioner [redacted] represented herself and her son, Petitioner [redacted] who was present during some of the hearing. The District was represented by Neeru Gupta, Esq. Following the hearing, the parties filed post-hearing briefs. Petitioner also filed a Motion for Review and/or Consideration of Psychological Evaluation and Eligibility Report for [redacted] ("Petitioners' Motion for Review") on April 2, 2018. On April 5, 2018, the District filed an objection to Petitioners' Motion for Review. Due to the complexity of the issues, the length of the record, and the post-hearing motion, the deadline for issuance of the decision was extended to May 14, 2018, pursuant to 34 C.F.R. § 300.515(c) and Ga. Comp. R. & Regs. 616-1-2-.27.

II. FINDINGS OF FACT[1]

A. GENERAL BACKGROUND

1.

[redacted] is a [redacted] grader at [redacted] Middle School ("[redacted] He lives with his mother, [redacted] and his siblings in [redacted] Georgia. At the time of the hearing, he was eligible for special education services under the category of "Other Health Impairment" or "OHI" as a result of his Attention-Deficit Hyperactivity Disorder ("ADHD"). (Exhibit J-1.)

2.

This is the second due process hearing that the Undersigned Administrative Law Judge has conducted involving Petitioners and the District in the last year. On October 10, 2017, Petitioners filed a due process complaint against the District, docketed by OSAH as Docket No. 1814155-OSAH-DOE-SE-44-Schroer, and a hearing was held on November 16 and 17, 2018. The Court issued a Final Decision in that case on January 22, 2018, finding, among other things, that although the District delayed in conducting a reevaluation of [redacted] for a possible emotional and behavior disorder, the delay was partially attributable to [redacted]'s rescission of her original request. In addition, because there was no evidence to prove that the District's delay in conducting the evaluation was unreasonable or that it had resulted in either (i) the denial of a free and appropriate public education ("FAPE") to [redacted] or (ii) a significant impediment to [redacted]s ability to participate in [redacted]s education, the Court concluded that Petitioners were not entitled to relief.[2]

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1 To the extent that certain findings of fact are more appropriately classified as conclusions of law, they should be so construed. To the extent that conclusions of law are more appropriately classified as findings of fact, they should be so construed.

2 The January 22, 2018 Final Decision is included in the record of this case as ALJ #1 and is incorporated herein by reference. Under the doctrine of res judicata, the parties cannot relitigate issues that were adjudicated in the first due process hearing. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); Bowman v. Bowman,

Just a few days after the Court issued the Final Decision in the first case, Petitioners filed a second due process complaint against the District, which is the subject of this Final Decision. In their January 26, 2018 due process complaint, Petitioners described the following problems:

1) The District cancelled two meetings of [redacted]s Individualized Education Program ("IEP") team, including one scheduled for November 2, 2017 and one for January 16, 2018, in which the IEP team was to consider revisions to [redacted]s IEP. Although the team met on November 29, 2017, they did not finish the meeting, and the District has failed to timely schedule and hold a follow-up meeting.

2) [redacted]'s current IEP from May 2017 does not contain measurable goals, and the goals that are identified are not appropriate.

3) The District has failed to provide [redacted] with required progress monitoring reports.

4) In or around August 2017, [redacted] requested a psychological evaluation of [redacted] to determine whether he had a specific learning disability, a request which she repeated during the November 29, 2017 IEP team meeting. The evaluation has not been completed.

5) [redacted]s IEP team met on November 29, 2017 to discuss revisions to his IEP. Although the meeting ended before the discussion was complete, the team did agree on some amendments, which have not been added to [redacted]s IEP.

6) Testing data that was available and reviewed by the IEP team on May 2, 2017 and November 29, 2017 should have prompted the IEP team to conduct further assessment to determine [redacted]s academic functioning and to determine whether he has a specific learning disability.

7) The District has withheld [redacted]s academic records and data from [redacted] despite her repeated requests.

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215 Ga. 560, 561-562 (1959); Todd v. Dekle, 240 Ga. 842, 844-845 (1978). The doctrine of res judicata promotes judicial economy and prevents parties from relitigating disputes and endlessly prolonging cases. Id. In Georgia, a judgment rendered by a court of competent jurisdiction is "conclusive between the same parties and their privies." O.C.G.A § 9-12-40. In addition, under the doctrine of collateral estoppel, which also applies to this case, Petitioners may not relitigate "an issue of law or fact already adjudicated between the parties or their privies, where that issue is essential to the judgment." Malloy v. State, 293 Ga. 350, 354 (2013) (citations and quotations omitted).

3.

As a remedy to these problems, Petitioners requested that the District conduct an immediate psychological evaluation of [redacted] as well as a Functional Behavioral Assessment ("FBA"); establish adequate academic and behavior goals; provide summer school instruction; work with a third-party tutor for [redacted] to establish lesson plans; provide bi-weekly progress reports to [redacted] provide previous "FBA" data; and identify and address [redacted]s deficits toward meeting seventh grade academic standards.

B. MAY 2, 2017 IEP

4.

[redacted] moved into the District in January 2017, in the middle of his [redacted] grade year. On May 2, 2017, his IEP team met to develop a new annual IEP for the coming school year ("May 2017 IEP"). During the meeting, [redacted] requested that [redacted] be reevaluated to determine whether he should be found eligible for special education under the emotional behavior disorder category. However, although [redacted] clearly expressed her concerns about [redacted]s deficits in math and language arts at that time, there is no credible evidence in the record that she requested that [redacted] be evaluated for a specific learning disability at that time. (Ex. J-1; Ex. ALJ-1; Tr. 26.)

5.

