IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

FILED
OSAH
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Kevin Westray, Legal Assistant

[redacted] by and through his Parents, [redacted] (father), and [redacted] (mother), and [redacted] (father) and [redacted] (mother) individually as Plaintiffs;

Petitioners,

v.

Fulton County School District,

Respondent.

Docket No.: 1929382
1929382-OSAH-DOE-SE-60-Baxter

ORDER GRANTING RESPONDENT FULTON COUNTY SCHOOL DISTRICT'S MOTION FOR INVOLUNTARY DISMISSAL WITH PREJUDICE

On September 3-5, 2019, the parties attended a Due Process Hearing and Petitioners presented their case in chief. Specifically, this Court heard testimony from [redacted] and [redacted] This Court also heard testimony from all three of Petitioners' expert witnesses – Dr. Elizabeth Turnage, Ms. Laura Kirk, and Ms. Marva Wiggins. Finally, this Court heard testimony from Dr. Vincent Ho, who is [redacted] private psychiatrist, and two teachers – Mr. George Sarris and Ms. Pamela Wade – who both taught [redacted] during his seventh grade year. At the end of Petitioners' presentation of evidence, Respondent moved for involuntary dismissal of all claims on the basis that Petitioners had not met their burden of proof. For the reasons set forth below, this Court **GRANTS** Respondent's Motion for Involuntary Dismissal as to all claims with prejudice.

I. FINDINGS OF FACT

1.

[redacted] is a thirteen (13) year old student who is currently in eighth grade at Crabapple Middle School. (Hr'g. Tr., Vol. 1, Sept. 3, 2019, 20:22-25.)

2.

[redacted] is eligible for special education services under a primary eligibility of Autism. (*Id.* 21:2-9.) [redacted] has medical diagnoses of autism, ADHD, Tourette's Syndrome, and an anxiety disorder. (*Id.* 22:24 – 23:2.)

3.

On March 3, 2017, [redacted] IEP team convened for an IEP meeting to plan for his transition to middle school. (*Id.* 159:7-19.) During that meeting, [redacted] IEP team discussed his progress in fifth grade and noted that his STAR results revealed that he was above grade level in all classes. (*Id.* 160:9-13.)

4.

[redacted] parents wanted for him to be in all advanced, honors, and/or TAG courses when he transitioned to middle school. (*Id.* 164:2-6.)

5.

During his sixth grade year, [redacted] took advanced language arts, talented and gifted ("TAG") science and social studies, and advanced math that was an entire grade level ahead of his current grade. (*Id.* 49:7-16.) [redacted] also took a high school level Spanish course during his sixth grade year. (*Id.* 167:22-24.)

6.

[redacted] parents had the option to allow [redacted] to move from advanced/honors/TAG courses back to regular general education courses and elected not to do so. (*Id.* 52:10-16.)

7.

[redacted] had paraprofessional support in his math course during his sixth grade year. (*Id.* 166:17-19.)

8.

[redacted] IEP team met on November 1, 2017 for an annual review of [redacted] IEP. At this point, [redacted] had spent approximately three months in his sixth grade courses. (*Id.* 166:20-25.) During this meeting, they discussed [redacted] current grades, which were: TAG Science (99); Advanced (7th grade) Math (88); Advanced ELA (86); TAG Social Studies (94); Spanish (90). (*Id.* 168:15-22.) The IEP team also discussed [redacted] performance on his most recent Georgia Milestones. [redacted] was deemed a "proficient learner" in language arts and math and a "distinguished learner" in science and social studies. (*Id.* 169:7-14.) A "distinguished learner" indicates that a student is in the 99th percentile for that subject. (*Id.* 169:15-17.)

9.

The IEP team met again on April 23, 2018. (*Id.* 175:23-25.) At this meeting, the team discussed [redacted] current academic performance, including his grades: TAG Science (93); Advanced (7th grade) Math (89); Advanced ELA (85); TAG Social Studies (93); Spanish (85). (*Id.* 176:8-12.)

10.

During the fall of 2018, [redacted] parents elected to place [redacted] in a Virtual Math course that was a grade level ahead of [redacted] current grade. (*Id.* 181:2 – 182:3.) [redacted] parents later decided to remove [redacted] from Virtual Math and place him in an Advanced 8th grade Math course. (*Id.* 182:4-11.) [redacted] parents also rejected the District's offer for paraprofessional support in the math setting. (*Id.* 182:23 – 183:4.)

11.

