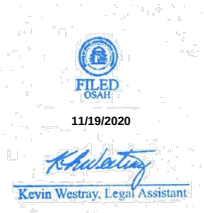
BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] BY AND THROUGH [redacted]; and [redacted], Petitioners, **v.** **ATLANTA PUBLIC SCHOOL SYSTEM, Respondent.**	**Docket No.: 2104051** **2104051-OSAH-DOE-SE-60-Walker**



FINAL DECISION AND ORDER GRANTING INVOLUNTARY DISMISAL

I. Introduction

On or about September 8, 2020, [redacted] by and through his guardian [redacted], and [redacted] ("Petitioners") filed a Due Process Hearing Request ("Complaint") pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. §§ 1400 to 1482, and its implementing regulations, 34 C.F.R. Part 300, against Respondent, Atlanta Independent School System ("Respondent" or "District"). On October 28, 2020, a hearing was held at the Office of State Administrative Hearings. Petitioners represented themselves, and MaryGrace Bell, Esq., and Laurance Warco, Esq. appeared for the District.

Petitioners asserted three claims at the hearing.[1] First, Petitioners argued that [redacted]. was entitled to an Independent Educational Evaluation ("IEE"). Second, Petitioners maintained that [redacted]. should be placed in the eighth, rather than the ninth, grade. Third, Petitioners asserted that the District had failed to hold an eligibility meeting as mandated by the IDEA. At the conclusion

[1] Petitioners filed a Due Process Hearing Request using a form provided by the State's Department of Education and checked the following boxes to indicate the reasons for their request: Identification, Educational Placement and Free Appropriate Public Education. The narrative portion of the Due Process Hearing Request asked that the District provide the following: 1) funding for private school, 2) an eligibility meeting regarding [redacted]'s primary disability, 3) funds for an Independent Educational Evaluation, and 4) removal of an evaluation conducted by another academic institution from [redacted]'s file. They also requested the District allow [redacted]. to remain in eighth grade. Prior to the hearing, the District filed a Motion for Summary Determination that resulted in the dismissal of several of these claims. Any claims not pursued by Petitioners at the hearing are hereby deemed abandoned.

of Petitioners' presentation, the District moved for Involuntary Dismissal pursuant to Ga. Comp. R. & Regs. 616-1-2-.35. The undersigned **GRANTED** the District's Motion as to Petitioners' first two claims, and the hearing proceeded as to the remaining claim. The record was held open an additional week to allow the parties to submit additional legal authority to the Court. After careful consideration of the evidence of record in this case, and for the reasons stated below, Petitioners' request for relief is **DENIED**.

II. Involuntary Dismissal

IDEA enables a parent to bring challenges to the "identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to (the] child" by filing a due process complaint. 20 U.S.C. § 1415(b)(6)(A). As the parties bringing this hearing request and seeking relief, Petitioners bear the burden of proof as to all issues for resolution. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

Under Ga. Comp. R. & Regs. 616-1-2-.35, "[a]fter a party with the burden of proof has presented its evidence, any other party may move for dismissal on the ground that the party that presented its evidence has failed to carry its burden." Following the presentation of Petitioners' evidence, the District moved for Involuntary Dismissal. For the following reasons, the District's Motion for Involuntary Dismissal is **GRANTED IN PART**, as to the first two claims.

A. IEE at Public Expense

Petitioner [redacted] is enrolled as a ninth-grade student at North Atlanta High School for the 2020-2021 academic year and is eligible for services under IDEA. [redacted] present levels of academic achievement and functional performance, as well as the services the District provides, are set forth in an Individualized Education Program ("IEP"). On August 21, 2020, an IEP meeting regarding [redacted] took place. At the meeting, Petitioners consented to the District performing a Functional Behavioral Assessment ("FBA"). Shortly thereafter, on September 8, 2020, Petitioners filed the instant

Complaint asserting that [redacted] is entitled to an IEE at public expense.[2] (Testimony of Petitioner [redacted] Testimony of Gayle Womack-Johnson; Exhibit R-10, see Court File).