[redacted]s May 2017 IEP identified the following five annual goals:

1) Given a weekly story or reading passage, [redacted] will demonstrate improvement in Reading Comprehension by answering comprehension questions. [redacted] is currently reading on a 4th grade 5th month reading level.

2) [redacted] will be able to write a five-sentence paragraph that includes a topic sentence, three supporting details, and a concluding sentence.

3) [redacted] will be able to solve numbers and operation problems involving multi-digit multiplication and division problems. (If calculator is used, document on the part or whole assignment when and where.)

4) [redacted] will follow directions given by authority figures.

5) [redacted] will maintain physical control by asking to . . . .[3]

(Ex. J-1.)

6.

The first three goals were academic goals, and the IEP set the criteria for mastery at 80% accuracy. For goal 1, the reading goal, the methods of evaluation were identified as informal assessments, benchmark assessments, and reading passages. For goal 2, the writing goal, the methods of evaluation were writing samples and a writing rubric. For goal 3, the math goal, the methods of evaluation were informal assessments and work samples. Both behavior goals were to be evaluated through "data collection," and the criteria for mastery was set at 80%.[4] (Ex. J-1.)

7.

The May 2017 IEP provided that the District will inform [redacted] of [redacted]s progress toward meeting the annual goals "concurrent with the issuance of regular education progress reports/report cards." According to the District, a progress report or a report card is distributed to regular education students every 4.5 weeks. (Ex. J-1; Ex. ALJ-1; Tr. 99, 302.)

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3 Goal 5 is incomplete in all versions of the May 2, 2017 IEP in the record of this case. (Ex. J-1; Ex. R-4; Ex. P-1.) However, the May 2, 2017 IEP does have a section entitled "Behavioral Intervention Plan," which identifies two target behaviors – following directions and temper tantrums/emotional outbursts – and states that his teachers will teach [redacted] a way to request a "break" from work. In addition, both goals 4 and 5 above were marked as "met or exceeded" as of May 2, 2017. As explained in the January 22, 2018 Final Decision in the prior case, the two behavior goals were included in [redacted]s new IEP at [redacted]s request, despite [redacted]s teachers reporting that they had not observed these problem behaviors since [redacted] had enrolled in the District. (ALJ #1.)

4 The criteria for mastery for the behavior goal of following directions was set at 80% accuracy "with cue assistance." With respect to the goal for maintaining physical control, the criteria for mastery was set at 80% for "independently" meeting the goal. (Ex. J-1, .)

8.

The May 2017 IEP provided that [redacted] would receive instruction for math and language arts in a small group setting with a special education teacher. For science and social studies, [redacted] was placed in a regular education classroom that is co-taught by both a regular education teacher and a special education teacher. The May 2017 IEP also identified a number of accommodations and supplemental aids and services for [redacted] including the use a calculator, extended time for testing and for some classroom assignments, and the provision of "notes when needed." (Ex. J-1; Tr. 456.)

C. IEP AMENDMENT MEETING

9.

In late August 2017, [redacted] met with [redacted] then-principal, M[redacted] B[redacted], and K[redacted] M[redacted], the District's Special Education Compliance Coordinator. Following that meeting, in September 2017, J[redacted] D[redacted], [redacted]s language arts teacher and his special education case manager, attempted to arrange a meeting of [redacted]'s IEP team to discuss possible amendments to [redacted]s IEP. Due to the unavailability of the school psychologist, D[redacted] had trouble finding a date for the meeting. Eventually, on or around October 13, 2017, [redacted] met with M[redacted] and the school psychologist, during which they discussed the psychological evaluation conducted by the Richmond County School District in 2016. As set forth in more detail in the January 22, 2018 Final Decision, [redacted] withdrew her request to have [redacted] reevaluated at the October 2017 meeting with B[redacted] and M[redacted]. (Exs. P-16, P-17, ALJ #1; Tr. 120, 126.)

10.

Eventually, an IEP amendment meeting was scheduled for November 3, 2017. However, when [redacted] arrived for the meeting, some of the members [redacted]s IEP team had been called into an "emergency" meeting by a [redacted] administrator and were not available for the meeting.[5] The IEP amendment meeting was rescheduled for November 29, 2017, after Thanksgiving break. (Tr. 303-04, 338-41.)

11.

At the November 29, 2017 meeting, [redacted] notified the team that she did, in fact, want [redacted] to be reevaluated. Although the purpose of the meeting was to discuss amendments to [redacted]s May 2017 IEP, the team used a generic IEP agenda designed for a student's annual IEP meeting. Understandably, the team did not cover all the topics on the agenda, but did spend considerable time discussing [redacted]s academic progress, which had been significant in some areas,[6] and his present levels of performance, including his performance on various assessments.[7]

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5 There was insufficient evidence in the record to assess the nature of the "emergency." However, it does appear that the administrator who called the emergency meeting was not fully aware that some of the teachers were scheduled to attend [redacted]s IEP meeting. Although the District's l cancellation of the November 3, 2017 IEP Amendment meeting was inconvenient and likely could have been handled better, there is no evidence that the District deliberately cancelled the meeting at the last minute or that they were unreasonably dilatory in rescheduling the meeting. D[redacted] contacted [redacted] within six days of the cancelled meeting to suggest November 29, 2017 as an alternative date. (Tr. 304; Exs. P-22, P-23.)

6 [redacted] had demonstrated considerable growth in reading and writing, having increased his reading level a full year in just a semester, according to one assessment, and he was demonstrating higher-level writing strategies, including writing complete paragraphs. In addition, [redacted] did not have a modified curriculum and was receiving passing grades, although he had 70s in math and language arts, the two subjects for which he received small-group instruction. (Tr. 33, 78, 314, 410-411, 460; Exs. R-13, R-16.)

