BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] **Plaintiff,**	:	
	:	**Docket No.**
v.	:	**OSAH-DOE-SE-1203963-67-KENNEDY**
GWINNETT COUNTY SCHOOL DISTRICT,	:	
Defendant.	:	

FINAL DECISION
AND
ORDER GRANTING DEFENDANT'S MOTION FOR INVOLUNTARY DISMISSAL

For Plaintiff:
[redacted] P. and [redacted] P., Parents

For Defendant:
Victoria Sweeny, Esq.
Catherine T. Followill, Esq.
Thompson & Sweeny, Kinsinger & Pereira, PC

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiff, [redacted] is a high school student who is eligible for services under the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA). On August 3, 2011, Plaintiff filed a Due Process Hearing Request (Complaint) contending that Gwinnett County School District (Defendant) violated his rights under IDEIA related to educational placement and the provision of a Free Appropriate Public Education (FAPE). On August 12, 2011, Defendant filed its Response to Plaintiff's Complaint, denying that any violations had occurred. Around that same time, Plaintiff requested an Independent Educational Evaluation (IEE). Defendant declined to fund an IEE and, instead, filed its own Due Process Hearing Request seeking to defend its evaluation and show that it was conducted within the requisite guidelines. Shortly thereafter, on August 26, 2011, Plaintiff filed his Response to Defendant's Request for Due Process. On September 1, 2011, Plaintiff filed an Amended Complaint asserting additional claims related to

his identification as a student with a disability and evaluation. *Order Denying Plaintiff's Request for Summary Determination on the Issue of the Annual Individualized Education Program, filed March 26, 2012*; 20 U.S.C. 1415(c)(i)(I) or (II); 3 C.F.R. § 300.508(d)(3).

A hearing was held October 24, 25 and 28, 2011 regarding whether the psycho-educational evaluation conducted by Dr. Matt Turner was appropriate under IDEIA. On January 23, 2012, the Court issued a Final Decision, after submission of written closing arguments, concluding that Defendant's evaluation met the requirements of IDEIA. Defendant, therefore, was not obligated to fund an IEE, although [redacted] could still obtain one at his own expense. Three days later a hearing was set in this matter to commence February 29, 2012, to address the issues raised by Plaintiff in his Complaint and Amended Complaint. Plaintiff requested a continuance to allow Plaintiff and his parents an opportunity to obtain an IEE at their own expense. Plaintiff's request was granted and the matter was re-set to April 30.

A hearing on the merits of Plaintiff's complaint was then held on April 30, May 1, 2 and 3, 2012. At the conclusion of Plaintiff's presentation of evidence, Defendant made an oral Motion for Involuntary Dismissal, asserting that Plaintiff presented insufficient evidence to substantiate his claims. On June 4, 2012, Defendant submitted its Motion in writing. Plaintiff responded to Defendant's Motion on June 21, 2012. Plaintiff also requested additional time to supplement his response, which request was granted. On July 30, 2012, Plaintiff filed an Amended and Supplemental Brief in Opposition to Defendant's Motion for Involuntary Dismissal. Defendant then filed a reply that was received by the court on August 7, 2012. On August 21, 2012, Plaintiff filed a Brief in Reply to Defendant's Responses. After careful

consideration of the evidence, arguments and submissions, and for the reasons set forth below, Defendant's Motion for Involuntary Dismissal is **GRANTED.**[1]

II. FINDINGS OF FACT

A. Plaintiff's Disability and Eligibility for Services

[redacted] is [redacted] years old (D.O.B. [redacted]). (Ex. J124.) He has been diagnosed with Asperger's Syndrome and Dysthymic Disorder. He has also been determined to experience Excessive Daytime Sleepiness.[2] In addition to his diagnoses, Plaintiff's most recent evaluation, conducted between May and June 2011, indicated he suffered from depression, impulse control difficulties, attention issues, and a lack of initiative, as well as some degree of excessive worry and heightened anxiety levels. (Tr. 29, 56, 108-109, 191, 192, 201, 310, 331; Exs. J125, J136, J138.)

Plaintiff has been found eligible to receive services under the IDEIA, based on the eligibility category referred to as Autism Spectrum Disorder.[3] (Exs. J40, J124, J147-155.) The services he is to receive are set forth in Plaintiff's Individual Education Program (IEP), as developed by Plaintiff's IEP team. (Exs. J1-92.) The IEP team includes, among others, Plaintiff's parents. (Exs. J1, J37, J38, J84.)

B. Plaintiff's Educational History in the Gwinnett County School District

1. Hull Middle School

Plaintiff first enrolled in the Gwinnett County School District in August of 2009 as an 8th grader at Hull Middle School. (Tr. 148; Ex. J147.) Hull Middle School is a feeder school for Peachtree Ridge High School (Peachtree Ridge), where Plaintiff's parents want him to attend.

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[1] The issuance of this decision was delayed, in part, due to the complexity of the issues in this matter, as well as the lengthy record that includes at least 80 separate and distinct pleadings and orders.
[2] Plaintiff may have narcolepsy, although his doctor declined to give him that formal diagnosis. (Tr. 308, 309.)
[3] Plaintiff's parents agree with Plaintiff's eligibility based on his diagnosis of autism. (Tr. 262, 263.)

(*See Plaintiffs' Amended and Supplemental Brief in Opposition to Defendant's Motion for Involuntary Dismissal.)*

Near the end of Plaintiff's 8th grade year at Hull Middle School, his IEP team met to prepare an IEP for the following school year. The team met on or about April 29, 2010. Plaintiff's April 2010 IEP indicates that he often did not finish or could not find assignments; that he would choose sometimes not to work on assignments during class time; that he habitually turned in work late; that he rushed through class work; and that he performed inconsistently on quizzes and tests. (Ex. J3, J4.)[4] The IEP team determined that Plaintiff's socializing caused him to be distracted and off task in class. (Ex. J3.) Additionally, Plaintiff would draw negative attention in order to get his peers to laugh, but would not always understand when peers did not find his comments amusing. (Ex. J4.) He frequently made inappropriate comments in class. (Exs. J3, J4.) Transitions were difficult for him and he would often move around the room pushing or hitting peers or pulling on clothing rather than following classroom procedures. He required frequent redirection from teachers and paraprofessionals to get to his seat, get out his materials, and begin work. (Ex. J4.) He also required redirection throughout class to stay on task. (Ex. J4; *see also* Tr. 264–269.) Plaintiff's parents were concerned that he did not understand social cues, had poor organization, and was unmotivated.[5] (Ex. J-4.) His parents asked for him to have the option to remove himself if he should become agitated or frustrated. (Id.) Despite these educational problems, Plaintiff liked his teachers at Hull Middle School, as he perceived them to be encouraging rather than demanding, and he did not feel singled out. (Tr. 493-497.) While his experience was not problem-free, he did begin to like school for the first

[4] The information reported by Plaintiff's teachers during his Spring 2010 IEP meeting near the end of his 8th grade year at Hull Middle School is contradictory, to some extent, with Plaintiff's recollection that he did not need extended time to turn work in. (Ex. J3, J4; Tr. 496.)