The IDEA's implementing regulations define an IEE as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. § 300.502(a)(3)(i). Petitioners may be entitled to obtain an IEE at public expense; however, they may only request such an IEE if they disagree with an evaluation that already has been conducted by a school district. 34 C.F.R § 300.502**(**b). ("A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency"); cf. Edie F. v. River Falls Sch. Dist., 243 F.3d 329 (7th Cir. 2001) (parents not entitled to an IEE where they do not identify an area of disagreement with the diagnosis or the educational methodology used by the school); R.L. v. Plainville Bd. of Ed., 363 F. Supp. 2d 222 (D. Conn. 2005) (parents not entitled to an independent educational evaluation at public expense when there is no disagreement as to the district's evaluation but, instead, parents simply desire an additional source of information).

Given that Petitioners filed their Complaint less than twenty days after the August 21, 2020 IEP meeting, the District has not had sufficient time to conduct the FBA.[3] Petitioners have failed to carry their burden that they are entitled to an IEE, and the District's Motion for Involuntary Dismissal is **GRANTED** as to this claim.

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[2] Petitioner [redacted] complained that prior FBA evaluations have been inadequate because they all have been performed by the same individual. (Testimony of Petitioner [redacted]).

[3] Petitioners did not argue that the District's FBA was untimely. Under Part B of IDEA, a reevaluation must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303(b)(2). The District indicated that, due to the ongoing pandemic, all instruction is being conducted remotely at this time. It stated that it likely will not be able to perform the FBA until the return to in-person instruction. The projected date of return is January 2021. Guidance from the United States Department of Education "acknowledges that, during the pandemic, social distancing measures and each child's individual disability-related needs may make administering some in-person evaluations impracticable and may place limitations on how evaluations and reevaluations are conducted under IDEA Part B." Part B Implementation of IDEA Provision of Services in the Current COVID-19 Environment Q&A Document, U.S. DEP'T OF EDUC. OFFICE OF SPECIAL EDUC. PROGRAMS (Sept. 28, 2020), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-provision-of-services-idea-part-b-09-28-2020.pdf.

B. Grade Placement

[redacted] is currently in the ninth grade at North Atlanta High School. [redacted] testified that [redacted]. did not attend school for much of his eighth-grade year, and Petitioners maintain that the District's promotion of [redacted] from eighth to ninth grade constitutes an improper educational placement under the IDEA. In her testimony at the hearing, [redacted]. acknowledged that the private school [redacted] attended in eighth grade had provided written certification that he was prepared for the ninth grade. [redacted] is passing three out of four of his current classes. (Testimony of Petitioner [redacted], Testimony of Gayle Womack-Johnson; Exhibit R-10).

An IDEA claim must relate to the identification, evaluation, educational placement of the child, or the provision of a free appropriate public education ("FAPE"). 20 U.S.C. § 1415(b)(6); 34 C.F.R. §§ 300.507(a)(1)-(2).[4] Although the IDEA does not define "educational placement," the Fourth Circuit has described it as "the overall instructional setting in which the student receives his education rather than the precise location of that setting." AW ex rel. Wilson v. Fairfax Cty Sch. Bd., 372 F.3d 674, 683 (4th Cir. 2004). The IDEA "creates a presumption in favor of the education placement established by a child's IEP, and the party attacking its terms bears the burden of showing why the educational setting established by the IEP is not appropriate." Shaffer, 546 U.S. at 62; Devine v. Indian River Cty. Sch. Bd., 249 F.3d 1289, 1291-92 (11th Cir. 2001) (citation omitted).

Contrary to Petitioners' assertions, guidance from the Office of Special Education Programs of the federal Department of Education explains that "a retention or promotion decision is not synonymous with a placement decision for IDEA purposes." Letter to Anonymous (Nov. 9, 2000), 35 IDELR 35 ("Generally, the IDEA would not require that the IEP team make decisions regarding

[4] Petitioners also suggested that [redacted] placement in the Georgia Network for Educational and Therapeutic Support (GNETS) program would be inappropriate; however, the evidence is undisputed that [redacted]. has not been placed in GNETS and this claim is not ripe for determination.

promotion or retention of a child with a disability"). Even assuming that [redacted] promotion were to constitute an educational placement for IDEA purposes, a court reviewing a challenge to an educational placement decision must assess whether the placement "was designed to permit appropriate progress for the child instead of focusing on the student's or parent's desires." Middleton v. District of Columbia, 312 F. Supp. 3d 113, 138-39 (D. D.C. 2018).

