BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted], by and through [redacted] and [redacted]; [redacted], and [redacted]; Petitioners,	)	
v.	)	Docket Number: 1904500 1904500-OSAH-DOE-SE-18-Kennedy
BUTTS COUNTY SCHOOL DISTRICT, Respondent.	)	

FINAL DECISION

[redacted] by and through his parents [redacted] and [redacted] and [redacted] and [redacted] in their own right, filed a Due Process Hearing request on August 6, 2018. A hearing was held on September 20, 2018. The court received the transcript on October 15, 2018.

In their hearing request, the Petitioners requested the following relief: (1) order Respondent to "make up for the time [redacted] lost by [Respondent] refusing him services based on . . . MID [Mild Intellectual Disability], including awarding compensatory damages such as tutoring to remediate him to grade level; (2) order Respondent "to provide transportation to a school of [Petitioners'] choice;[1] (3) order Respondent's Special Education Director and School Psychologist to attend humanity/ethics training and technical support in eligibility rules; and (4) award compensatory damages for having [redacted] sit in a GNETS placement under Autism.[2]

At the conclusion of Petitioners' presentation of evidence on September 20, 2018, the court granted Respondent's Motion for Involuntary Dismissal. This written Final Decision memorializes the court's ruling.

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[1] This request for relief does not appear to be notice of unilateral withdrawal and request for private placement at public expense. Rather, it appears that Petitioners want to choose which school [redacted] attends and require Respondent to provide transportation to such school. Although a school district has an obligation to provide transportation if providing services to a child under an Independent Educational Program (IEP), a parent does not have a legal right to solely dictate which school the student attends. Accordingly, the court indicated at the commencement of the hearing that the request for the parents to choose [redacted] school location would not be considered. (Tr. at pp. 14-15.)

[2] This request for relief was raised in a prior Due Process Complaint that was dismissed with prejudice. Accordingly, the court did not consider this relief. (Respondent's Exhibits 18, 20, 21.)

I. FINDINGS OF FACT

1.

[redacted] is a [redacted] year old boy (D.O.B. [redacted]) who resides within the Butts County School District. He is currently enrolled as a [redacted] grade student at [redacted], a private school located in [redacted] County, Georgia. (Tr. at pp. 44-45, 54.)

2.

[redacted] pediatrician has never diagnosed him with any conditions. However, around age eight or nine, someone diagnosed [redacted] with Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder (ADD/ADHD). Additionally, a psychological evaluation completed by Dr. S[redacted] in March, 2018, indicated that [redacted] suffered from a Mild Intellectual Disability (MID). (Tr. at pp. 46-48, 128.)

3.

Petitioners assert that [redacted] meets the eligibility category of MID under the Individuals with Disabilities Education Act (IDEA) and that Respondent violated Petitioners' rights by finding that [redacted] only met the eligibility category of Speech and Language Impairment when he entered middle school (2017-2018 schoolyear). (Due Process Complaint)

4.

To be found eligible under the IDEA eligibility category of MID, two requirements must be met. First, the student must have "Intellectual functioning ranging between an upper limit of approximately 70 to a lower limit of approximately 55; ***and*** the student must demonstrate deficits in adaptive behavior that significantly limit the student's effectiveness in meeting the standards of maturation, learning, personal independence or social responsibility, and especially school performance that is expected of the student's age level and cultural group, as determined by clinical judgment. Not every student who receives an IQ score of less than 70 will be determined to meet the eligibility category of Intellectual Disability. Rather, when determining if a student meets the eligibility category of Intellectual Disability, interpretation of results should take into account factors such as associated disabilities in communication, sensory or motor areas. (Ga. Comp. R. & Regs. 60-4-7-.05(Appendix E)) (emphasis added)

5.

Prior to entering middle school in the 2017-2018 schoolyear, [redacted] attended [redacted] Elementary School, which is within the Butts County School District. For the 2016-2017 schoolyear, he was enrolled in the GNETS program and received Special Education services under the eligibility categories of Autism and Speech and Language Impairment. The eligibility determination and the services [redacted] received were based, in part, on findings in a Comprehensive Evaluation Report prepared by Respondent on January 14, 2015. (Tr. at pp. 63-64, 80-81; Petitioner's Exhibit 13.)

6.