7 Among other things, the team discussed [redacted]s performance on the Measurable Academic Progress or "MAP" tests, which had indicated a decline in math scores and an improvement in reading scores through the fall semester. MAP tests are online assessments used with all the District students, not just special education students. D[redacted] testified that MAP testing can be a good tool, among many used by the District, to assess a student's progress and learning. Of course, like with any test, the validity of the results depends on whether the student expends reasonable time and effort to answer the questions. In [redacted]s case, he did not always take the MAP testing seriously, especially the math test. He sometimes rushed through the questions, slept, or played with his cell phone instead of completing the test. According to [redacted]s math teacher, [redacted]s performance on the MAP math test is not an accurate or reliable measure of his progress toward his math IEP goal because of these behaviors. In addition, [redacted]'s May 2017 IEP did not designate the MAP or any other formal assessment as the measurement of mastery for

The team agreed that in addition to use of the calculator for classroom work, as established in the May 2017 IEP, [redacted] should be permitted to use the calculator during assessments. The team also agreed that a testing proctor should observe [redacted]'s testing behaviors and that his testing accommodations should be updated to reflect that [redacted] would take assessments at optimal times. Finally, the team agreed that [redacted] could use his tablet or phone to take a picture of work and assignments written on the board, in lieu of writing them down himself. The team did not reach consensus on amending any of [redacted]s annual goals. (Exs. P-11, ALJ # 1; Tr. 250, 253-54, 258, 270, 309-11, 417, 434-37.)

12.

Because of time constraints due to both the teacher's schedules and [redacted]s schedule, the team was unable to complete the IEP amendment meeting on November 29, 2017. The team agreed to reconvene the meeting on December 5, 2017. However, [redacted] sent an email about thirty minutes before the scheduled start time, notifying the team that she could not make the meeting. D[redacted] attempted to find a new date, and on January 5, 2018, sent an email to [redacted] proposing January 16, 2018. Although [redacted] promptly sent an email confirming that she could attend on that date, D[redacted] did not see [redacted]'s email and thus did not schedule the meeting for that date.[8] (Tr. 241, 253, 308, 419; Exs. P-25, P-26.)

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his math goal. Rather, the IEP called for progress to be measured by informal assessments and work samples. Although [redacted] testified that he struggles in math, especially with memorizing math facts, J[redacted] testified that [redacted] can use either a calculator or a math fact sheet to assist him in completing math assignments. Moreover, according to J[redacted], [redacted] has demonstrated an understanding of multi-digit multiplication and regrouping. D[redacted], who also works with [redacted] in math during "Extended Learning Time" or "ELT," testified that [redacted] has made good progress in math this year, but he does work slowly and his performance is inconsistent. (Ex. P-7, R-7; Tr. 17, 28, 32, 146, 328, 361, 379, 380, 382, 391, 395, 413-14, 445.)

8 [redacted] came to the school on January 16, 2018 for the IEP meeting. Although the meeting was not held, D[redacted] gave [redacted] a print-out [redacted]s current IEP. The IEP that D[redacted] printed out was largely blank, with the exception of the minutes from the November 29, 2017 meeting. The District's witnesses explained that D[redacted]e clicked the wrong button when she created the document, causing it to generate a new, blank IEP, rather than pulling in the information from [redacted]s May 2017 annual IEP and adding the minutes. Although the District's witnesses explained the mistake in printing out the IEP, they did not explain why, once the mistake was discovered, they did

13.

D[redacted] apologized and attempted to find a new date for the meeting, proposing January 24, 2018. [redacted] could not attend on January 24, 2018, and further efforts to schedule the IEP amendment meeting were hampered by problems with the District's email system. As of the date of the hearing, the IEP Amendment meeting had not been successfully rescheduled, and the May 2017 IEP had not been formally amended. Among other things, meetings relating to Petitioner's current due process complaint took scheduling precedence over the IEP amendment meeting. (Tr. 258, 264-65, 308, 316, 420, 438-39; Exs. P-26, P-27, P-28.)

D. PROGRESS REPORTS

14.

D[redacted], [redacted]s case manager, monitors his progress toward his IEP goals. Although there is no mandated form for the progress reports, [redacted]s May 2017 IEP provided that the District would send [redacted]s parent a report on his progress toward IEP goals on the same schedule used for regular education progress reports and report cards. Typically, the District generates an IEP progress report through a computer program, which populates the progress report with the goals listed in the IEP. The form also contains boxes to indicate whether the student (i) has met or exceeded the goal, (ii) is making progress toward the goal, or (iii) is not making progress. There is also a section on the progress report form for comments. (Tr. 34, 57, 350-51, 429-32; Ex. P-6.)

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not correct the mistake and provide [redacted] with a complete and current IEP. Essentially, D[redacted] testified that other than appending the minutes from the November 29, 2017 meeting, she would not have made any formal revisions to the May 2017 IEP as a result of the November 29, 2017 meeting because the team had not completed its discussion regarding revisions. D[redacted] acknowledged, however, that she did not send a corrected or amended IEP home with [redacted] even after she realized her mistake. (Tr. 267-68, 312-13, 347-49, 423, 433, 441-42; Ex. P-2, R-5.)

15.

In general, the District does not rely on a single method to assess whether a student is making progress toward his IEP goals. Rather, it uses a variety of data sources, including informal assessments, work samples, and online research-based assessment programs. At the beginning of the school year, [redacted] began making inquiries to District personnel regarding the tools that the District was using to monitor [redacted]'s progress. Having reviewed the evidence in the record, including the available email communications between the parties and the testimony of the witnesses, the Court finds that the District did not directly or promptly respond to [redacted]'s questions about how the District measured [redacted]s progress toward his IEP goals. Nevertheless, some of the information she requested, although not all, could be gleaned from the four progress reports from [redacted]s fall 2017 semester.[9] (Tr. 363, 388; Exs. P-18, P-19, P-20, R-8, R-9, R-10, R-11, R-12.)

