

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA



MAR 27 2018

Kevin Westray, Legal Assistant

█ BY AND THROUGH █ AND █ )  
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Petitioners, )  
 )  
v. )  
 )  
GWINNETT COUNTY SCHOOL )  
DISTRICT, )  
 )  
Respondent. )

DOCKET NO.:  
1821384-OSAH-DOE-SE-67-Baxter

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**FINAL ORDER**

This action came before the Court pursuant to complaints filed by two students, █ siblings Petitioners █ and █ and their mother, █ against Gwinnett County School District, Respondent, alleging that the Respondent had failed to implement █'s and █'s Individual Educational Programs ("IEPs") as required by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*, and its implementing regulations, 34 C.F.R. Part 300. A consolidated hearing on both complaints<sup>1</sup> was held on February 26, 2018. After Petitioners completed the presentation of their evidence, Respondent

<sup>1</sup> █ filed identical due process complaints for █ and █

moved for an involuntary dismissal pursuant to the Administrative Rules of Procedures due to Petitioners' failure to carry the burden of proof. After careful consideration of the evidence and arguments, and for the reasons set forth below, this Court finds that Respondent's motion for involuntary dismissal is **GRANTED** and Petitioners' claims for relief are **DISMISSED**.

## I. PROCEDURAL HISTORY

Petitioners initiated the above-styled actions on November 20, 2017, contending that Respondent violated their rights under IDEA related to their educational placement and requested private school placement at public expense. After an early resolution session and a mediation did not resolve the matters, and following a continuance of the hearing date requested by Petitioners, a hearing on the merits was held on February 26, 2018. Petitioners, represented by Petitioner [REDACTED] *pro se*, presented testimony from six witnesses. After Petitioners' presentation of evidence, Respondent moved for an involuntary dismissal on the grounds that Petitioners presented insufficient evidence that their IEPs had not been implemented and thus failed to meet their burden of proof. This Court finds as follows:

## II. FINDINGS OF FACT

1.

Petitioners [REDACTED] and [REDACTED] are [REDACTED] [REDACTED] who are eligible to receive special education services pursuant to the IDEA from Respondent. [REDACTED] and [REDACTED] are currently [REDACTED] grade students at [REDACTED] High School. T. 183, 190, 221, R. Ex. 1, Complaints.<sup>2</sup>

2.

Petitioners [REDACTED] and [REDACTED] were both identified by Respondent in the fourth grade as having a significant learning disability in math. T. 183. [REDACTED] also has a diagnosis of attention deficit

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<sup>2</sup> Citations to the record are: "P. Ex. \_\_\_" for Petitioners' exhibits; "R. Ex. \_\_\_" for Respondent's exhibits; and "T." followed by the page number for the hearing transcript.

hyperactivity disorder. T.183. ■■■ and ■■■ have attended Respondent's schools continuously but for their ■■■ and ■■■ grade years when they attended a charter school, ■■■ Academy. T. 183. Their difficulties in math continued at ■■■ and it was during that time that their mother, ■■■ engaged the services of an advocate, Ms. E■■■. T. 183, 185. ■■■ and ■■■ returned to Respondent's schools for eighth grade. T. 186.

3.

As a result of their disabilities, ■■■ and ■■■ have great difficulty with math. They lack some basic skills and math computation. T. 199. ■■■ and ■■■ receive support on foundational skills such as adding, subtracting with regrouping, multiplication, and variables. T. 37-38. With the exception of math and math related science courses, ■■■ and ■■■ perform at an average, or in some cases above average, level in their general education high school classes. T. 188; P. Ex. 2; P. Ex. 3.<sup>3</sup>

4.

■■■s and ■■■s mother ■■■ and her advocate, Ms. E■■■, have participated as members of the IEP team in developing IEPs to address ■■■s and ■■■s math disabilities for the past two school years. T. 200, 201; Complaints. According to ■■■ these IEPs were "detailed and specific." Complaints. Their goals and objectives have changed each year. T. 98. ■■■ agreed with the ■■■s IEP for the 2016-2017 school year. T. 158. ■■■ believes, however, that ■■■s and ■■■s IEPs, and the goals and objectives contained therein, were not implemented as ■■■

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<sup>3</sup> ■■■ and ■■■ have not yet passed Algebra I. P. Ex. 2; P. Ex. 3. They need to pass Algebra I to graduate with a regular education diploma. P. Ex. 2; P. Ex. 3; R. Ex. 1; T. 254. ■■■ has also not passed one semester of Chemistry and her first semester of Physics; however, she has taken and passed a science class in middle school that could count for her high school science credit. P. Ex. 2; P. Ex. 3; T. 186; 194-195. ■■■ and ■■■ both passed their current math courses, Geometry and Geometry Strategies, during the first semester of the 2017-2018 school year. P. Ex. 2; P. Ex. 3.

and ■■■ have not yet passed Algebra I. T. 162, 201. According to ■■■ if the supports within the IEPs had been implemented, ■■■ and ■■■ would have passed. T. 201.