For the 2017-2018 schoolyear ([redacted] grade year), [redacted] attended [redacted] Middle School within the Butts County School District.[3] For the current 2018-2019 schoolyear, Petitioners withdrew [redacted] from [redacted] Middle School and placed him at [redacted], a private school, where he receives occupational therapy, speech therapy and physical therapy in addition to academics. Petitioners have been approved for the SB-10 Special Needs Scholarship to help pay for his schooling at [redacted] (Tr. at pp. 28-30, 44-46, 54; Petitioner's Exhibit 11.)

7.

Petitioners chose to withdraw [redacted] from the Butts County School District for the 2018-2019 schoolyear, in part, due to their disagreement with the Individualized Education Program (IEP) team's decision that [redacted] currently only meets the eligibility category of Speech and Language Impairment under IDEA. This determination allows [redacted] to receive an array of various services and accommodations to ensure he receives a Free and Appropriate Public Education tailored to meet his needs. However, Petitioners believe [redacted] should also be found eligible under the MID eligibility category. (Tr. at pp. 36, 54-55, 88-89, 121, 126-127.)

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[3] At the beginning of the 2017-2018 schoolyear, Respondent initially offered to place [redacted] at [redacted] another school within the Butts County School District. Petitioners disagreed with this placement and kept him home while discussing other options with Respondent. During this time, which lasted approximately six weeks, Dr. [redacted] T[redacted] worked with [redacted] on his academics until he was permitted to enroll in [redacted] Middle School. (Tr. at pp. 107-108.)

8.

Dr. T[redacted] worked with [redacted] on his academics for approximately six weeks in August/September 2017, prior to his enrollment at [redacted] Middle School. During this time, Dr. T[redacted] noted that [redacted] was "generally quiet, occupied with drawing, [and] approaching tasks with avoidance behavior such as needing to go to the bathroom, crying, shutting down." She further noted that "his current academic scores based on IEP, that he had coming out of the [redacted] grade indicated that he performs well below grade level in all of his subject areas." In addition, she noted that he "had difficulty digging deeper, recognizing details around him" and that he would "retreat into his own world and when challenged to complete task that require multi-steps with critical thinking." (Tr. at p. 108.)

9.

Although [redacted] struggles academically, Dr. T[redacted] noted during her time working with him that he "can attend to assigned tasks and achieve school success through direct interventions." Based on her observations, Dr. T[redacted] "recommended self-awareness exercise, eye coordination strengthening, incorporate drawing in his lesson planning, remediate math and basic reading skills, because . . . he was still having a lot of difficulty with just basic addition and subtraction, base ten, multiplication, and math word problems were very difficult." She further suggested "that he should have small group socialization, increase his OT and PT for coordination issues and get a comprehensive eye exam." (Tr. at pp. 108-109.)

10.

Three evaluations, including an Independent Educational Evaluation (IEE), were conducted during the 2017-2018 school year, each consistent with the others, regarding [redacted]'s present levels of functioning. (Tr. at p. 81.)

11.

The first evaluation was conducted by Dr. Mc[redacted] the school psychologist. Dr. Mc[redacted] administered only one IQ measure even though that test showed an IQ

score below 60,[4] which would normally indicate a need to administer a second IQ measure. (Tr. a p. 71, 143; Petitioner's Exhibit 12; Due Process Complaint ¶ 2.)

12.

After [redacted]'s parents disagreed with the IEP team's eligibility determination of only Speech and Language Impairment, the parents had an evaluation completed by Dr. M[redacted] in December 2017. A.G.'s Composite IQ score reported by Dr. M[redacted] was 50. Dr. M[redacted] report indicates a provisional diagnosis of Intellectual Disability with a recommendation for a more comprehensive evaluation to confirm the diagnosis. A copy of the evaluation was provided to [redacted]'s IEP team in January, 2018, to take into consideration regarding [redacted]'s eligibility and services. (Tr. at pp. 18-19, 73, 82, 92, 117; Petitioners' Exhibit 1; Due Process Complaint ¶ 3.)

13.

Another evaluation was conducted by Dr. S[redacted] in March 2018, as an IEE. [redacted]'s Full Scale IQ measure on this evaluation report was listed as 61. Dr. S[redacted] diagnosed [redacted] with ADHD, predominantly inattentive type, and Mild Intellectual Disability (MID). (Tr. at pp. 20, 41-42, 116; Petitioners' Exhibit 2; Due Process Complaint ¶ 4.)

14.