16.

Specifically, the District generated IEP progress reports for [redacted] on or about September 22, 2017, October 18, 2017, November 27, 2017, and December 13, 2017. Although [redacted] testified that she did not receive all of the progress reports on or near the date they were generated, the preponderance of the credible evidence showed that D[redacted] sent the progress reports home with [redacted] around the same time that report cards and regular education progress reports were sent home. Moreover, according to D[redacted], [redacted] was, for the most part, organized with his papers, and she had a reasonable expectation that he would take the reports home to his mother. With respect to the content of the progress reports, the Court finds that the reports

9 The District also generated a progress report at the end [redacted]s [redacted] grade year, on or about May 17, 2017, only two weeks after the May 2017 IEP was created. On the May 17, 2017 progress report, the District noted that [redacted] was making progress on his three academic goals and that he had met or exceeded his two behavior goals. (Ex. R-8.)

provided adequate, if sometimes sparse, information about [redacted]'s progress toward his three academic goals.[10] However, the reports did not adequately report [redacted]s progress toward or maintenance of mastery of his behavior goals. As set forth above, [redacted]'s two behavior goals were considered met or exceeded at the time they were adopted as annual goals in May 2017. Nevertheless, as they remained goals on his annual IEP, the District was obligated to report on [redacted]s performance on those goals as measured by "data collection," which they did not do. Specifically, the September and October 2017 progress reports did not include a report on [redacted]s behavior goal relating to maintaining physical control, and the November and December 2017 progress reports did not report on either of [redacted]'s behavior goals.[11] (Tr. 210, 217-21, 278, 422, 429-32, 447-48; Exs. R-9 through R-12.)

17.

On or about January 4, 2018, D[redacted] printed out an IEP progress report for [redacted] which was blank. At the administrative hearing, K[redacted] A[redacted], [redacted] Lead Teacher for Special Education, testified that the January 4, 2018 progress report was blank because of D[redacted] earlier mistake in creating a new IEP, rather than an amended one, following the November 29, 2017 IEP meeting. That is, because the progress report pulls information from the IEP, and the new IEP was blank except for the November 29, 2017 minutes, the IEP progress report did not contain any goals or other information. According to A[redacted], the May 2017 IEP was still in the

10 [redacted] was reported to be making progress on all three of his academic goals in each of the four progress reports. With respect to his reading goal, as of November 2017, the District reported that he had met his goal and was currently reading on a fifth to sixth grade reading level. D[redacted] testified that she did not stop teaching [redacted] once he met this goal. Rather, she gives him new and more challenging material, as she would any student. (Tr. 362, 418-19; Exs. R-9 through R-12.)

11 For the behavior goal of following directions, the September 22 2017 progress report noted that 20% of the time, [redacted] required one to two reminders to follow directions. It is unclear from this report if [redacted] followed directions without any reminders the other 80% of the time, but that appears to be the implication. On the October 18, 2017 progress report, the District reported that [redacted] "has made great gains in listening to authority figures. He masters this goal 80 percent of the time." Despite the report of 80% mastery on both reports, this goal was still marked in the "making progress" category, rather than the "met or exceeded" category. (Exs. R-9, R-10.)

system and accessible to [redacted]s teachers. In addition, A[redacted] testified that the December 13, 2017 progress report, which was created manually by D[redacted], was timely, complete as to [redacted]s academic goals, and should stand in for the January 4, 2018 blank IEP. There is no evidence in the record, however, that the District ever provided a corrected or updated progress report to [redacted] at any time in January 2018. (Tr. 268, 312-13, 346, 351-55, 421; Exs. P-4, R-12.)

E. [redacted]S REFUSAL TO WORK FOLLOWING NOVEMBER 29, 2017 MEETING

18.

When [redacted] began [redacted] grade, his teachers found him to be a hard worker who appeared eager to learn. Following the November 29, 2017 IEP amendment meeting, [redacted] began refusing to do work, telling both D[redacted] and his math teacher, E[redacted] J[redacted], that his mother told him he did not have to do his work if he did not "feel comfortable" doing so. D[redacted] said that although [redacted] is still a sweet child and is not disrespectful to adults,[12] he has demonstrated increasing oppositional behaviors since the November 29, 2017 meeting, such as refusing to put away his cellphone, which has become a "huge problem" in the classroom. If J[redacted] takes his phone away, [redacted] will often go to sleep rather than work. Since the November 29, 2017 meeting, D[redacted] testified that she just does not get as much effort out of [redacted] as she did at the beginning of the year. (Tr. 315, 323, 385-86, 415-16.)

F. PSYCHOLOGICAL EVALUATION

19.

After [redacted] renewed her request for a reevaluation of [redacted] on November 29, 2017, the District began the process of arranging for a new psychological evaluation. Although the process took longer than M[redacted] thought it should, part of the delay was due to [redacted] failing

12 According to J[redacted], [redacted] uses inappropriate language toward his peers and engages in name calling, but is not disrespectful to his teachers. (Tr. 383-84.)

the prerequisite vision screening on January 26, 2018. Specifically, [redacted] has glasses for distance, which were broken. In fact, at the November 29, 2017 meeting, the teachers had discussed that [redacted] was having trouble seeing the board because he did not have his glasses. Eventually, the District allowed [redacted] to take just the "near vision screening" portion of the vision test, which he passed, and allowed the psychological testing to commence. At the time of the administrative hearing in early March 2018, the reevaluation had been completed, but the written evaluation report had not been finalized. (Tr. 138-41, 155-56, 284; Ex. R-14.)