5.

■■■ raised concerns at the hearing regarding documents produced by Respondent which she had not previously received, including a prior written notice letter. T. 101-103; P. Ex. 1. The prior written notice was written in 2016 and explained why Respondent believed it had sufficient data to draft new goals and objectives despite ■■■ and her advocate's disagreement. P. Ex. 1. ■■■ acknowledges that she and her advocate worked "side by side" with the team in developing measurable goals and objectives for ■■■ and ■■■ Complaints.

6.

After ■■■ and her advocate Ms. E■■■ raised concerns at ■■■'s IEP meeting in the spring of 2017 about ■■■'s lack of foundational math skills, the IEP team recommended 52 weeks of tutoring for ■■■ and subsequently for ■■■ as well. T. 35-36; 115. These extended school year (ESY) services are provided by H■■■ G■■■ for two hours each week. T. 35-36. Ms. G■■■ is a special education teacher employed by Respondent and was hand-selected by S■■■ P■■■-D■■■, a special education coordinator and member of the girls' IEP team, to provide the services.<sup>4</sup> T. 35, 38, 222. The services began in April of 2017 and continue. T. 35. Ms. G■■■ has a good relationship with ■■■ and ■■■ and they have made progress and benefitted from her tutoring. T. 40, T. 49-50, 221-222. With the help of Ms. G■■■, ■■■ and ■■■ are "closing the gap" with regard to their lack of foundational math skills, and they are more comfortable with math now. T. 222.

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<sup>4</sup> Ms. G■■■ has a bachelor's degree in child development, a master's degree in child development, and specialist degrees in special education and teacher leadership. T. 34. She currently serves as a special education teacher and special education mentor for new special education teachers within the county. T. 48.

7.

Other supports provided to [REDACTED] and [REDACTED] to assist them with their math courses, in addition to the year-round ESY include allowing them to use a calculator as an accommodation in math related courses; the school principal paying for an on-line Algebra course for [REDACTED] and [REDACTED] individual assistance from teachers in class as needed; allowing [REDACTED] and [REDACTED] to answer verbally as opposed to written work; providing detailed notes; allowing extended time on tests; offering positive reinforcement; small group instruction; special education math courses; and providing extra credit opportunities; T. 71; 111, 199-200; P. Ex. 9; R. Ex. 7. When [REDACTED] raised concerns about [REDACTED]'s and [REDACTED]'s Algebra I teacher during the 2016-2017 school year, Respondent offered to move [REDACTED] and [REDACTED] into another class for math; [REDACTED] and [REDACTED] declined. T. 209; R. Ex. 3. Petitioners did not identify any specific supports at the hearing that they requested which had not been provided by Respondent.

8.

Although [REDACTED] and [REDACTED] have not passed Algebra I, they both passed Math and Math Strategies during the first semester of the 2017-2018 school year. T. 124. [REDACTED] and [REDACTED] believe their current teachers are aware of their disabilities and IEPs. T. 52, T. 72. [REDACTED] and [REDACTED] testified that they feel more comfortable asking for help from their math teachers, and that help has been available from their teachers. T. 58, 73-75. [REDACTED] also goes to Mr. C [REDACTED] office, her case manager for help, and his assistance helps improve her grade. T. 80-81. Other opportunities for additional help in math exist - including going to a teacher for help before school, during advisement period, or after school by appointment, but [REDACTED] does not take advantage of these opportunities. T. 68.

9.

As it currently stands, [REDACTED] and [REDACTED] are [REDACTED] graders, and have cumulative GPAs of 75.597 and 73.938, respectively. P. Ex. 2; P. Ex. 3; R. Ex. 1; T. 190.

10.

Petitioners desire for [REDACTED] and [REDACTED] to attend private school at Respondent's expense because [REDACTED] feels her trust has been eroded<sup>5</sup> and she believes a private school will help [REDACTED] and [REDACTED] "regroup."<sup>6</sup> T. 180.

11.

A hearing convened on February 26, 2018. Six witnesses including Petitioners [REDACTED] [REDACTED] and [REDACTED] testified on their own behalf, as well as a previous private tutor, A [REDACTED] B [REDACTED]; [REDACTED] and [REDACTED]'s current tutor, Ms. G [REDACTED]; and Petitioners' advocate, who testified via telephone over Respondent's objection. At the close of Petitioners' evidence, Respondent moved for an involuntary dismissal on grounds that Petitioners failed to meet their burden of proof.