[5] Although Plaintiff's parents reported to Dr. Turner in May 2011 that their most pressing concern was that Plaintiff appeared to have lost his motivation towards school, such lack of motivation did not commence with Plaintiff's enrollment at North Gwinnett, but existed in prior years as well. (Tr. 273-274.)

time. (Tr. 496-497.) Plaintiff reported to Dr. Turner in May/June 2011 that he felt engaged and motivated when he attended Hull Middle School. (J124-143.)

2. Peachtree Ridge High School

Plaintiff's April 2010 IEP anticipated that Plaintiff would attend Peachtree Ridge, which was his zoned home school at the time the IEP was developed. However, over the summer months, Plaintiff's family moved to a new home outside of the Peachtree Ridge zone and into the North Gwinnett High School (North Gwinnett) attendance zone. (Tr. 963.) Not wishing to disrupt their son's education, Plaintiff's parents made the decision to move, in part, because they had been informed—erroneously--that the new home was still within the Peachtree Ridge attendance zone. (Tr. 1028–1029; Ex. P152.) Thus, Plaintiff began the 2010-2011 school year at Peachtree Ridge, unaware that his zoned school was North Gwinnett. When the mistake was discovered, Defendant initially intended to transfer Plaintiff to his zoned school, believing that the IEP could be implemented without mishap at North Gwinnett.[6] Plaintiff's parents objected to the transfer and fought to keep Plaintiff at Peachtree Ridge by, among other things, filing, a Due Process Complaint on August 16, 2010.

One of the main issues raised in Plaintiff's August 2010 Due Process Complaint was whether Plaintiff's school placement was more appropriately addressed through Gwinnett County School District's Permissive Transfer Policy or as part of Plaintiff's IEP, where school placement would be a decision made by his IEP Team. After initially denying the permissive transfer request and involuntarily withdrawing Plaintiff from Peachtree Ridge, Defendant changed its position and granted Plaintiff a permissive transfer, allowing him to remain at

[6] A meeting was held on August 12, 2010. However, the meeting's purpose was defined as "possible transition to North Gwinnett High School," and not an IEP meeting. (Tr. 192.) At the meeting, the school explained that a child must attend their home school unless a program is not offered at that school. Additionally, a student may attend a different school only if necessary to comply with the provisions of the IEP or under a permissive transfer. Since North Gwinnett offered a similar program and the permissive transfer had been denied at that time, it was determined that Plaintiff would be required to attend North Gwinnett. (J121.)

Peachtree Ridge. The decision to grant the permissive transfer came one day after Plaintiff filed his August 16, 2010 Due Process Complaint. While Defendant's decision allowed Plaintiff to remain at Peachtree Ridge, Plaintiff, after three to four weeks of attending Peachtree Ridge, voluntarily decided to enroll at North Gwinnett, where he completed his freshman year. According to Plaintiff's filings, the choice to transfer stemmed from concern that the permissive transfer could be revoked at any time by the principal if Plaintiff misbehaved. Plaintiff's parents were concerned that Plaintiff would inevitably be forced to attend North Gwinnett because he would at some point violate school rules and/or policies due to his diagnoses. Rather than suffer with wondering when the permissive transfer may be revoked, Plaintiff and his parents decided to transfer Plaintiff to North Gwinnett. However, testimony links the decision to enroll in North Gwinnett to a school-based incident involving Plaintiff's brother, who was also attending Peachtree Ridge, and the father's inability to trust that his other son would not "throw [his brother] under the bus." (Tr. 76-78, 330–331, 389, 545, 546, 551, 657, 811-812, 948, 954; Exs. J2-26, J502-503; P95, 136, 140, 141, 152, 207.)

Upon enrolling in North Gwinnett, Plaintiff dismissed his Due Process Complaint *with prejudice*. (*See* [redacted] *v. Gwinnett County School District*, OSAH-DOE-SE-110444-67-Gatto (September 7, 2010 Order of Dismissal).)

3. North Gwinnett High School

a. Enrollment in North Gwinnett

Plaintiff's April 2010 IEP followed him to North Gwinnett. The April 2010 IEP had been developed for Peachtree Ridge. (Exs. J2-26; Tr. 657, 811-812.) North Gwinnett and Peachtree Ridge have comparable education programs for students within the Autism Spectrum

Disorder. Thus, the program set forth in the April 2010 IEP was implemented as written at North Gwinnett.[7] (Exs. J2-26; Tr. 337, 339, 657, 811-812.)

Although Plaintiff's parents agreed that the educational program at North Gwinnett was comparable to the one at Peachtree Ridge, they were concerned about Plaintiff's mental well-being when he entered North Gwinnett. They were also equally concerned that Defendant had not taken Plaintiff's "thoughts or feelings [regarding the two schools] into any consideration." (Tr. 337.)

If a special education student's zoned attendance school can appropriately meet the student's needs and provide an individualized program designed to provide a Free and Appropriate Education, then Defendant works to maintain that student at his home school, which in this case is North Gwinnett. (Ex. J121.) Notwithstanding Defendant's policy, Defendant eventually gave Plaintiff the option of transferring to Collins Hill High School. (Tr. 552-553.) Plaintiff gave serious consideration to the offer but, in the end, declined to transfer because he was reluctant to meet a new group of people and to re-establish himself. (Tr. 553.)

b. Plaintiff's Parents reasons for wanting Plaintiff to return to Peachtree Ridge

Plaintiff and his parents want Plaintiff to attend Peachtree Ridge for three reasons. First, Plaintiff does not want to attend North Gwinnett, where he believes he does not have friends. Plaintiff considers a friend to be someone he trusts, enjoys talking to, and looks to for companionship. (Tr. 906, 907, 918.) Plaintiff believes none of the students at North Gwinnett meet his definition of "friend," as he does not socialize with them outside of school. (Tr. 918.) Rather, Plaintiff tends to be close friends with individuals who live or hang out near his home

[7] One exception, however, was that Plaintiff's IEP indicated that Saturday School was not a beneficial form of discipline. However, in October 2010, Ms. Siebenbrunner chose Saturday School as Plaintiff's consequence for violating school rules. She explained in a notation on Plaintiff's school records that she imposed an excessive discipline at parents' request. (P35.) However, Plaintiff's parents did not request excessive discipline, but rather chose to defer to Ms. Siebrunner. (P195.)

and share common interests with him. (Tr. 799, 919, 920, 921.) Most of these individuals attend Peachtree Ridge, although at least one is homeschooled. (Tr. 539, 542, 923.) Plaintiff believes that he does not "belong" at North Gwinnett and that, despite the length of time he has spent at the school, he does not "fit in." (Ex. J137.) However, he has admitted, and others have observed, that he has an active social life at school. (Tr. 568, 600, 654, 655, 662, 664, 798, 801, 803, 804, 906, 907, 918.) When Plaintiff is at North Gwinnett, he interacts with students in his classes and school staff perceives these students to be Plaintiff's friends. (Tr. 336, 600, 654, 655, 660, 662, 803, 804.)