All three of [redacted]'s evaluations administered during the 2017-2018 schoolyear indicate an IQ score of less than 70. Additionally, Dr. Santavicca's evaluation indicates that [redacted] "may have difficulty across all domains of adaptive functioning." (Petitioner's Exhibits 1, 2, 12; Record as a Whole)

15.

At some point, even though [redacted]'s IEP from Fall 2017 indicated he was to receive an accommodation of "small group," [redacted] was moved into a large group setting according to his parents and advocates. After [redacted] was moved from a small classroom setting to a larger classroom setting, [redacted] began to exhibit behavioral issues. He became angrier and frustrated, and was suspended for the first time for altercations with other students. (Tr. at pp. 26, 57-60; Petitioner's Exhibits 4, 5, 11)

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[4] Respondent's Exhibit 4, Dr. Mc[redacted] report, indicates that she determined [redacted]'s Full Scale IQ to be 64.

16.

Based on concerns that Respondent failed to provide [redacted] a Free and Appropriate Public Education by failing to find him eligible under the IDEA category of MID, Petitioners filed a Due Process Hearing Request. In their request, Petitioners requested the following relief:

> (1) order Respondent to "make up for the time [redacted] lost by [Respondent] refusing him services based on . . . MID [Mild Intellectual Disability], including awarding compensatory damages such as tutoring to remediate him to grade level;
>
> (2) order Respondent "to provide transportation to a school of [Petitioners'] choice;
>
> (3) order Respondent's Special Education Director and School Psychologist to attend humanity/ethics training and technical support in eligibility rules; and
>
> (4) award compensatory damages for having [redacted] sit in a GNETS placement under Autism.

(Due Process Complaint)

II. CONCLUSIONS OF LAW

Applicable Law

1.

The case at bar is governed by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*; its implementing regulations, 34 C.F.R. § 300.1, *et seq.*; and the Rules of the Georgia Department of Education, Ga. Comp. R. & Regs. 160-4-7-.01, *et seq.*.

2.

The Court's review is limited to the issues Petitioners raised in their due process hearing request; Petitioners may raise no other issues at the due process hearing unless the opposing party agrees or acquiesces. See 20 U.S.C. § 1415(f)(3)(B); see 34 C.F.R. § 300.511(d).

3.

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 hearing request. 20 U.S.C. § 1415(b)(6)(A); Shaffer v. Weast, 546 U.S. 49 (2005). The IDEA "creates a presumption in favor of the education placement established by a child's Individualized Education Program (IEP), and the party attacking its terms bears the burden of showing why the educational setting established by the IEP is not appropriate.'" Id.; see 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."). Thus, in this case, Petitioners bear the burden of persuasion and must produce sufficient evidence to support the allegations raised in the due process hearing requests. The standard of proof is preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

4.

The purpose of 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).

5.

The IDEA requires school districts to provide an eligible student 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. The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982). The Supreme Court in *Rowley* defined a FAPE as follows:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.

Id. at 200-201.

6.

In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local educational agency satisfied its obligation to provide a FAPE to a student with

disabilities. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowely, 458 U.S. 176, at 206 (1982). First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is "reasonably calculated to enable the child to receive educational benefit." Id. at 206-207.

7.

Regarding the first portion, Eleventh Circuit has held that "violation of any of the procedures of the IDEA is not a *per se* violation of the Act." Weiss v. Sch. Bd., 141 F.3d 990, 996 (11th Cir. 1998). Therefore, not all procedural breaches are IDEA violations. One procedural right parents have is the right to be members of "any group that makes decisions on the educational placement of their child." 20 U.S.C. § 1414(e); 34 C.F.R. § 300.322. In Weiss, the Court held that where a family has "full and effective participation in the IEP process . . . the purpose of the procedural requirements are not thwarted." Id. see generally Evanston Community Consol. School Dist. No. 65 v. Michael M., 356 F.3d 798, 804 (7th Cir. 2004) (holding "[o]nly procedural inadequacies that result in the loss of educational opportunity" constitute a denial of FAPE).

8.

In 2017, the Supreme Court clarified the second portion of the aforementioned inquiry: "[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." Endrew F. ex rel. Joseph F. v. Douglas County School District, 137 S. Ct. 988, 999 (2017). This requirement does not require that a child's IEP bring the child to grade-level achievement, but it must aspire to provide more than *de minimis* educational progress. Id. at 1000-01.

9.