### III. CONCLUSIONS OF LAW

1.

Petitioners bear the burden of proof in this matter. Ga. Comp. R. & Regs. 160-4-7-.12(3)(n) ("The party seeking relief shall bear the burden of persuasion with the evidence at the administrative hearing."); Shaffer v. Weast, 546 U.S. 49, 62 (2005). The IDEA "creates a presumption in favor of the educational placement established by [a child's] IEP, and the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate." Devine v. Indian River Co. Sch. Bd., 249 F.3d 1289, 1291-1292

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<sup>5</sup> This lack of trust is presumably due to statements allegedly made by [REDACTED]s and [REDACTED]s former case manager to [REDACTED] T. 151. The former case manager was not called as a witness to testify in the hearing.

<sup>6</sup> Petitioners identified [REDACTED] [REDACTED] [REDACTED] in [REDACTED] Georgia as their selected private school, as it has a track for students with learning disabilities. T. 180-181.

(11<sup>th</sup> Cir. 2001). The standard of proof on all issues is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

This Court's review is limited to the issues Petitioners raised in the due process complaint. 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d); Ga. Comp. R. & Regs. 160-4-7-.12(3)(j). In the due process complaint hearing requests, Petitioners raised complaints related only to ■■■ and ■■■s educational placement and implementation ■■■■ and ■■■s IEPs. They bore the burden of showing by a preponderance of the evidence that Respondent failed to implement their IEPs.<sup>7</sup>

***Brief Overview of IDEA***

3.

The purpose of the IDEA 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 future education, employment, and independent living . . .” 20 U.S.C. § 1400(d)(1)(A).

4.

The IDEA requires school districts to provide to a student eligible for special education services a free appropriate public education (“FAPE”) in the least restrictive environment (“LRE”). 20 U.S.C. § 1412; 34 C.F.R. §§ 300.17, 300.114 – 300.118.

5.

The IDEA is designed to open the door of public education to children with disabilities but it does not guarantee any particular level of education once inside those doors. Bd. of Educ.

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<sup>7</sup> At the hearing, Petitioners also raised a procedural violation concerning documents produced as part of Respondent's pre-hearing disclosures which ■■■ alleged had not previously been provided. Though outside of the hearing requests, the Court addresses the procedural claims below.

of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 191 (1982); JSK. v. Hendry Co. Sch. Bd., 941 F.2d 1563 (11<sup>th</sup> Cir. 1991).

6.

The “IDEA requires school districts to develop an IEP for each child with a disability, with parents playing a ‘significant role’ in this process.” Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524 (2007) (internal citations omitted). “The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child.” Rowley, 458 U.S. at 207. Thus, the educators who develop a child’s IEP are entitled to “great deference.” Todd D. v. Andrews, 933 F.2d 1576, 1581 (11<sup>th</sup> Cir. 1991).

7.

The United States Supreme Court established a two-part test to determine the sufficiency of an IEP in Rowley, which has been adopted by the Eleventh Circuit. See JSK, 941 F.2d 1563. Under the Rowley standard, a court must consider whether (1) there has been compliance with the procedures<sup>8</sup> set forth in the Act and (2) whether the IEP is reasonably calculated to enable the child to receive educational benefit in the least restrictive environment. Rowley, 458 U.S. at 206-7. To meet its substantive obligation under IDEA, the school must offer an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Andrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017). For a child fully integrated in the regular classroom, an IEP typically should be “reasonably calculated to enable

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<sup>8</sup> The Act’s procedural safeguards are specifically enumerated in 20 U.S.C. § 1415.



the child to achieve passing marks and advance from grade to grade.” Endrew F. 37 S. Ct. 988, 992, (citing Rowley, 458 U.S. at 204.)

***Alleged Procedural Violation***

8.

The first prong of the two-part test examines whether any harm has resulted from a technical violation of the procedural requirements set forth in the IDEA. As a rule of law, procedural violations are not a per se denial of FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513. That is, a violation of the procedural safeguards will not automatically constitute a denial of FAPE. Rather, a party must show that any alleged procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded their parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE; or (iii) caused a deprivation of educational benefit. Id.

9.

Though Petitioners did not raise any procedural violations in their due process hearing requests, they asserted at the hearing that a procedural violation had occurred after they were provided with documents as part of Respondent’s pre-hearing disclosures which Petitioners asserted they had not previously received despite requesting for ■■■’s and ■■■’s educational records.<sup>9</sup> T. 129-134. Petitioners alleged they were unaware of the documents until received as part of Respondent’s five-day disclosures. T. 101, 168-170. As Petitioners could not have complained in their due process hearing requests about these documents, the Court considered the Petitioners’ procedural claims at the hearing.