Second, upon first enrolling at North Gwinnett, Plaintiff associated the school with Loganville Middle School, where he states he was abused. When Plaintiff's parents first drove Plaintiff to North Gwinnett, Plaintiff curled up in the back seat and rolled back and forth. He told his parents that North Gwinnett was another Loganville based, in part, on the physical structure of the building. North Gwinnett's buildings were similar in look and construction as Loganville Middle School. (Tr. 57, 471, 474-477, 531, 533.)

Third, while he has negative associations with North Gwinnett, he associates Peachtree Ridge with Hull Middle School, where he felt happy. (Tr. 501-503, 943.) Thus, he was resistant to attending North Gwinnet from the outset and this attitude pervaded and colored his freshman-year experience. (Tr. 56-57, 911.) His parents believe that Plaintiff is suffering from ongoing anxiety and depression because of his continued enrollment in North Gwinnett. (*Summary of Complaint, filed February 17, 2012; Plaintiff's Response to Defendant's Motion for Involuntary Dismissal, filed June 21, 2012.*)

c. Plaintiff's experience at North Gwinnett

Despite his parents' reservations, Plaintiff's experience at North Gwinnett has not been wholly negative. Plaintiff likes his teachers, although he has not chosen to open up to them. (Tr. 546.) Specifically, he testified that his chemistry teacher, Mr. Wuentzer, teaches in such a way that the material is interesting, that his German teacher, Mr. Goolsby, is supportive, and his biology teacher is good. (Tr. 536-37, 539.) Regarding his Business Essentials teacher he stated, "He's funny. Yeah, I like him." (Tr. 546, 547.) While he generally likes his current teachers at North Gwinnet,[8] he admitted that he "[does not] try and get too attached to [his] teachers or anyone else [at North Gwinnett] for that matter, because [he's] been moved around from school to school so much, [he] just—[he doesn't] want—he just [doesn't] want to begin to like another school and get switched away from it." (Tr. 536-37, 538, 539.) Notwithstanding his expressed hesitancy to establish meaningful relationships at school, Plaintiff has taken steps to reach out to certain students. For example, Plaintiff's Language Arts teacher, Ms. Petrarca, testified that Plaintiff stops by her classroom to visit with a student. (Tr. 606.)

Additionally, both Ms. Petrarca and Mr. King, a special education teacher at North Gwinnett and Plaintiff's case manager for the 2010-2011 school year, found that he transitioned well to high school. (Tr. 599-607, 636, 646, 807-810, 817-818.) Socially, Ms. Petrarca found him to be typical for a freshman. (Tr. 599.) He was very social in her class, so social in fact that she had to change the seating arrangement to separate him from his friends. (Tr. 600, 608, 611, 623-24.) Mr. King also testified that Plaintiff was very outgoing, making friends easily, without struggling to pick up on normal social cues, unlike other Asperger's students. (Tr. 655, 661, 662, 664.) Ms. Petrarca, who has had experience in teaching autistic children, shared Mr. King's

[8] Plaintiff's initial interactions with staff at North Gwinnett were not received well by Plaintiff, which likely hindered his rate of adjustment. (J139.) Additionally, at one point Plaintiff did not like his German teacher because she made a comment that she taught differently than the teacher at Peachtree Ridge. (J123.)

assessment of Plaintiff's sociability, to the extent that she stated she would not have recognized him as having Asperger's had she not known otherwise. (Tr. 598, 599, 600, 608, 611, 623-24.)

Academically, both teachers found that Plaintiff performed reasonably well, as did his parents. (Tr. 320, 607, 809-810, 817-818.) Ms. Petrarca testified that Plaintiff's final grade in her class was in the average range, and she believed that he benefited from being in her classroom. (Tr. 607.) Mr. King was pleased that Plaintiff "adjusted very well" to high school, especially in light of his observation that students generally struggle in transitioning to high school, given the increased workload. (Tr. 808-810.) His satisfaction was enhanced by the fact that Plaintiff was performing decently in most of his classes, even though he was registered in all general education, college preparatory classes and had decreased support and increased academic independence, as delineated in his high school IEP. (Tr. 687, 697, 809-810; Ex. J42.) In regards to Math, the one class in which Plaintiff performed poorly, Mr. King testified that he worked with Plaintiff's parents to try to find a solution to Plaintiff's difficulties, including switching his math classes, although that strategy was ultimately unsuccessful. (Tr. 692-697, 735; Ex. J41.) Despite his poor math performance, Plaintiff progressed to tenth grade at North Gwinnett. (Tr. 817-818.)

Behaviorally, Plaintiff's experience at North Gwinnett has been imperfect, yet he has shown improvement. (Tr. 321.) While Plaintiff has misbehaved on occasion, he has done nothing out of the ordinary for a typical high school student or that would cause alarm. (Tr. 810, 813-817.) In dealing with any behavioral or academic issues, Mr. King testified that he relied heavily on parents' reports and suggestions in working with Plaintiff. (Tr. 653, 670-72, 678-79, 685-87, 733.) For example, when Plaintiff skipped school, he tried to take a hands-off, non-confrontational approach, as suggested by Plaintiff's parents. (Tr. 732-734.) Plaintiff and his

parents also believe he has learned to control himself better at North Gwinnett. (Tr. 321, 911, 912.) On the other hand, Plaintiff frequently uses escape tactics to avoid attending class, or school altogether, because he feels he is prone to getting into trouble if he is in class and he cannot get into trouble if he is not there. (Tr. 904, 936.)

4. IEP Meeting in March 2011

As Plaintiff neared the completion of 9th grade, the School held an IEP meeting on March 4, 2011 to prepare for the 2011-2012 school year. (Exs. J40-83.) Prior to the meeting, the Plaintiff's parents filed a Due Process Hearing Request on February 25, 2011 seeking approval for an Independent Education Evaluation to be conducted at public expense. (Exs. D36-52.)

The concerns discussed during the March 4, 2011 IEP meeting mirrored those expressed while Plaintiff attended Hull Middle School. (Exs. J3, J4, J42, J43.) Plaintiff was not completing or turning in assignments, and his test and quiz scores were inconsistent. (Ex. J42.) Plaintiff's socializing continued to be a distraction, and he continued to seek negative attention in order to "get laughs." (Id.) Although he seemed very tired some days, he appeared to be paying attention when his head was down. (Id.) Plaintiff's parents again expressed concern that Plaintiff lacked motivation. (Ex. J43.) Plaintiff's father was also worried that Plaintiff made impulsive choices. (Id.) By contrast, Plaintiff did not express any concerns at that time, other than apprehension over deciding on a career. (Id.) He also stated that he would like to maintain the grades necessary to earn the Hope Grant. (Id.)