20.

According to A[redacted], the District considers it a "best practice" to reevaluate a student's eligibility for special education every two years.[13] [redacted] was last found eligible for special education while in the Richmond County School District in February 2016. Thus, [redacted]'s eligibility should have been reviewed around February 2018 under the District's procedures, which was the month that the assessments of [redacted] were completed. Moreover, A[redacted], who was qualified as an expert in the planning and provision of special education services, opined that the terms of the May 2017 IEP were appropriate for [redacted] taking into account his cognitive functioning, the results of his 2016 psychological evaluation from Richmond County, his recent assessments, and his significant academic progress during the first semester of [redacted] grade. Finally, A[redacted] noted that [redacted] received services in an "interrelated" setting, which included students with a variety of disabilities, including specific learning disabilities. (Tr. 309, 331-36.)

21.

Following the administrative hearing, Petitioner filed the Motion for Review, asking the Court to consider the new evaluation report and eligibility report, which were considered by

13 IDEA only requires a reevaluation every three years, and the parent and the district can agree that a reevaulation is unnecessary. 34 C.F.R. § 300.303.

[redacted]s IEP team after the due process hearing was over. For the reasons set forth below in the Conclusions of Law, Petitioner's Motion for Review is hereby denied.

G. RECORDS REQUEST

22.

[redacted] testified that she requested [redacted]s educational records when she met with M[redacted] and B[redacted] in August 2017. M[redacted] testified that she understood that B[redacted] and A[redacted] gave [redacted] the records she requested. However, A[redacted] did not recall following up on this request and B[redacted] was removed as principal shortly after the August 2017 meeting. On or about October 30, 2017, [redacted] sent an email to M[redacted] and others[14] "formally requesting" a copy [redacted]s entire special education file, which [redacted] had requested in the past and had not received. She also specifically requested testing results and progress reports from the previous school year.[15] [redacted] testified that she did not receive the records she request from A[redacted] or anyone else at the District in response to this email and that most of the records she has received were produced by the District during this and the prior due process hearing. (Tr. 98, 102, 121, 214; Exs. P-19, P-21.)

III. CONCLUSIONS OF LAW

A. GENERAL LAW

1.

The pertinent laws and regulations governing this matter include IDEA, 20 U.S.C. § 1400

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14 [redacted] frequently sent emails to multiple District employees at the same time. For example, the October 30, 2017 email requesting [redacted]s special education file was sent to M[redacted], [redacted] former principal, B[redacted], D[redacted], and A[redacted]. She also copied OSAH's Calendar Clerk, although such communication is not contemplated or appropriate under OSAH's rules.

15 [redacted]s progress reports from March, April and May 2017 are included in the record as Exhibits R-2, R-3, and R-8. It is unclear when the District provided these reports to [redacted] although [redacted] did request them in the October 30, 2017 email.

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.

Under IDEA, a student with a disability is entitled to individualized special education, also known as a FAPE. Durbrow v. Cobb Cty. Sch. Dist, 2018 U.S. App. 9645, *10 (11th Cir. 2018), citing 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1)(A); see also Winkleman ex re. Winkleman v. Parma City Sch. Dist., 550 U.S. 516, 523 (2007). "The principle vehicle for providing a FAPE is an IEP prepared by the child's parents, teachers, and school officials that 'is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.'" Durbrow, 2018 U.S. App. 9645, *10, quoting Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S.Ct. 988, 999 (2017). The United States Supreme Court has developed a two-part inquiry to determine whether a school district has provided FAPE: "First, has the State complied with the procedures et forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982); see L.M.P. v. Sch. Bd., 879 F.3d 1274, 1278 (11th Cir. 2018). In the event that a court finds violations of IDEA's procedural requirements, the court has broad discretion to fashion relief it deems "appropriate in light of the IDEA's purposes;" however, "[o]nly procedural violations that cause a party substantive harm will entitle plaintiffs

to relief." L.M.P. v. Sch. Bd., 879 F.3d at 1278.

B. IEP AMENDMENT AND GOALS

4.

Both Georgia and federal law require school districts to develop an annual IEP for a student with a disability. Ga. DOE Rule 160-4-7-.06(12) & (19) (IEP must be in place by the beginning of each school year and be reviewed at least annually); 34 C.F.R. § 300.323(a); 34 C.F.R. § 300.324(b)(i). In addition, the IEP must contain, among other things, a statement of measurable, annual goals, including academic and functional goals designed to "[m]eet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum." 34 C.F.R. § 300.320(a)(2); Ga. DOE Rule 160-7-.06(1)(b). Once an annual IEP is developed, it may be changed by either the entire IEP team through an IEP team meeting or, if the parent and the school district agree, by a written document amending or modifying the current IEP. 34 C.F.R. § 300.324(a)(6); Ga. DOE Rule 160-4-7-.06(18)(e). If changes are made to an IEP, the school district must "ensure that the child's IEP Team is informed of those changes," and the "parent must be provided with a revised copy of the IEP with the amendments incorporated." Ga. DOE Rule 160-7-.06(18); 34 C.F.R. § 300.324(a)(6). Although IDEA only specifies review and revision of an IEP "periodically, but not less than annually," the IEP team must revise the IEP, as appropriate, to address lack of expected progress toward annual goals, the results of a reevaluation, or information provided to or by the parent. 34 C.F.R. § 300.324(b).[16]

16 See W.H. v. Schuykill Valley Sch. Dist., 954 F. Supp. 2d 315, 327 (E.D. Pa. 2013), quoting Kings Local Sch. Dist. v. Zelazny, 325 F.3d 724, 731 (6th Cir. 2003) ("The federal courts have said little on the failure to revise programs, but the school district is required to revise the programs as appropriate."); Loren F. v. Atlanta Sch. Sys., 349 F.3d 1309, 1312 (11th Cir. 2003) (IEP must be amended at least annually if its objectives are not met, but perfection is not required.).