The IDEA requires a school district and parents to develop an IEP designed to address the child's unique needs. RL v. Miami-Dade Cty. Sch. Bd., 757 F.3d 1173, 1177 (11th Cir. 2014). Although the IDEA does not specifically reference grade promotion or retention, if [redacted]. had not been receiving IEP services specifically designed to assist him in meeting the promotion standards Petitioners could challenge the lack of services as a denial of FAPE. See Middleton, 312 F. Supp. 3d at138-39; cf. Endrew F., 137 S. Ct. at 999 ("[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"). However, Petitioners did not present evidence to support such a claim here.

As explained above, Petitioners bear the burden of persuasion and must produce sufficient evidence to support the allegations raised in the Complaint. See Ga. Comp. R. & Regs. 160-4-7-.12(3)(n). Other than her own opinions, [redacted]. presented no evidence demonstrating that [redacted] promotion to ninth grade was a violation of the IDEA. Petitioners' generalized, vague and unsupported grievances cannot establish a violation of IDEA and the District's Motion for Involuntary Dismissal also is **GRANTED** as to this claim. The Court turns now to the third and final claim.

III. Findings of Fact

1.

[redacted] is a student eligible for services under the under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). He initially was found eligible for special education services in May 2017. (Testimony of Petitioner [redacted], Testimony of Gayle Womack-Johnson; Exhibit R-10).

2.

The Georgia Department of Education promulgates categories of eligibility for special education and related services. [redacted]s primary exceptionality is emotional/behavioral disorder ("EBD"),[5] his secondary exceptionality is other health impairment ("OHI")[6] and his tertiary

[5] An emotional and behavioral disorder is an emotional disability characterized by the following:

(i) An inability to build or maintain satisfactory interpersonal relationships with peers and/or teachers . . . .

(ii) An inability to learn which cannot be adequately explained by intellectual, sensory or health factors.

(iii) A consistent or chronic inappropriate type of behavior or feelings under normal conditions.

(iv) A displayed pervasive mood of unhappiness or depression.

(v) A displayed tendency to develop physical symptoms, pains or unreasonable fears associated with personal or school problems.

Ga. Comp. R. & Regs. 160-4-7-.05(Appendix d) (citing 34 C.F.R. § 300.8(c)(4)(i) (A - E)).

[6] Other health impairment means having limited strength, vitality or alertness including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that:

(1) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficient hyperactivity disorder, diabetes, epilepsy, or heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette Syndrome, and

(2) Adversely affects a child's educational performance.

Ga. Comp. R. & Regs. 160-4-7-.05(Appendix g) (citing 34 C.F.R.§ 300.8(c)(9)).

exceptionality is speech/language impairment ("SLI").[7] (Testimony of Petitioner [redacted]., Testimony of Gayle Womack-Johnson; Exhibit R-10, see Ga. Comp. R. & Regs. 160-4-7-.05).

3.

Dr. Gayle Womack-Johnson is the Special Education Lead Teacher at North Atlanta High School and oversees all programs for the school's students with disabilities. She is familiar with the Georgia Department of Education's policies and procedures and the computer software developed by the District regarding special education meetings. (Testimony of Gayle Womack-Johnson).

4.

According to Dr. Womack-Johnson, the District revaluates a student's category of eligibility once every three years. The District will meet with the parents to have a discussion as to whether a full evaluation is warranted before the eligibility determination. Generally, an eligibility decision would be made after consideration of any additional data. (Testimony of Gayle Womack-Johnson).

5.

Petitioner [redacted] was invited to participate in a meeting with the school district regarding [redacted]s eligibility on January 4, 2019. At the meeting on January 4, 2019, the District asked [redacted] for permission to evaluate [redacted] before holding an eligibility meeting. [redacted] refused to consent to the District's proposed evaluation. Documentation of the January 4, 2019 meeting indicates that '[redacted] requested the evaluation but refused to sign [the consent]." (Testimony of Gayle Womack-Johnson;

[7] Speech or language impairment refers to a communication disorder, such as stuttering, impaired articulation, language or voice impairment that adversely affects a child's educational performance. A speech or language impairment may be congenital or acquired. It refers to impairments in the areas of articulation, fluency, voice or language. Individuals may demonstrate one or any combination of speech or language impairments. A speech or language impairment may be a primary disability, or it may be secondary to other disabilities.