In addition to the concerns noted above, Plaintiff's parents also informed school personnel about concerns that Plaintiff's anxiety and depression were increasing. However, the school staff had not observed the same change at school. J80. During the meeting, Plaintiff's

mother informed school personnel that if the school wanted to pursue psychological services it would not likely be effective because Plaintiff would not want to reveal "his mask." J77.

During the IEP meeting, Defendant asked Plaintiff's parents for consent to conduct an evaluation. Plaintiff's parents advised Defendant they were unwilling to discuss the matter of evaluations at that time, wishing instead to wait until the resolution of their Due Process Hearing Request of February 25, 2011, then pending before Judge Kristin Miller. (Exs. P46, J47.) Plaintiff's parents also declined to sign the IEP that was developed until the matter pending before Judge Miller was resolved. The parties eventually reached a settlement whereby the parties agreed that Defendant would conduct an evaluation. Subsequently, on May 20, 2011, Plaintiff's February 2011 Due Process Hearing Request was dismissed without prejudice. (Exs. P59-75, D144; J77.)

5. Dr. Turner's Psychological Evaluation

In April of 2011, Plaintiff's parents consented to a psychological evaluation of their son, which was conducted by North Gwinnett's school psychologist, Dr. Matthew Turner, between May and June 2011. (Exs. P59-75, J77, J124-143.) Prior to this, Plaintiff's parents had resisted Defendant's offer to conduct a school psychological examination on Plaintiff insisting instead that an Independent Educational Evaluation be completed at public expense. (Ex. J77.)

In his report, Dr. Turner concluded that Plaintiff's disability would not prevent him from adapting to North Gwinnett if Plaintiff recognized it as a permanent placement and treated it as a fresh start. Although, he conceded, changing Plaintiff's negative perspective of North Gwinnett would likely take time and encouragement. Dr. Turner also recognized that a transfer to another school would not be conducive to developing Plaintiff's ability to adapt, which is a skill that Plaintiff must learn in order to be successful as an adult. Yet, because he determined that

Plaintiff and his parents' negative views of North Gwinnett were likely to persist, he suggested that Defendant consider transferring Plaintiff to another school to potentially foster a more comfortable learning environment.[9] (Ex. J139.)

After Dr. Turner issued his report, Defendant and Plaintiff attempted to find a mutually agreeable date to discuss and review the March 4, 2011 IEP in light of Dr. Turner's findings and conclusions. By late summer, however, Plaintiff's parents grew concerned that he would begin his 10th grade year at North Gwinnett since the IEP team had not yet been able to meet to discuss and review the IEP due to various scheduling conflicts. Plaintiff's parents, therefore, filed the Complaint giving rise to the present case, and chose to keep Plaintiff home when school commenced. (Exs. J84, J88-92.)

6. August 2011 IEP Meetings and Finalization

On or about August 11, 2011, the IEP Team met with Plaintiff's parents to resolve Plaintiff's Complaint and to discuss Plaintiff's IEP. (Ex. J118.) By that time, Plaintiff had already missed several days of school. (Ex. J120.)

Shortly thereafter, on or about August 14, 2011, Plaintiff notified Defendant that he had decided to return to North Gwinnett. (Tr. 338; Ex. J130.) According to meeting notes, Plaintiff decided he wanted to return to North Gwinnett against his parent's wishes. (Ex. J88.)

Several days later, on August 18, 2011, Plaintiff's IEP team met again to further review and revise the March 4, 2011 IEP. The purpose of the meeting was to determine whether changes to Plaintiff's IEP were necessary, given Plaintiff's decision to return to North Gwinnett and the findings and conclusions reached in Dr. Turner's evaluation. (Ex. J84; Tr. 319.) The IEP team agreed it would be appropriate to move Plaintiff into more general education classes,

[9] At an IEP meeting held on August 11, 2011, Dr. Turner stated "that a change of building is a good idea" for [redacted] but that it would not necessarily improve Plaintiff's situation or his compliance. (J120.)

where he would be supported by a special education teacher, in what is referred to as a "team or collaborative class." (Tr. 319; Ex. J84.) In such a class, the special education teacher works with the entire class so no one individual student is singled out. (Tr. 319, 320.) This method of education was chosen deliberately in response to Plaintiff's particular needs and desires: he does not like to be the target of particularized attention or addressed in a small group. (Tr. 324.) In addition, each of Plaintiff's teachers was handpicked for him and each was to provide regular communication to his parents through his new case manager, Jennifer Crotts, who was assigned to his case at Plaintiff's father's request.[10] (Tr. 322, 338; Exs. J84, J88-92, J130.) The IEP continued to provide Plaintiff with allowances for his disability, such as permitting him to take additional time on tests or take tests in an alternative location. (Tr. 323-24.)

Plaintiff acknowledges that the educational program offered at North Gwinnett is substantially similar to the educational program available at Peachtree Ridge. Plaintiff also has, at times, acknowledged that the educational program offered at North Gwinnett does not, in and of itself, violate Plaintiff's rights under IDEIA. (Tr. 337, 331; Exs. J84, J88-92; *see also* Ex. J80, wherein mother stated, in effect, that they are simply worried parents trying to comprehend and deal with what has happened to their son and acknowledged that North Gwinnett was not the real problem.) Additionally, Plaintiff's parents do not object to the teachers and administrators at North Gwinnett or to Jennifer Crotts, Plaintiff's current case manager. (Tr. 276, 322, 336, 1046.) Instead, Plaintiff alleges that Defendant has violated Plaintiff's rights, first, by not taking into consideration Plaintiff's thoughts about or feelings toward North Gwinnet, and, second, by disregarding Plaintiff and his parents' beliefs that attendance at Peachtree Ridge would benefit him. (Tr. 337; Exs. J-88-92.) However, after discussion and consideration of the available

[10] Plaintiff requested a new case manager because his father had no confidence in the prior case manager, Mr. King. (Tr. 338; J84, J88-92, J130.)

information and concerns that were raised, the IEP team agreed, with the exception of Plaintiff's parents, that Plaintiff's disability did not require that his program be administered at a school outside of his attendance zone. J119, J120.

At the close of the August 18, 2011 meeting, Plaintiff's father signed the completed IEP, indicating agreement with the educational program offered, although he continued to disagree with the location of implementation, North Gwinnett. (Ex. J84; Tr. 319, 322, 323, 337.)