1. Annual Goals

5.

Petitioners in this case argue that the annual goals in the May 2017 IEP were not measureable or appropriate. Based on the evidence in the record, the Court concludes that the five goals included adequate measurements to determine mastery, and that Petitioners failed to prove by a preponderance of the evidence that the goals were not appropriate for [redacted] at the time they were adopted in May 2017. First, as to whether the goals were measurable, all five goals had criteria for mastery set at 80% accuracy. For reading, [redacted]s goal was to improve his reading comprehension when he answered questions based on a weekly reading passage. His baseline reading level was established as fourth grade/fifth month, and improvement was to be measured by 80% accuracy on the weekly questions. For writing, [redacted]s goal was to demonstrate the ability to write a structured, five-sentence paragraph with 80% accuracy as measured by a writing rubric. For math, [redacted]s annual goal was to solve multi-digit multiplication and division problems with 80% accuracy. Finally, both behavior goals defined mastery as demonstration of the target behavior 80% of the time as measured through data collection. The Court concludes that all five goals in the May 2017 IEP sufficiently identified a method for measuring whether [redacted] was making progress toward mastering his annual goals.

6.

Second, with respect to whether these goals were appropriate, the Court concludes that Petitioners failed to meet their burden to prove that the five goals were not designed to meet [redacted]s special needs and enable him to make progress in the general education curriculum. 34 C.F.R. § 300.320(a)(2). Although [redacted] has cognitive limitations,[17] he does not have a modified

17 According to the psychological evaluation conducted by the Richmond County School District, [redacted]s full scale I.Q. falls in the low range of 76. M[redacted] testified that [redacted]s rate of academic progress will likely be

curriculum and is covering the same curriculum as other seventh graders in Georgia. He is earning passing grades in all his class, and according to the testimony of his teachers, [redacted] has met his reading goal and is making progress toward both his writing and math goals. In particular, with respect to the math goal, the Court concludes that the District adequately explained why [redacted]s declining MAP scores in math were not a reliable measure of his progress toward mastering his math goal. Rather, the Court credits the testimony of J[redacted] and D[redacted] that [redacted] had demonstrated an understanding of multi-digit multiplication and division and that his difficulties with memorizing math facts have not prevented him from making progress in the general education math curriculum, given that he can use a calculator as an IEP accommodation.

7.

With respect to the behavior goals, the Court concludes that the goals were appropriate and reasonably calculated to allow [redacted] to make progress in light of his circumstances. Given that the school had not observed the target behaviors in sixth grade, it was reasonable, if perhaps unnecessary, for the IEP team to agree to keep the behavior goals in place from his prior IEP in order to monitor his continued mastery of such goals. Moreover, it was not unlikely that the target behaviors might resurfaces under certain circumstances, such as occurred in this case. Specifically, according to D[redacted] and J[redacted], [redacted] began refusing to follow his teachers' directions after the November 29, 2017 IEP amendment meeting. The Court concludes that the goals of following directions and maintaining physical control were appropriate behavior goals for [redacted] for the 2017-2018 school year.

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affected by both his cognitive abilities and his ADHD. (Tr. 157-58.)

2. Timing and Completion of the IEP Amendment Meeting

8.

Petitioners assert that the District failed to hold and complete an IEP amendment meeting in a timely manner. As set forth above, IDEA only requires that an IEP be reviewed and revised, if necessary, on an annual basis. Although a parent may request that the IEP team reconvene to address necessary changes to the IEP before a full year has elapsed, there is no strict deadline for when such an amendment meeting must be held. Of course, although the District cannot unreasonably refuse to convene a meeting of the IEP team at a parent's request and must act in good faith to schedule the IEP meeting in a timely manner, the District is entitled to some "flexibility" in finding a meeting date. See Letter to Anonymous, 18 IDELR 1303 (OSEP 1992). Specifically, IDEA requires that each meeting of the IEP team be scheduled "at a mutually agreed on time and place." 34 C.F.R. § 300.322(a)(2); Ga. DOE Rule 160-4-7-.06(11)(a). Having considered the evidence in the record, including D[redacted] good faith attempts to find a mutually agreed on time and place for the amendment meeting, both the District's and [redacted]s cancellation of meetings at the eleventh hour, intervening school holidays in November and December, and missed email communication due to technical difficulties or excusable oversight on the part of D[redacted], the Court concludes that Petitioners failed to prove that the District intentionally or unreasonably delayed scheduling either the first IEP amendment meeting, which was ultimately held on November 29, 2017, or the follow-up meeting, which had not been scheduled by the time of the filing of the due process complaint.

9.

Moreover, to the extent that the delay in scheduling the IEP amendment meeting could be considered a procedural violation of IDEA, the Court concludes that Petitioners failed to prove

that the delay caused [redacted] substantive harm. In order to be entitled to relief under IDEA, a procedural violation must have impeded the child's right to a FAPE, significantly impeded the parent's right to participate in the decision-making process, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2). See also G.J. v. Muscogee Cty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). There is insufficient evidence to show that the delay in scheduling and completing the IEP amendment meeting denied [redacted] FAPE or significantly impeded [redacted]'s right to participate in the decision-making process. [redacted] was an active participant in the November 29, 2017 meeting, and the District has attempted to accommodate [redacted]s own time constraints when scheduling the IEP meetings.

10.