[redacted] IEP team met on October 26, 2018 for an annual review. (*Id.* 183:12-17.) During this meeting, the team discussed [redacted] academic performance, including his grades: Advanced

ELA (84); TAG Life Science (94); Advanced (8th grade) Math (85); TAG Social Studies (92); Visual Arts (95); and Spanish (75). (*Id.* 184:5-10.)

12.

Petitioners did not present any evidence that [redacted] grades were inflated during the course of the hearing. In fact, their expert, Dr. Elizabeth Turnage, confirmed that Petitioners were not alleging any artificial inflation of grades. (Hr'g. Tr., Vol. 2, Sept. 4, 2019, 124:13 – 126:21.)

13.

Dr. Elizabeth Turnage testified as an expert witness on behalf of Petitioners. She testified that [redacted] IEPs during the relevant time period were inadequate because his goals and objectives did not address his areas of disability and need. (Tr. Vol. 1 308:14-24; 316:5-18; 318:21-24.) Dr. Turnage later confirmed that the very goals and objectives that she criticized were drafted by Petitioners and herself and incorporated into [redacted]s IEP. (Tr. Vol. 2 49:1 – 54:1; 58:10-19; 69:3-21.) Dr. Turnage also confirmed that [redacted] accommodations were appropriate and reflected the accommodations that Petitioners requested. (*Id.* 66:1-7.)

14.

Dr. Turnage testified that the only way that [redacted] IEP can be appropriately implemented is in a co-taught advanced or honors classroom. (*Id.* 73:12-15.) Dr. Turnage later admitted, however, that during her four year tenure as a Special Education Director in Cob County for Legal and Policy and her over twenty years of experience as an educator, she has participated in thousands of IEP meetings and does not recall a single time that she placed a student in a co-taught TAG or honors course. (*Id.* 113:18 – 115:4.) Dr. Turnage further testified that she could not recall a single time that any IEP team ever placed a child in a co-taught TAG or honors course. (*Id.* 115:5-18.)

15.

Similarly, Marva Wiggins, who also served as an expert witness for Petitioners, testified that during her ten years of experience as the twice-exceptional consultant for Cobb County School District and her two years of experience as a special education supervisor in Cobb County School District, she does not recall a single time that an IEP team placed a twice-exceptional child in a co-taught advanced or honors course. (*Id.* 186:14-20; 187:21 – 188:13.) Ms. Wiggins further clarified that she actually attended every single IEP meeting for every twice exceptional child in Cobb County School District for a decade and never witnessed a team recommend the co-taught setting for a twice-exceptional child. (*Id.* 187:3 – 188:13.)

16.

Ms. Wiggins testified that the reason that she never observed an IEP team in Cobb County School District place a child in a co-taught advanced or honors course was because she personally ensured "there was communication with the special education teacher, communication with the gifted teacher, and . . . accommodations from the IEP were honored and carried out for those students." (*Id.* 188:1-4.)

17.

Dr. Turnage further testified that [redacted] should receive compensatory services because he did not receive FAPE during the relevant two year period. (*Id.* 11:24 – 15:16.) Dr. Turnage later admitted that her calculation of time required for compensatory services included time for Spanish education that accrued after [redacted] parents had unilaterally withdrawn him from his Spanish course. (*Id.* 99:23 – 100:5.) Dr. Turnage also admitted that her calculation of time required for compensatory services included time for math education that accrued when [redacted] parents unilaterally decided to place [redacted] in a virtual math course and during the period of time

when [redacted] was educated by Mr. Sarris, whom Petitioners agree went above and beyond to provide all services in [redacted] IEP. (*Id.* 101:2-8; 102:10 – 103:7.)

18.

Petitioners called two of [redacted] seventh grade teachers as witnesses: Mr. George Sarris and Ms. Pamela Wade. Mr. Sarris taught [redacted] Advanced 8th grade Math during seventh grade and testified that [redacted] did "very well" in his class and ended first semester with an 82 average and ended the second semester with an 89 average. (Hr'g Tr., Vol. 3, Sept. 5, 2019 75:9-11; 91:25 – 92:11.) Mr. Sarris testified extensively about the ways he closely followed [redacted] IEP. (*Id.* 75:12 – 80:12; 82:23 – 84:24.) Finally, Mr. Sarris credibly testified that [redacted] performance on tests shows that he both understood the concepts and understood how to put the steps on paper, and Mr. Sarris does not believe that [redacted] requires any support that exceeds what Respondent was already providing him. (*Id.* 82:12-18; 99:19-21.)

19.