III. STANDARD ON INVOLUNTARY DISMISSAL

Plaintiff, as the party seeking relief, carries the burden of proof in this matter. *Schaffer ex rel Schaffer v. Weast*, 546 U.S. 49, 57-58, 62 (2005); *Devine v. Indian River Co. Sch. Bd.*, 249 F.3d 1289, 1291 (11th Cir. 2001); Ga. Comp. R. & Regs. r. 160-4-7-.12(3)(n). OSAH Rule 35 provides:

> After 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. The Administrative Law Judge may determine the facts and render an Initial or Final Decision against the party that has presented its evidence as to any or all issues. The moving party shall not waive its right to offer evidence in the event the motion is denied. The Administrative Law Judge may decline to render an Initial or Final Decision until after the close of all the evidence.

Ga. Comp. R. & Regs. r. 616-1-2-.35. OSAH Rule 35 is similar to the involuntary dismissal provision in the Georgia Civil Practice Act (CPA). *See* O.C.G.A. § 9-11-41(b). Case law interpreting Section 41(b) of the CPA does not require the Court to construe the evidence in a light most favorable to Plaintiff. *See Ivey v. Ivey*, 266 Ga. 143, 144 (1996). Because it is the trial court's job to determine both the facts and the law, the court may sustain the motion for involuntary dismissal even if the plaintiff has established a prima facie case. *Chamlee v. Dept. of*

Transp., 189 Ga. App. 334, 335 (1988); *Comtrol, Inc. v. H-K Corp.*, 134 Ga. App. 349, 352 (1975).

IV. CONCLUSIONS OF LAW

A. General Law

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

Plaintiff bears the burden of proof in this matter. *Schaffer v. Weast*, 546 U.S. 49 (2005); Ga. Comp. R. & Regs. r. 160-4-7-.12(3)(l); Ga. Comp. R. & Regs. r. 616-1-2-.07. The standard of proof on all issues is a preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21(4).

The IDEIA creates a presumption in favor of the education 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. *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285 (5th Cir. 1991).

1. Scope of Review

a. Statute of Limitations

Claims brought under IDEIA are subject to a two-year statute of limitations. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.507(a)(2). Plaintiffs filed their Complaint on or around August 2, 2011. Thus, regardless of any prior filing, only events occurring after August 2, 2009 are at issue in this proceeding. *See generally W.C. v. Cobb County Sch. Dist.*, 407 F. Supp. 2d 1351, 1353 (N.D. Ga. 2005); *Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331 (N.D. Ga. 2007), *aff'd*, 518 F.3d 1275 (11th Cir. 2008).

b. *Res Judicata*

However, in this particular case, there have been two prior Due Process Requests involving the same general complaints, the first of which was dismissed with prejudice. [redacted] *v. Gwinnett County Sch. Dist.*, OSAH-DOE-SE-110444-67-Gatto; *Hedquist v. Merrill Lynch, Pierce, Fenner & Smith, Inc., et al.*, 272 Ga. 2009 (2000) (a dismissal with prejudice is an adjudication on the merits). This Court must therefore apply the doctrine of *res judicata* in refusing to hear these same issues. *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 401 (1981), *citing Heiser v. Woodruff*, 327 U.S. 726, 733 (1946) ('There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*.'"). "The doctrine of res judicata prevents the re-litigation of claims that have already been adjudicated, or that could have been adjudicated, between identical parties or their privies in identical causes of action." *Williamson Tobacco Corp. v. Gault*, 280 Ga. 420 (2006). *Res judicata* is a fundamental legal principle that prevents the unnecessary prolongation of litigation. *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 401-402 (1981). Furthermore, when the merits of the claim could have been adjudicated had the case been properly handled, those claims may not be raised again. *Piedmont Cotton Mills, Inc. v. Woelper*, 269 Ga. 109, 111 (1998). Thus, claims predating the September 7, 2010 dismissal with prejudice are barred by *res judicata*.

c. Court will not consider new evidence

This Court declines to consider Plaintiff's newly submitted evidence. (*See Plaintiff's Motion for the Introduction of Additional Evidence.)* While an administrative law judge may permit a party to introduce newly discovered material evidence, admission is not appropriate where the evidence does not bear on the issue before the Court. *See* Ga. Comp. R. & Regs. 616-1-2-.25.

Here, the evidence Plaintiff seeks to introduce post-dates the development and adoption of the March/August 2011 IEP. Because only this IEP is under review, information regarding Plaintiff's educational progress or lack thereof in the 2011-2012 school year is not relevant to the determination of whether the 2011 IEP was appropriate at the time it was developed. *See Mandy S. v. Fulton County Sch. Dist.*, 205 F. Supp. 2d 1358, 1367 (N.D. Ga. 2000), *aff'd*, 273 F.3d 1114 (11th Cir. 2001) (IEP must have been reasonable at the time it was adopted, not in retrospect). Furthermore, the parents cannot now claim that the 2011 IEP was not reasonably calculated to enable Plaintiff to receive educational benefit, because that claim was not raised in Plaintiff's Complaint or Amended Complaint. *See* U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d)("The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint"). For the same reason, Plaintiff cannot now raise an IEP implementation claim. Finally, the information Plaintiff seeks to introduce only shows that subsequent to the April 30 – May 3 hearing, Plaintiff's grades dropped significantly, which could be the result of various causes. Plaintiff has not presented any evidence or information to show that Plaintiff's grades dropping following the hearing is the result of an inappropriate placement and/or inappropriate educational program.

B. Claims 1-3

Here, Plaintiff has ostensibly presented the Court with four claims not barred by *res judicata* or barred due to Plaintiff's failure to include the claims within his Complaint or Amended Complaint. *See* U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d). The undersigned will dispose of the first three claims before addressing the fourth claim, which is whether Defendant provided Plaintiff with a FAPE in the least restrictive environment.

1. Identification

First, Plaintiff asserts that the school failed to identify him as a child with a disability. However, within the relevant timeframe to be considered by the Court, there has been no dispute by the school system or parents that Plaintiff is a child eligible for special education. (Exs. J147-155; Tr. 262-263.)

2. Evaluation

Second, Plaintiff contends that Defendant did not properly evaluate him pursuant to 34 C.F.R. § 300.304(c)(6). However, evaluations were completed by at least 3 psychologists in the 12 months preceding Plaintiff's enrollment in the Gwinnett County School District. At the time Plaintiff enrolled in the Gwinnett County School District in August 2009, he had been evaluated just a few months prior in January 2009. No one objected to Defendant relying on the prior evaluations, including the one completed the same year Plaintiff enrolled in the Gwinnett County School District. Subsequently, Defendant obtained Plaintiff's parents consent in April 2011 to conduct its own evaluation. *See* Ga. Comp. R. & Regs. r. 160-4-7.04(3)(c)(must have parental consent to conduct an evaluation). Absent parental request, a child need only be reevaluated once every three years. Ga. Comp. R. & Regs. r. 160-4-7.04(3)(a). In August 2011, following the evaluation conducted by Dr. Turner in May/June 2011, Plaintiff's IEP team met to discuss whether any changes to Plaintiff's IEP were warranted based on the findings and conclusions reached in Dr. Turner's July 2011 evaluation report. (Exs. J84-92, 124-143.) Thus, the IEP for the 2011-2012 year was finalized using information from Plaintiff's most recent psychological evaluation, which this Court has previously decided was appropriately conducted.