Finally, the Court concludes that the District's failure to provide [redacted] with a copy of the revised IEP following the November 29, 2017 amendment meeting did not violate IDEA. As an initial matter, it is not clear that the District was obligated under IDEA to provide a copy of a revised IEP to [redacted] until the IEP team had completed the amendment meeting, and IDEA does not specify a time by which the District must provide a revised IEP to the parents. Clearly, it would have been preferable for the District to have incorporated the agreed-upon changes to the IEP – namely, the use of the calculator during assessments, the limited use of a tablet or phone to capture images from the board, the monitoring of [redacted]s behaviors during testing, and the scheduling of testing during optimal times – rather than giving [redacted] a blank IEP with only the November 29, 2017 minutes attached. However, because the evidence in the record shows that attached minutes adequately reflected the agreed-upon changes and that both [redacted] and [redacted]s IEP team members had access to the minutes, the Court concludes that the District's failure to incorporate the preliminary amendments into the actual IEP document itself did not constitute a

violation of IDEA for which Petitioners are entitled to relief. See Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990) (IEP document that did not include all required elements was not invalid when "parents and administrators had all the information required by [IDEA] "even though it was not contained within the four corners of the IEP").

C. PROGRESS REPORTS

11.

IDEA requires that a student's IEP contain a description of "[w]hen periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided." 34 C.F.R. § 300.320(a)(3); Ga. DOE Rule 160-4-7-.06(1)(d). The May 2017 IEP stated that the District would provide [redacted] with progress reports at the same time as it provided report cards and progress reports for regular education students, which was roughly every four-and-a-half weeks. The preponderance of the credible evidence showed that the District complied with its obligation to provide timely progress reports on [redacted]s academic goals, but did not comply with respect to [redacted]s behavior goals. Specifically, the District did not provide a progress report on [redacted]s behavior goal of maintaining physical control, and only reported on his progress toward the following directions goal in May, September, and October 2017.

12.

Moreover, it is unclear from the evidence in the record whether the District collected any data on [redacted] maintaining physical control, although it may be that he did not exhibit any problem behaviors in this area. Still, [redacted] was entitled to receive reports on all his goals, even if the report was simply that [redacted] continued to meet or exceed the goal, and the District's failure to do so constitutes a procedural violation of IDEA. More concerning, however, was the

District's failure to provide progress reports on the goal of following directions in November, December, or January, particularly because [redacted] went from "meeting or exceeding" this goal in May 2017, to merely "making progress" on the goal in September and October. Moreover, beginning in late November 2017, following the IEP Amendment meeting, both J[redacted] and D[redacted] observed a marked decline in [redacted]'s willingness to follow directions, including refusing to do his work and refusing to put away his cell phone.

13.

Having considered the evidence, the Court concludes that this procedural violation more likely than not caused a deprivation in educational benefit to [redacted] [redacted]s oppositional behavior, including refusing to do work or put away his cell phone, was a "huge problem" according to D[redacted] and should have been reported to [redacted] on the December 13, 2017 progress report, as well as on a progress report that was due sometime in late January or early February 2018. Of course, as it appears that [redacted]s oppositional behaviors were directly sanctioned by [redacted] who told [redacted] that he did not have to comply with his teacher's directions when it involved work that he "wasn't comfortable with," the Court concludes that [redacted] shares responsibility for [redacted]s regression on this behavior goal.

D. REEVALUATION

14.

In the January 22, 2018 Final Decision, the Court held that the District's delay in conducting a reevaluation of [redacted] for a possible emotional behavior disorder ("EBD") was not unreasonable and that the District was not on notice that [redacted] had a suspected EBD. In the instant due process complaint, Petitioners assert that in August and November 2017, [redacted] specifically requested that [redacted] be evaluated for a different category of disability – namely, a

"specific learning disability" or "SLD." The evidence in the record proved that at the time of the administrative hearing in early March 2018, the District had completed the psychological evaluation of [redacted] but the written evaluation report had not been prepared.

15.

As the Court held in the January 22, 2018 Final Decision, although a school district must reevaluate a student with a disability if it determines that the student's educational needs warrant a reevaluation or if the parent or teacher requests a reevaluation, IDEA does not establish a deadline for completing a reevaluation. 34 C.F.R. § 300.303(a)(1), (2). Considering the authority cited in the January 22, 2018 Final Decision, which is specifically incorporated herein by reference, the Court has considered whether the District unreasonably delayed the psychological evaluation of [redacted] once [redacted] confirmed her request for the reevaluation in November 2017. The Court concludes that it did not. Rather, given [redacted]s vacillation about whether she consented to a reevaluation, as well as the intervening December holiday break and the delay associated with [redacted]s failed vision screening, the Court concludes that District's completion of [redacted]s psychological evaluation in approximately ninety days was not unreasonable. Accordingly, Petitioners are not entitled to relief on this claim.

16.

In addition, the Court concludes that consideration of the now-completed psychological evaluation and subsequent eligibility report is not appropriate at this time. First, Petitioners' due process complaint does not raise any claims based on the contents of the psychological evaluation or eligibility report. The complaint only addresses the delay by the District in completing the evaluation by the time the complaint was filed, which the Court has found did not violate IDEA. Petitioners cannot retroactively, after the close of the record, seek to amend their

complaint to add claims relating to the reevaluation. 34 C.F.R. § 300.509(d)(3). In addition, the District has the right under IDEA to "[p]rohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing." 34 C.F.R. § 300.512(a) (3) & (b). Finally, although OSAH's rules allow a party to move for an order allowing the introduction of newly-discovered evidence, this rule is not intended to allow for the introduction of newly-created evidence. Ga. Comp. R. & Regs. 616-1-2-.25.[18] Accordingly, Petitioners' Motion to Review is hereby **DENIED**.

E. RECORDS REQUEST

17.