Ga. Comp. R. & Regs. 160-4-7-.05(Appendix j) (citing 34 C.F.R. § 300.8(c)(11)).

Exhibit R-7).

6.

If a parent declines a proposed evaluation, the District will review the material it already has collected to make an eligibility determination. At the meeting on January 4, 2019, the District examined [redacted] curriculum-based and psychological assessments, IEP records, achievement data, standardized testing, disciplinary and attendance records, teacher/staff observations, Behavioral Intervention Plan, and parent information to determine eligibility. (Testimony of Gayle Womack-Johnson; Exhibit R-7).

7.

In preparation for the current school year (2020-2021), an IEP meeting for [redacted] was held on August 21, 2020. The record of the IEP meeting indicates that [redacted]'s last eligibility meeting was held on January 4, 2019, and lists [redacted]'s categories of eligibility as EBD, OHI and SLI. Based on her review of the record, Dr. Womack-Johnson has no doubt that the District held an eligibility meeting held on January 4, 2019 and, following its review of available data, determined [redacted] categories of eligibility. (Testimony of Gayle Womack-Johnson; Exhibit R-10).

8.

Petitioners argue that the District has violated IDEA for failing to hold an eligibility meeting within three years. [redacted] maintains that the District last held an eligibility meeting for [redacted] in May 2017, and never told her about the January 4, 2019 meeting. According to [redacted]., if records indicate that she did attend a meeting on January 4, 2019 with the District, the meeting concerned [redacted]s Manifestation Determination, not his eligibility. (Testimony of [redacted].

9.

On or about April 18, 2019, the District and [redacted]. entered into a Settlement Agreement ("Agreement") wherein Respondent agreed to fund private school placement for [redacted] during the

2019-2020 school year. The Agreement provides that it "constitutes the total and final resolution of any and all issues that were or could have been the subject of a legal action . . . through the date of the execution of this Agreement." The Agreement explicitly provides that either party may bring a claim for violations occurring after the date of execution. (Exhibit R-20).

IV. Conclusions of Law

1.

The pertinent laws and regulations governing this matter include IDEA, 20 U.S.C. § 1400 et seq.; federal regulations promulgated pursuant to IDEA, 34 C.F.R. § 300 et seq.; and Georgia Department of Education Rules, Ga. Comp. R. & Regs. 160-4-7-.01 -.21.

2.

Under IDEA, students with disabilities have the right to a free appropriate public education ("FAPE"). 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1, 300.100; Ga. Comp. R. & Regs. 160-4-7-.02(1)(a). "The purpose of the IDEA generally is 'to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . . .'" C.P. v. Leon County Sch. Bd., 483 F.3d 1151, 1152 (11th Cir. 2007) (quoting 20 U.S.C. § 1400(d)(1)(A)). Provision of a FAPE requires the District to provide special education and related services designed to meet [redacted] needs in the least restrictive environment. 20 U.S.C.S. § 1400(d).

3.

[redacted] is a student with a disability eligible for services under IDEA. Ga. Comp. R. & Regs. 160-4-7-.05(a). Unless the parent and the District agree otherwise, the District must conduct a reevaluation at least once every 3 years. 34 C.F.R. § 300.303(b); Ga. Comp. R. & Regs 160-4-7-.04(3). A school district must obtain informed parental consent before conducting a reevaluation

of a child with a disability, unless the school district can show that it attempted to obtain consent, but that the student's parent failed to respond. Id.

4.

Petitioners assert that the District failed to hold an eligibility meeting as mandated by the IDEA. The undersigned rejects Petitioners' claim that [redacted] did not participate in an eligibility meeting and finds that the evidence demonstrated that an eligibility meeting for [redacted] took place on January 4, 2019 with [redacted] in attendance.

5.

Even if Petitioners had succeeded in demonstrating that an eligibility meeting had not been held, the district's failure to comply with one of the IDEA's procedural requirements would not automatically entitle the student to relief. A procedural error must result in substantive harm. G.J. v. Muscogee Cty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). Any failure to evaluate or identify [redacted]. did not deprive him of a FAPE because Petitioners did not demonstrate that he would receive additional special education services under a different eligibility category. J.N. v. District of Columbia, 637 F. Supp. 2d 11, 18-19 (D.D.C. 2009) (delay in performing evaluation does not affect substantive rights if child's education would not have been different had there been no delay).