3. Reimbursement for Counseling

Third, Plaintiff seeks reimbursement for private counseling services because his parents assert that the implementation of the program at North Gwinnett has had a negative psychological effect on Plaintiff. Plaintiff argues that Defendant has never made an effort to address Plaintiff's anxiety and depression. Although it is true that Plaintiff's IEPs have not included psychological services, it is inaccurate to state that Defendant has totally ignored or failed to address Plaintiff's anxiety and depression.

First, Plaintiff's anxiety and depression were addressed during the March 2011 IEP meeting. At that meeting, Plaintiff's mother informed Defendant that school psychological services were not likely to be effective.

Additionally, at the request of Plaintiff's parents, Dr. Turner addressed parental concerns regarding whether Plaintiff suffered from a school phobia in general and/or in particular toward North Gwinnett, whether attendance at North Gwinnett was causing Plaintiff harm, what Plaintiff required to be successful in school, and also assessed Plaintiff's apparent lack of motivation and increased anxiety and depression.

Finally, at the August 18, 2011 meeting, counseling services were not even raised or discussed by either party. Thus, it has not been shown that the IEP team knew or should have known that psychological services needed to be part of Plaintiff's educational program. *D.R. v. Dep't of Educ.*, 827 F. Supp. 2d 1161, 1170 (D. Haw. 2011)(parents cannot contend that IEP is deficient for failing to address concerns they did not raise at the time IEP was formulated); *Mandy S. v. Fulton County Sch. Dist.*, 205 F. Supp.2d 1358, 1367 (N.D. Ga. 2000), *aff'd*, 273 F.3d 1114 (11th Cir. 2001)(only information available to the school district at the time of IEP adoption is relevant to determining whether school provided a FAPE).

Furthermore, while Plaintiff may be suffering from some level of depression and anxiety, it is unclear that his conditions are a result of his placement at North Gwinnett. Rather, it is equally possible that the on-going court proceedings triggered or worsened Plaintiff's anxiety and depression. (Tr. 458.)

C. FAPE

Plaintiff's remaining claim is that he was not offered a Free Appropriate Public Education in the Least Restrictive Environment due to the fact that he has not been permitted to attend Peachtree Ridge. Plaintiff's parents have made it clear hat the crux of the present complaint is not Plaintiff's IEP programming, but his placement location at North Gwinnett. (Tr. 337.)

Under IDEIA, students with disabilities have the right to a free appropriate public education (FAPE) in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1, 300.100; Ga. Comp. R. & Regs. r. 160-4-7-.01(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 (11th Cir. 2007), *quoting* 20 U.S.C. § 1400(d)(1)(A).

The United States Supreme Court has developed a two-part inquiry to determine whether a school district has provided a FAPE: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational 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); *M.M. v.*

Sch. Bd. Of Miami-Dade Co., Fla., 437 F.3d 1085 (11th Cir. 2006). The procedural prong will be addressed first.

1. Procedural Violations

The first prong under *Rowley* addresses the importance of complying with IDEIA's extensive procedural safeguards, although a violation of those safeguards will not automatically constitute a violation of the IDEIA. *Weiss v. Sch. Bd.*, 141 F.3d 990, 996 (11th Cir. 1998). In order to prove a denial of FAPE based on a procedural violation, Plaintiffs must show that the procedural inadequacies "(i) impeded the child's right to a FAPE; (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." 34 C.F.R. § 300.513(2); 20 U.S.C. § 1415(f)(3)(E). Where a family has had "full and effective participation in the IEP process . . . the purpose of the procedural requirements [is] not thwarted." *Weiss*, 141 F.3d at 996.

It is true that procedural shortcomings that "seriously infringe the parents' opportunity to participate in the IEP formulation process" violate the FAPE mandate. *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23,* 960 F.2d 1479 (9th Cir. 1992). However, Plaintiff has not shown that Defendant committed procedural violations that seriously infringed on his parents' opportunity to participate in the IEP formulation process. Plaintiff's parents, in fact, actively participated in all IEP meetings held since September 7, 2010. (Exs. J71-83; 84; 88-92; Tr. 326.) 20 U.S.C. 1414(d); 34 C.F.R. 300.327, 300.501(c)(1). They also aided in the implementation of Plaintiff's IEP at North Gwinnet. (Tr.326, 812.) Mr. King, Plaintiff's case manager during Plaintiff's freshman year, testified in detail as to parental involvement in

developing and implementing strategies to help Plaintiff benefit from his educational setting. (Tr. 653, 670-72, 678-79, 685-87, 733.)

Plaintiff asserts that Defendant "totally ignored" Plaintiff's parental concerns regarding the school where Plaintiff's educational program was to be implemented, but the evidence does not support Plaintiff's contention. 20 U.S.C. § 1414(3)(A); 34 C.F.R. § 300.324(a)(1). First, after Plaintiff's consented to Defendant conducting an evaluation, Defendant's school psychologist, Dr. Turner, addressed Plaintiff's concerns regarding whether (1) Plaintiff exhibited a school phobia in general and/or in particular toward North Gwinnett High School, and (2) whether Plaintiff's attendance at North Gwinnett High School was causing him harm. (Ex. J-139.) Dr. Turner's report was then reviewed and considered in determining whether any changes to Plaintiff's IEP were required. 20 U.S.C. § 1414(4)(A); 34 C.F.R. § 300.324(b). Plaintiff's parents were present at that meeting, along with Plaintiff's IEP team. (Ex. J118.) During that meeting, the team discussed parent's concerns regarding the school where Plaintiff's program would be implemented. The team agreed that Plaintiff's desire to attend another school was not a manifestation of his disability. Additionally, the team, with the exception of Plaintiff's parents, determined that Plaintiff's disability did not require that his program be administered at a school outside of his attendance zone. By including Plaintiff's parents in the decision-making and in updating and revising Plaintiff's IEP, Defendant complied with the federal requirement to include parents in any group charged with making decisions on the educational placement of their child and to take parental input into consideration in revising the IEP and making placement determinations. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.327, 300.501(c)(1); Ga. Comp. R. & Regs. r. 160-4-7-.06(11), (18), (19); Ga. Comp. R. & Regs. r. 160-4-7-.07(2)(a).