Ms. Pamela Wade, who taught [redacted] seventh grade Advanced ELA, testified that she has a special education degree. (*Id.* 106:8-10.) She further testified that she is aware of a case where a student at Crabapple Middle School was placed in a co-taught advanced class. (*Id.* 107:6-19.) Ms. Wade stated that it is "rare" for a student to require a co-taught advanced course as their LRE, but it has happened within the District. (*Id.* 107:13-15.)

20.

Ms. Wade testified about the ways she ensured that [redacted] IEP was implemented with fidelity in her classroom. (*Id.* 111:1 – 118:23; 129:18 – 133:23; 137:7-25; 141:5 – 146:3.) Ms. Wade testified that she does not believe his written expression impacted his ability to make progress in the general education setting. (*Id.* 118:17-23.) Ms. Wade further testified that [redacted]

mastered the content in her course and earned an 89 during the first semester and an 86 average during the second semester. (*Id.* 138:9-14; 140:1-6.) Finally, Ms. Wade credibly testified that she does not believe [redacted] requires any additional supports that were not already being provided to him. (*Id.* 146:10-19.)

21.

II. CONCLUSIONS OF LAW

22.

This case 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.*

23.

This Court's review is limited to the issues raised by Petitioners in their due process hearing request. 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).

24.

The IDEA creates a "presumption in favor of the education placement established by a child's Individualized Education Program ("IEP"), and Petitioners bear the burden of proof as to all issues for resolution. *See Schaffer v. Weast*, 126 S. Ct. 528 (2005), Ga. Comp. R. & Regs. 160-4-7-.12(3)(m).

25.

The standard of proof is preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

26.

The IDEA requires school districts to provide an eligible student with FAPE in the least restrictive environment ("LRE"). 20 U.S.C. § 1412; 34 C.F.R. §§ 300.17, 300.114-300.118. The Supreme Court has defined 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.

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 200, 102 S. Ct. 3034, 3048, 73 L. Ed. 2d 690 (1982). In *Rowley*, the Supreme Court set out a two part inquiry to determine if a local educational agency satisfied its obligation to provide FAPE to a student with disabilities. *Id.* at 206. 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.

27.

Regarding the first inquiry, the 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. Indeed, FAPE is only denied if the procedural inadequacy (1) impeded the child's right to FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE to the parent's child; or (3) caused a deprivation of educational benefit. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a).

28.

Regarding the second inquiry, the Supreme Court has clarified: "[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 Cnty. Sch. Dist.*, 137 S. Ct. 988, 999 (2017). This requirement does not require that a child's IEP bring the child to grade-level achievement but must aspire to provide more than *de minimis* educational progress. *Id.* at 1000-01.

29.

A school district is required to offer a continuum of educational placements and educate children with disabilities in the LRE possible. 20 U.S.C. § 1412(a)(5).

30.

In order to satisfy its duty to provide FAPE to a disabled child, a school district must provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *WC v. Cobb Cnty. Sch. Dist.*, 407 F. Supp. 1351, 1359 (N.D. Ga. 2005). 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 1309, 1312 (11th Cir. 2003).

31.

After the party bearing the burden of proof presents its evidence, the "other party may move for dismissal on the ground that the party that presented its evidence has failed to carry its burden." Ga. Comp. R. & Regs. 616-1-2-.35.

32.

Petitioners failed to prove that [redacted] was denied FAPE in the LRE at any time.

33.

At all relevant times, Respondent offered [redacted] an IEP reasonably calculated to enable him to make progress appropriate in light of his circumstances.

34.

Petitioners failed to prove that [redacted] IEP was inappropriate at any time or that [redacted] IEP was improperly implemented at any time.

35.

Petitioners failed to prove that they were denied meaningful parental participation at any time.

36.

Petitioners failed to prove that Respondent failed to provide the direct, specialized instruction contemplated in [redacted] IEPs.

37.

At all relevant times, Respondent did access grade-level and above grade level curriculum and demonstrated mastery of that curriculum.

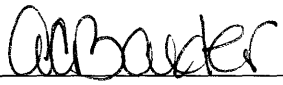
38.

This Court finds that [redacted] made appropriate educational progress, and Respondent met its legal obligation to provide [redacted] with FAPE in the LRE.

III. DECISION

Based on the foregoing, Respondent is entitled to judgment as a matter of law on the facts established, as Petitioners have failed to carry their burden of proof. Petitioners' claims are thus dismissed with prejudice.

SO ORDERED, this 7th day of October, 2019.



AMANDA C. BAXTER
Administrative Law Judge