IDEA provides parents of a child with a disability an opportunity to inspect and review all education records with respect to the child's identification, evaluation, and educational placement, as well as the provision of FAPE. 34 C.F.R. § 300.501(a)(1), (2); 34 C.F.R. § 300.613 (school districts must permit parents to inspect and review any education records[19] relating to their children that are collected, maintained or used by the district, and the district must comply with a request without unnecessary delay, before any meetings regarding an IEP, and in no case more than 45 days after the request has been made). In addition, IDEA provides that the right of access to records includes the right to a response to reasonable requests for

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18 Even if the psychological evaluation and eligibility report were considered "newly discovered," they are not material to the claims raised in the due process complaint. When considering whether a school district's IEP has provided FAPE, the federal courts have held that "[a]n IEP is a snapshot, not a retrospective. In striving for 'appropriateness' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, the time the IEP was promulgated." Mandy S. v. Fulton Cty. Sch. Dist., 205 F. Supp. 2d 1358, 1367 (N.D. Ga. 2000) (citations omitted). In this case, the Court's inquiry is what the IEP team knew or should have known at the time the IEP was adopted in May 2017.

19 Education records are defined under the IDEA implementing regulations as analogous to the definition in the Family Educational Rights and Privacy Act (FERPA). 34 C.F.R. § 300.611(b). FERPA defines "education records" as "records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." E.D. v. Colonial Sch. Dist., 2017 U.S. Dist. LEXIS 50173, *26 (E.D. Pa. 2017), quoting 20 U.S.C. § 1232g(a)(4)(A).

explanations and interpretations of the records. 34 C.F.R. § 300.613(b)(1). The failure to provide records as required by IDEA is considered a procedural violation, and parents must prove that the violation resulted in harm to the child or restricted the parents' ability to participate fully in the IEP process. K.A. v. Fulton Cty. Sch. Dist., 741 F.3d 1195, 1205 (11th Cir. 2013).

18.

Having weighed the evidence in the record, the Court concludes that Petitioners proved that the District violated IDEA by failing to provide [redacted] with access to [redacted]s entire education file despite her repeated requests. Although the Court understands that [redacted]s frequent emails and requests were burdensome and [redacted]s concerns and requests were sometimes mercurial, the preponderance of the evidence showed that [redacted] asked to review [redacted]s education records, including test results and progress reports, in her August 2017 meeting and again by email on October 30, 2017. [redacted] testified that she did not receive a timely response to these requests, and the District did not present any reliable evidence to rebut [redacted]s testimony. Having considered the evidence in the record, the Court concludes that [redacted]s ability to fully and effectively participate in the IEP process, particularly the IEP amendment meeting on November 29, 2017, was significantly impeded by the District's failure to provide her full access to [redacted]s education records prior to that meeting. 34 C.F.R. 300.513(a)(2); see also Weiss v. Sch. Bd. of Hillsborough County, 141 F.3d 990, 996 (1998), citing Doe v. Alabama State Dept. of Educ., 915 F.2d 651, 662 (11th Cir. 1990) (IDEA's extensive procedural framework intended to provide parents the opportunity for "full and effective participation in the IEP process.").

F. RELIEF

19.

Relief under IDEA is "determined by balancing the equities. Factors that should be taken into account include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters." Burlington v. Department of Educ., 736 F.2d 773, 801-801 (1st Cir. 1984), aff'd Burlington, 471 U.S. 359. See also B.G. v. Cranford Bd. of Educ., 702 F. Supp. 1158 (D.N.J. 1988), aff'd, 882 F.2d 510 (3d Cir. 1989), citing Jenkins v. Fla., 815 F.2d 629 (11th Cir. 1987). In B.G., the district court held that the conduct of the parties is extremely relevant when a court is authorized to apply equitable considerations. Id. at 1166.

20.

In this case, the District has committed two procedural violations – failure to provide timely or complete progress reports on [redacted]s behavior goals and failure to provide full access to [redacted]'s education records – that significantly impeded [redacted]'s ability to fully participate in the IEP process. Having considered Petitioners' request for relief, as well as [redacted]'s significant role in [redacted]s regression in maintaining his goal of following directions, the District's good faith, and, most importantly, [redacted]s educational needs, the Court concludes that the following is appropriate equitable relief for these procedural violations:

1) Within one week of the date of this Final Decision, the District shall designate a contact person who will receive requests from Petitioners for records or explanations of records under 34 C.F.R. §§ 300.501 and 300.613. The District shall also designate the method by which Petitioners shall notify the District of such requests and notify Petitioners of the contact person's email address, telephone number, or other contact

information. If Petitioners make a timely request for records (or for an explanation or interpretation of records) to the designated contact person, the District shall respond to the request at least three business days prior to any scheduled IEP meeting, or no later than 45 days following the request, whichever date is earlier.

2) Within two weeks of the date of this Final Decision, the District shall provide Petitioners with a supplemental progress report regarding [redacted]s two behavior goals from the May 2017 IEP, covering the time period from the beginning of seventh grade (August 2017) to the present. The report shall include a summary of the data collection used to measure [redacted]s progress toward these two goals and append any education records relating to such data collection. If, after receipt of this supplemental progress report, Petitioners wish to review [redacted]'s behavior goals or related services or accommodations with [redacted]s IEP team, the District shall promptly convene an IEP team meeting at a mutually-agreed upon date and time.

21.

All other requested relief not specifically granted above is hereby denied.

IV. DECISION

For the reasons stated above, the Court finds that the DeKalb County School District committed two procedural violations under IDEA that significantly impeded [redacted]s right to fully participate in the IEP process. Petitioners are entitled to the relief set forth above.

SO ORDERED, this 14th day of May, 2018.

Kimberly W. Schroer
Administrative Law Judge