2. Adequate Educational Benefits

Second, Plaintiff's parents contend that Plaintiff was denied a FAPE in the least restrictive environment as mandated by IDEIA, because he has not been permitted to transfer from North Gwinnett, his zoned school, to Peachtree Ridge.

Under the second prong of *Rowley*, to meet the FAPE mandate, an IEP must be reasonably calculated to provide educational benefit, which means only that the student is provided a "basic floor of opportunity." *Rowley*, 458 U.S. at 202. In other words, the student with a disability "is only entitled to some educational benefit; the benefit need not be maximized to be adequate." *Rowley*, 458 U.S. at 190; *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1292 (11th Cir. 2001). Because an "appropriate education" under IDEIA "means 'making measurable and adequate gains in the classroom,'" the benefit to the student may be restricted to the school setting. *L.G. ex. rel. B.G. v. Sch. Bd. of Palm Beach County*, 255 Fed. Appx. 360 (11th Cir. 2007), *quoting JSK*, 941 F.2d at 1573; *Devine*, 249 F.3d at 1293, *quoting JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1573 (11th Cir. 1991); *see also M.W. v. Clarke County Sch. Dist.*, 2008 U.S. Dist. LEXIS 75278 (M.D. Ga. 2008). It does not require that the child improve within the home setting. *See Devine*, 249 F.3d at 1292-93.

Under the IDEIA, a school district does not have to "guarantee a particular outcome." *W.C. v. Cobb County Sch. Dist.*, 407 F. Supp. 2d. 1351, 1359 (N.D. Ga. 2005), *citing Rowley*, 458 U.S. at 192. Rather, "[i]n evaluating the appropriateness of an IEP, the Court must determine the measure and adequacy of the IEP at the time it was offered to the student and not at some later date." *Draper v. Atlanta Indep't Sch. Sys.*, 480 F. Supp. 2d 1331, 1345 (N.D. Ga. 2007), *aff'd* 518 F.3d 1275 (11th Cir. 2008), *citing Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3rd Cir. 1995). An "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 County Sch. Dist.*, 205 F. Supp.2d 1358, 1367 (N.D. Ga. 2000), *aff'd*, 273 F.3d 1114 (11th Cir. 2001). Finally, in the Eleventh Circuit, courts tasked with determining whether a student has received adequate educational benefit under IDEIA, "should pay 'great deference' to the educators who developed the IEP." *W.C.*, 407 F. Supp. 2d at 1359, *citing JSK*, 941 F.2d at 1573.

Here, Plaintiff has not shown that Defendant failed to offer him an educational program reasonably calculated to confer educational benefit. To the contrary, the evidence shows that Plaintiff did not object to the program and found that it was equivalent to the program offered at the school of their choice, Peachtree Ridge. His teachers testified that, on the whole, Plaintiff performed fairly well at school, socially, academically, and behaviorally.

Plaintiff's parents have made it clear that they will not consider any alternatives other than Peachtree Ridge. However, parents, no matter how well intentioned, are not entitled to dictate location, nor do they have veto power over decisions made by the IEP team. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 273 (5th Cir. 2003); *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689 (5th Cir. 1996). Instead, such decisions must be made by the IEP team, taking into consideration, among many other factors, the child's disability, the ability of school staff at a particular location to implement an educational program recommended for the child, parental concerns, and psychological information. *M.M. v. Sch. Bd.*, 437 F.3d 1085, 1102 (11th Cir. 2006), *citing Lachman v. Illinois Bd. of Educ.*, 852 F.2d 290,297 (7th Cir. 1988) ("parents no matter how well-motivated, do not have a right under the [statute] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child"). There is some disagreement in the federal circuits

over whether an IEP must identify the particular school in which the plan is to be implemented in order to comply with FAPE requirements. *Compare White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003) ("'educational placement' as used in the IDEA means educational program - not the particular institution where the program is implemented."), *with A.K. ex rel. J.K. v. Alexandria City Sch. Board*, 484 F.3d 672, 675 (4th Cir. 2007) (IEP was substantively deficient because it failed to name a particular school in which the plan would implemented).[11] However, while parents are permitted and encouraged to participate in education decisions affecting a disabled student, "the school board is not required to follow [the] parents wishes at every step, so long as [the student] is receiving a FAPE in the least restrictive means possible." *L.G. ex rel. B.G. v. Sch. Bd.*, 512 F. Supp.2d 1240, 1250 (S.D. Fla. 2007); *cf. M.M.*, 437 F.3d 1085, 1102 ("[U]nder IDEA there is no entitlement to the 'best' program.").

In this case, parents contend that the School District has improperly denied Plaintiff an appropriate placement by not taking into consideration Plaintiff's perceptions of North Gwinnett. (*See Plaintiff's Amended and Supplemental Brief in Opposition to Defendant's Motion for Involuntary Dismissal.)* There are two main weaknesses with this assertion. First, Plaintiff has been given the opportunity to attend other schools on at least two occasions, at the outset of his high school career and later when he was offered an opportunity to transfer to Collins Hill High School. To elaborate, initially Plaintiff was granted a permissive transfer to allow him to remain at Peachtree Ridge. While the circumstances surrounding the permissive transfer are not at issue in this case, as the mechanics of the decision are barred by *res judicata*, Plaintiff's parents have

[11] Plaintiff relies on *A.K. ex rel. J.K. v. Alexandria City School Bd.*, 484 F.3d 672 (4th Cir. 2007), to argue that school location is part of an IEP and, because he was not permitted to attend the school of his choice, he has been denied a FAPE. The *A.K.* case is distinguishable from this one, as Plaintiff's IEP provides for a school location—North Gwinnett—while the school in that case neglected to name any particular school as a placement location. J84; *A.K. ex rel. J.K.*, 484 F.3d at 676; *see also* Michael T. McCarthy, Note: *Don't get the Wrong IDEA: How the Fourth Circuit Misread the Words and Spirit of Special Education Law—and How to Fix It*, 65 Wash. & Lee L. Rev. 1707, 1708-1748 (2008)(explaining why the court in *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.* erred in its interpretation of the term "location" as used in the IDEA).

admitted that they voluntarily withdrew their son from Peachtree Ridge in September 2010, and placed him in North Gwinnett.[12] Whether or not Plaintiff's parents have come to regret their decision does not change the fact that Plaintiff could have chosen to stay at Peachtree Ridge, while still challenging the basis for Defendant's decision to allow attendance at Peachtree Ridge under a permissive transfer rather than include it as part of Plaintiff's IEP. Furthermore, when given the option of transferring to Collins Hill, Plaintiff demurred. He did not want to have to meet new people and start over. (Tr. 552-553.) He now states he would prefer to enroll at Collins Hill over North Gwinnett, but that is a decision for the IEP team to consider and decide upon. *See M.M. v. Sch. Bd.*, 437 F.3d 1085, 1102 (11th Cir. 2006); (Tr. 963.)