In matters alleging a procedural violation of IDEA, the undersigned may find that a child did not receive a FAPE only if the procedural inadequacies:

(i) impeded the child's right to a FAPE; or

(ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(iii) caused a deprivation of educational benefit.

20 U.S.C. § (f)(3)(E)(ii); 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's, or parents, substantive rights. See Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 518 (2007) (holding "parents enjoy rights under IDEA, they are entitled to prosecute IDEA claims on their own behalf).

10.

IDEA contemplates a continuum of educational placements to meet the needs of children with disabilities. Depending on the nature and severity of their disability, a child may be instructed in the following educational placements:

(1) the general education classroom with age-appropriate non-disabled peers; or

(2) outside the general classroom with other individuals or in small groups; or

(3) at a separate day school or program; or

(4) through home-based instruction; or

(5) a residential placement in-state or out-of-state; or

(6) hospital/homebound instruction.

20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.115; Ga. Comp. R. & Regs. 160-4-7-.07(3)(d).

11.

In addition to offering a continuum of educational placements, IDEA requires school districts to educate children with disabilities in the LRE possible. 20 U.S.C. § 1412(a)(5). IDEA allows "removal of children with disabilities from the regular educational environment . . . only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Id. The goal of this statutory requirement is to "mainstream" children with disabilities to the maximum extent possible, reserving more restrictive educational placements for children with special needs. It is up to the IEP Team to determine the LRE for each student. 34 C.F.R. § 300.116(a). While mainstreaming is not required, the IDEA maintains a strong preference for it. 20 U.S.C. § 1412(a)(5); Beth B. v. Van Clay, 282 F.3d 493, 498 (7th Cir. 2002) (holding a "district must mainstream [a student] -- that is, provide her an education with her nondisabled peers -- to the 'greatest extent appropriate.").

12.

"'In order to satisfy its duty to provide a free appropriate public education to a disabled child, the state must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." WC v. Cobb County Sch. Dist., 407 F. Supp. 1351, 1359 (N.D. Ga. 2005) (citations omitted). However, IDEA does not require that a student's potential be maximized; "rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from instruction." Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d at 1312 n.1 (11th Cir. 2003) (citations omitted).

13.

The term "individual education program" or "IEP" means a written statement that is developed in compliance with Section 1414 and includes a statement of the special education and related services and supplementary aids and services that will be provided to the disabled child and the frequency, location, and duration of those services. 20 U.S.C. § 1414(d)(1)(A)(i). The term "related services" means transportation, and such developmental, corrective, and other supportive services (including psychological services, recreation including therapeutic recreation, social work services, and counseling services including rehabilitation counseling) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disability conditions in children. 20 U.S.C. § 1401(26)(A). Related services under the IDEA can also include parent counseling and training. 34 C.F.R. § 300.34(c)(8).

14.

In developing an appropriate IEP for a disabled student, the IEP team, which includes the parents as well as other individuals who have knowledge or special expertise regarding the student, must consider the strengths of the child, the concerns of the parents for enhancing the education of their child; the results of the initial evaluation or most recent evaluation of the child; and the academic, developmental, and functional needs of the child. 20 U.S.C. §§ 1414(d)(1)(B)(i) and (vi) and (d)(3). The category under which the student is found eligible for special education does not determine the special education services to which the student is entitled. Further, regardless of the eligibility category

assigned, the school system's obligation to the child is met if the IEP offered to the child is "'reasonably calculated' to deliver 'educational benefits.'" C.G. *ex rel.* A.S. v. Five Town Cmty. Sch. Dist., 513 F.3d 279, 284 (1st Cir. 2008) citing *Hendrick Hudson Bd. Of Educ. v. Rowley,* 458 U.S. 176, 207 (1982).

15.

The IDEA does not require a school district to "guarantee a particular outcome." WC, 407 F. Supp. 2d. at 1359, citing Rowley, 458 U.S. at 192. "In determining whether a student has received adequate educational benefit, moreover, the Eleventh Circuit has noted that courts should pay 'great deference' to the educators who developed the IEP." WC, 407 F. Supp. 2d at 1359, citing JSK, 941 F.2d at 1573.

16.