6.

Petitioners also argue that the District erred by finding EBD to be [redacted] primary disability. No matter which category the District lists as [redacted] primary disability, the District must provide him with an IEP addressing specific needs. 34 C.F.R. § 300.300(a)(3)(ii); see M.M. v. Sch. Bd., 437 F.3d 1085, 1095 (11th Cir. 2006); Heather S. v. Wis., 125 F.3d 1045, 1055 (7th Cir. 1997) (IEP "must be tailored to the unique needs of that particular child)"; 34 C.F.R. § 300.111(d) (IDEA does not require that a child be classified by his or her disability as long as the child is receiving the special education and related services). A category of disability is "not an end to itself;" rather,

designating categories of eligibility only facilitates the underlying purpose of IDEA of "try[ing] to meet [a child's] educational needs." Pohorecki v. Anthony Wayne Local Sch. Dist., 637 F. Supp. 2d 547, 557 (N.D. Ohio 2009).

7.

Petitioners presented no evidence that, notwithstanding its designation of EBD as [redacted] primary disability, his IEP had failed to meet his educational needs under the IDEA. In any event, the parties entered the Agreement on April 18, 2019. By its terms, the Agreement constituted "the total and final resolution of any and all issues that were or could have been the subject of a legal action…through the date of the execution of [the] Agreement."[8] See Exhibit R-20. As the relevant action took place on January 4, 2019, Petitioners are barred from asserting this claim.

V. DECISION

Based on the aforementioned Findings of Fact and Conclusions of Law, Petitioners have failed to prove their IDEA claims by a preponderance of the evidence. Accordingly, Petitioners' request for relief is **DENIED**.

SO ORDERED, this 19th day of November, 2020.

Ronit Walker

Ronit Walker
Administrative Law Judge

[8] Settlement agreements may be enforced "in any State court of competent jurisdiction or in a district court of the United States, or, by the SEA, if the State has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements." 34 C.F.R. § 300.510(d)(2). There is no indication that Georgia has such mechanisms or procedures. Moreover, the Office of State Administrative Hearings ("OSAH") is not a court of competent jurisdiction for enforcement of settlement agreements or other contracts. Rather, OSAH's jurisdiction is limited to that conferred by the Georgia Administrative Procedures Act or other specific state or federal statutes and rules. See O.C.G.A. §§ 50-13-13, 50-13-40(a). The undersigned notes that the Court has not been asked to *enforce* the Settlement Agreement. The Court instead has been asked to recognize that issues that were resolved or could have been the subject of legal action as of the date of the Mediation Agreement were resolved and thus are not appropriately raised by the Petitioners.

NOTICE OF FINAL DECISION

Attached is the Final Decision of the administrative law judge. The Final Decision is not subject to review by the referring agency. O.C.G.A. § 50-13-41. A party who disagrees with the Final Decision may file a motion with the administrative law judge and/or a petition for judicial review in the appropriate court.

Filing a Motion with the Administrative Law Judge

A party who wishes to file a motion to vacate a default, a motion for reconsideration, or a motion for rehearing must do so within 10 days of the entry of the Final Decision. Ga. Comp. R. & Regs. 616-1-2-.28, -.30(4). All motions must be made in writing and filed with the judge's assistant, with copies served simultaneously upon all parties of record. Ga. Comp. R. & Regs. 616-1-2-.04, -.11, -.16. The judge's assistant is Kevin Westray - 404-656-3508; Email: kwestray@osah.ga.gov; Fax: 404-656-3508; 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303.

Filing a Petition for Judicial Review

A party who seeks judicial review must file a petition in the appropriate court within 30 days after service of the Final Decision. O.C.G.A. §§ 50-13-19(b), -20.1. Copies of the petition for judicial review must be served simultaneously upon the referring agency and all parties of record. O.C.G.A. § 50-13-19(b). A copy of the petition must also be filed with the OSAH Clerk at 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303. Ga. Comp. R. & Regs. 616-1-2-.39.