The second weakness in Plaintiff's effort to demonstrate the District's failure to provide him a FAPE in the LRE is that he has not demonstrated that his educational difficulties or his anxiety and depression stem solely from his attendance at North Gwinnett, or that such difficulties would not persist even if Plaintiff attended Peachtree Ridge. Moreover, Plaintiff's mother and Dr. Turner both agreed during the August 2011 IEP meeting that Plaintiff's perceptions and feelings about North Gwinnett were not a "function of his disability." *See* Ga. Comp. R. & Regs. r. 160-4-7-.06(1)(2) (IEP should be designed to meet educational needs *resulting from child's disability*) (emphasis added); 34 C.F.R. § 300.320(a)(2)(i)(A)'(B). First, Plaintiff has a long history of both school difficulties and anxiety and depression pre-dating his

[12] Plaintiffs have given various, conflicting statements regarding their rationale for doing so; however, one reason had to do with a family matter involving their other son. (*See Motion for Dismissal with Prejudice* OSAH-DOE-SE-1104444-67-Gatto, filed September 3, 2010) ("[redacted] does not want to live under the specter of change to another school every year, nor does he want to wait for approval to stay at [Peachtree Ridge] which for him is agony, so he has made the decision to go to his designated home school of North Gwinnett."). (Tr. 528, 591, 546.) (incident at Peachtree Ridge involving his brother led to his father's decision to transfer him to North Gwinnett); (*Plaintiffs' Amended and Supplemental Brief in Opposition to Defendant's Motion for Involuntary Dismissal* -"[redacted]s parents rejected the permissive transfer because [redacted] could be removed at any time for behavior".)

high school years.[13] Even at Hull Middle School, the school where Plaintiff allegedly performed at his best, he was experiencing many of the same issues he is now experiencing at North Gwinnett. Consequently, Plaintiff's argument that he would do well at Peachtree Ridge because he views it as an extension of Hull Middle School is not persuasive. Furthermore, the fact that he was performing erratically at Hull Middle School undercuts Plaintiff's argument that his negativity and poor school performance is due to primarily to his forced enrollment in North Gwinnett. In other words, Plaintiff's problems are not necessarily attributable to his enrollment at North Gwinnett based on the evidence presented in this case.

Second, Dr. Turner, the only mental health professional to testify, does not believe that Plaintiff's anxiety is necessarily a manifestation of his attendance at North Gwinnett. (Ex. J139.) Dr. Turner testified that Plaintiff has other potential sources of stress, including the uncertainty caused by the present litigation.[14] (Tr. 459, 460-463.) Third, Plaintiff's own testimony suggests that his inability to settle satisfactorily into North Gwinnett is due, at least in part, to the ongoing litigation:

> Well, when I'm at school, I don't try and get too attached to my teachers or anyone else there for that matter, because I've been moved around from school to school so much, I just—I don't want—I just don't want to begin to like another school and get switched away from it.

(Tr. 538, 539.)

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[13] Dr. Robert Conner completed a comprehensive evaluation of Plaintiff in August 2008. He noted that Plaintiff was within the "at risk" range on the School Problems composite, and further was at risk for dropping out of school. Dr. Connor concluded that Plaintiff exhibits a pervasive pattern of dissatisfaction with schooling, school personnel, and the structure of the educational process. The following month, in September 2008, Dr. Gale completed an evaluation of Plaintiff. She noted in her report that Plaintiff's father had informed her that Plaintiff was "unmotivated to learn." Finally, in January 2009, Dr. Robert Montgomery completed an evaluation of Plaintiff. At that time, Plaintiff reported that he dislikes school and sometimes wished to be elsewhere. These evaluations were all completed prior to Plaintiff's enrollment at North Gwinnett.

[14] Dr. Robert Montgomery noted in his January 2009 evaluation of Plaintiff that social demands pose a serious source of stress for Plaintiff, as do novel and unexpected situations and situations in which Plaintiff perceives a lack of control.

Plaintiff has not presented sufficient evidence to carry his burden to prove that Defendant has failed to provide him FAPE in the LRE. The evidence tends to show that Plaintiff has received some educational benefit while attending North Gwinnett under the IEP at issue in this matter.

3. Least Restrictive Environment

As mentioned above, a FAPE must be provided in the least restrictive environment (LRE). The LRE requirement involves the extent to which a child with disabilities may be educated with non-disabled children in a regular education setting and receive supplementary services within the classroom, as opposed to being segregated and isolated from the general school population. 20 U.S.C. § 1412(5)(A); Ga. Comp. R. & Regs. r. 160-4-7-.07(1). This is in accordance with Congressional findings that disabled students have long been deprived of the opportunity to be educated within the general school population and that such segregation has hindered their education. 20 U.S.C. § 1400(5). As such, IDEIA provides that children should be provided "with special education and related services, and aids and supports in the regular classroom...whenever appropriate." 20 U.S.C. § 1400(5).

Here, Plaintiff has received services within the regular classroom setting. His August 2011 IEP, at issue, incorporated his parents' request that he be integrated into the general school population. He is enrolled in college preparatory classes and no longer has a paraprofessional in the classroom. This increased independence, however, does not mean that the school has left Plaintiff without supports. His case manager, who works in tandem with his parents to ensure that Plaintiff is making educational strides, closely monitors his educational and behavioral progress in school. In general, up to the point of the hearing in this matter, it appears Plaintiff has performed fairly well academically, and that his teachers have been generally pleased with his

grades. When Plaintiff was performing poorly in Math, his case manager had him transferred to another class, believing that another teacher's classroom approach might better suit Plaintiff's learning style. While this move did not produce the desired results, the school made appropriate changes when it became apparent that it was necessary. Plaintiff's IEP also provided other modifications and allowances, but did so in a way to keep Plaintiff from feeling segregated from the other students. This is in accordance with Plaintiff's wishes, as he has repeatedly made clear that he dislikes being singled out and being made to feel different.

Finally, the LRE regulations require that Defendant, in selecting the LRE, take into consideration "any potential harmful effect on the child." 34 C.F.R. § 300.116. Here, the evidence shows that Plaintiff's IEP team considered Plaintiff's parents' concerns, and the results and conclusions reached by Dr. Turner, and ultimately determined that Plaintiff's needs could be appropriately met at North Gwinnett in the general education setting.

Plaintiff has thus failed to demonstrate that Defendant violated his rights to receive a FAPE in the LRE.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, Defendant's Motion for Involuntary Dismissal is **GRANTED**. Plaintiff has presented insufficient evidence to prove that Defendant did not offer an educational program reasonably calculated to confer educational benefit. Moreover, Plaintiff has presented insufficient evidence to prove that Defendant violated Plaintiff's rights in determining an appropriate placement.

SO ORDERED, this 13th day of December 2012.

Ana Kennedy

Ana P. Kennedy
Administrative Law Judge