A child's educational placement must be appropriate for their unique situation. Both federal and state regulations provide that "[i]n selecting the LRE, consideration [must] be given to any potential harmful effect on the child or on the quality of services that he or she needs." 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.116(d); Ga. Comp. R. & Regs. 160-4-4-.07(2)(d); see also Greer v. Rome City School Dist., 950 F.2d 688, 696 (11th Cir. 1991), *quoting* Daniel R.R. v State Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989) ("[N]o single factor will be dispositive under this test. 'Rather, our analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs.'"). This balancing of considerations—potential harm versus quality of necessary services—in order to determine the LRE is a task delegated to the IEP team under IDEA. R.L. v. Miami-Dade County Sch. Bd., 757 F.3d 1173, 1177 (11th Cir. 2014) ("Among the decisions that must be made by the IEP team is the educational placement—that is, the setting where the student will be educated—which must be 'based on the child's IEP'") (*citing* 34 C.F.R. §§ 300.116(a)-(b)); Marc V. v. North East Indep. Sch. Dist., 455 F. Supp. 2d 577, 594 (W.D. Tex. 2006), *aff'd* 242 Fed. Appx. 271 (5th Cir. 2007) (finding an IEP team was not required to consent to hospital/homebound instruction, or home-based, placement prescribed by physician and, in fact, there is no authority under IDEA for an IEP team to delegate its duty to ensure an IEP in the least restrictive environment). As mentioned above, removal of children with

disabilities should only occur when the nature or severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5).

Analysis

17.

In this matter, Petitioners have not met their burden. The evidence indicates there are concerns with whether [redacted] IEP was calculated to meet [redacted]'s needs, especially given that his Milestones results for 2015, 2016, 2017 and 2018 show he scored in the "beginning learner" and, thus, is not reaching even a proficiency in his grade level work. However, there is insufficient evidence in the record to make any credible conclusions that Respondent violated [redacted]'s rights that would entitle him to the relief sought. In their Due Process Complaint, Petitioners assert that [redacted] struggled because he was "inappropriately placed and denied the placement and supports he needed." (Due Process Complaint ¶ 6.) However, the evidence presented was limited and insufficient to prove the allegations raised in the Due Process Complaint.

18.

First, there is no evidence in the record to support Petitioner's request for the court to order Respondent's Special Education Director and School Psychologist to attend humanity/ethics training and technical support in eligibility rules.

19.

Second, there is insufficient evidence in the record to support Petitioner's request for the court to order Respondent to provide transportation to a school of Petitioners' choice. The evidence established that [redacted] is attending [redacted] in [redacted] Georgia, and has applied for and received an SB-10 Special Needs Scholarship. Accordingly, Petitioners have withdrawn [redacted] from the Butts County School District and taken it upon themselves to educate [redacted], including providing transportation to and from the school of their choice. Moreover, even if Petitioners wanted Respondent to provide [redacted]s education, the IEP team would need to make a determination of appropriate placement in the Least Restrictive Environment rather than the parents having the sole discretion to choose a school of their choice unless the parents could prove that Respondent is unable

to provide FAPE, which was not established based on the limited evidence presented at the hearing.

20.

Third, there is insufficient evidence in the record to support Petitioners' request that the court order Respondent to "make up for the time [redacted] lost by [Respondent] refusing him services based on . . . MID [Mild Intellectual Disability], including awarding compensatory damages such as tutoring to remediate him to grade level. As noted above, the category under which the student is found eligible for special education does not determine the special education services to which the student is entitled. Further, regardless of the eligibility category assigned, the school system's obligation to the child is met if the IEP offered to the child is "'reasonably calculated' to deliver 'educational benefits.'" C.G. *ex rel.* A.S. v. Five Town Cmty. Sch. Dist., 513 F.3d 279, 284 (1st Cir. 2008) citing *Hendrick Hudson Bd. Of Educ. v. Rowley,* 458 U.S. 176, 207 (1982). Petitioners' did not present sufficient evidence for this court to conclude that [redacted]'s IEP was not reasonably calculated to deliver educational benefits.

21.

Finally, there is insufficient evidence in the record to support Petitioners' request that the court award compensatory damages for having [redacted] sit in a GNETS placement under Autism. This request for relief was raised in a prior Due Process Complaint that was dismissed with prejudice. Accordingly, the court does not have jurisdiction to decide this issue or award relief. 34 C.F.R. § 300.152(c)(2)(i).

III. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, **IT IS HEREBY ORDERED THAT** Petitioner's request for relief is **DENIED.**

This 10th day of December, 2018.

Ana Kennedy
Administrative Law Judge