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<sup>9</sup> These documents include a prior written notice and behavior observation form. T. 168-169.

10.

Petitioners failed to show that this alleged procedural violation regarding the provision of records caused actual harm. Petitioners put forth no evidence demonstrating that [REDACTED] or [REDACTED]'s right to a FAPE was impeded; that [REDACTED]'s right to participate in the decision-making process was significantly impeded; or that [REDACTED] or [REDACTED] was deprived of educational benefits. Instead, the only evidence before the Court showed that Respondent had complied with the IDEA's procedural requirements. [REDACTED] admitted that she, and her advocate, worked "side by side with [REDACTED]s and [REDACTED]s] IEP teams to craft "measurable goals and objectives." Complaint; T. 200. Thus, it is clear that the alleged procedural inadequacy with regard to the provision of records in no way impeded [REDACTED]'s opportunity to participate in the decision-making process regarding the provision of a FAPE.

***Alleged Substantive Violation***

11.

The second prong of the FAPE analysis under Rowley assesses whether students have been provided with educational programs reasonably calculated to enable them to receive educational benefit in the least restrictive environment. Rowley, 458 U.S. 176; JSK, 941 F.2d 1563. "Once an IEP is in place, the school must provide the services listed in it, and the IDEA sets out many rules governing the process of amending an IEP." Jamie S. v. Milwaukee Pub. Schs., 668 F.3d 481, 486 (7<sup>th</sup> Cir. 2012.) "A party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." L.J. ex rel. N.N.J. v. Sch. Bd. of Broward Cty., 850 F. Supp. 2d 1315, 1319 (S.D. Fla. 2012).

12.

Petitioners' hearing requests, and ■■■'s admissions at the hearing, made clear that their complaints concern the implementation of ■■■'s and ■■■'s IEPs, and not the IEPs themselves, which ■■■ and her advocate helped create.<sup>10</sup> T. 200; Complaints. ■■■ alleged that because ■■■ and ■■■ have not yet passed Algebra I, their IEPs, and the goals and objectives therein, have not been implemented. T. 162, 201; Complaints.

13.

Outside of ■■■ and her advocate's general presumptions concerning the implementation of ■■■'s and ■■■'s IEPs, no evidence was put forth showing that the IEPs were not implemented. Petitioners did not identify any special education supports or services contained in ■■■ and ■■■'s IEPs which were not provided by Respondent. While Petitioners on the one hand complained that ■■■ and ■■■ had not "met" their goals and objectives and revisions to the IEP were not being made, they also acknowledged that the goals and objectives were in fact revised each year, that the goals and objectives were measurable, and that ■■■ was part of that process. T. 98; Complaints.

14.

Although understandable that Petitioners wish for ■■■ and ■■■ to pass Algebra I and graduate on time, their assumption – that because ■■■ and ■■■ have not yet passed Algebra I their IEPs must not have been implemented – is faulty. An IEP is not a guarantee of success. See Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1151 (10<sup>th</sup> Cir. 2008) ("Congress established procedures to guarantee disabled students access and opportunity, not substantive

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<sup>10</sup> ■■■ described ■■■ and ■■■'s IEPs as "detailed and specific" and with "measurable goals and objectives that sought to address ■■■ and ■■■'s learning styles and deficits." Complaints. ■■■ maintained at the hearing that she was not concerned about the IEPs themselves, merely their implementation. T. 201.

outcomes.”) (citing Rowley, 458 U.S. at 192). Petitioners failed to show what support or element in particular Respondent failed to implement. To the contrary, the evidence presented illustrated the many supports Respondent had in place to assist [REDACTED] and [REDACTED] including year-round tutoring from which they were benefiting. Petitioners’ implementation claims consequently fail.

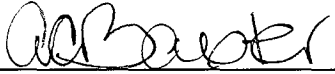
15.

While the Court understands [REDACTED]’s concern about her daughters’ difficulty successfully completing Algebra I, she failed to meet her burden in showing that [REDACTED] and [REDACTED] have been denied a FAPE and failed to present any evidence that the IEPs had not been implemented. Thus, Petitioners’ claims are denied.

#### **IV. ORDER**

Based on the foregoing, Petitioners’ request for relief is **DENIED** and Respondent’s motion for involuntary dismissal is **GRANTED**.

**SO ORDERED this 27th day of March, 2018.**

  
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**AMANDA C. BAXTER**  
**ADMINISTRATIVE LAW JUDGE**

**ORDER PREPARED BY:**  
Victoria Sweeny  
Georgia Bar Number 694663  
Catherine T. Followill  
Georgia Bar Number 267167  
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