IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted]., by and through his parent, [redacted]; and [redacted]	:	
Petitioners,	:	**Docket No.: 2026482**
	:	**2026482-OSAH-DOE-SE-75-Walker**
v.	:	
HENRY COUNTY SCHOOL DISTRICT,	:	
Respondent.	:	

FINAL DECISION

I. INTRODUCTION

On March 3, 2020, Petitioners[1] filed a Due Process Hearing Request ("Complaint") alleging that Respondent, Henry County School District (or "the District"), had violated the "Individuals with Disabilities Education Act" ("IDEA").[2] Petitioners first sought review of the District's finding that Petitioner [redacted] misconduct was not a manifestation of his disability. The Complaint also alleged that the School District had failed to provide [redacted] with a free appropriate public education ("FAPE") because 1) it had not protected him from bullying, and 2) [redacted] teacher had not been properly trained in the Mindset Safety Management Program.[3]

[1] To protect their privacy, the Petitioners' full names are not used herein.

[2] On March 14, 2020, the Chief Justice of the Georgia Supreme Court declared a judicial emergency due to the impact of the COVID-19 pandemic. Following several prehearing conferences, the parties agreed to continuances and extensions of certain deadlines. See 34 C.F.R. § 300.510(c) (providing that parties may adjust the 30-day resolution period); Supplemental Fact Sheet, U.S. Dep't of Educ., Office of Special Education Programs (March 21, 2020) (parties may mutually agree to extend the timeline for the 30-day resolution period due to the COVID-19 pandemic). Accordingly, on June 9, 2020 a hearing took place via video conference. All claims, expedited and non-expedited, were joined for hearing on this date.

[3] Petitioners' Complaint indicated that they would pursue additional claims including the identification of the child's disability, and that "they gave [redacted] failing grades on a progress when all grades were not put in the

A due process hearing commenced on June 9, 2020.[4] Petitioners represented themselves, and attorneys Megan Rittle, Esq. and Chase Collum, Esq. appeared for Respondent. Following the presentation of Petitioners' evidence, which consisted solely of the testimony of [redacted].'s parent, Petitioner [redacted] Respondent moved for Involuntary Dismissal. The undersigned granted Respondent's motion with respect to the two claims alleging that the District had not provided [redacted]. with FAPE, but reserved ruling regarding the District's manifestation determination.[5] After considering the evidence presented and reviewing the parties' post-hearing pleadings, Respondent's Motion for Involuntary Dismissal with respect to the manifestation determination claim is **DENIED**, and the Petitioners' request for relief is **GRANTED**.

II. FINDINGS OF FACT

1.

Petitioner [redacted]. was enrolled as a sixth-grade student at McDonough Middle School for the 2019-2020 academic year. He receives special education services through the District's program for emotional/behavioral disorder ("EBD") and is eligible for services for this disability under IDEA.[6] (Testimony of [redacted] Exs. R-1 at 1, R-15 at 3). He also has diagnoses of

computer." Petitioners offered scant evidence regarding these claims, and the undersigned finds that they have been abandoned.

[4] The record in this matter closed on June 19, 2020.

[5] [redacted]s parent, [redacted] testified that [redacted]. had told her he was bitten by another child and that Mr. Freeman "got in his face" and spit on him. These allegations, even if substantiated, would not constitute harassment so "severe, pervasive, and objectively offensive" as to amount to a denial of FAPE. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999). In addition, Petitioners did not present credible evidence supporting the allegation that the School District had failed to provide Mindset Safety Management Program training. Accordingly, Petitioners' uncorroborated allegations were insufficient to survive Involuntary Dismissal. Cf. L.G. ex rel. B.G. v. Sch. Bd., 512 F. Supp. 2d 1240, 1243 (S.D. Fla. 2007) (conclusory uncorroborated allegations by plaintiff cannot survive summary judgement determination in IDEA case) (citation omitted); cf. Alexander v. Watson, 271 Ga. App. 816, 817 (2005) (court presiding in a non-jury trial not required to construe the evidence most favorably to the Plaintiff under Georgia Civil Practice Act).

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

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

disruptive mood dysregulation disorder, anxiety, autism spectrum disorder with aggression, oppositional defiance disorder, and attention deficit hyperactivity disorder. (Testimony of [redacted]; Ex. R-15 at 3).

2.

[redacted]s present levels of academic achievement and functional performance, as well as the services the District provides, are set forth in an Individualized Education Program ("IEP").[7] The IEP in effect at the time of the incident resulting in the manifestation determination included a Behavioral Intervention Plan ("BIP").[8] (Testimony of [redacted] Ex. R-18).

3.

The BIP targeted [redacted]'s non-compliance/refusal to follow directions, specifically: "not adhering to or following a verbal request or directive within 5 seconds after the request or directive has been given. Examples of verbal request or directives are: being told to sit down, begin work, be quiet, come to the teacher's desk and so forth." Interventional strategies to address the targeted behavior included verbal praise, reminders with clear directives, cooling off or "downtime,"

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

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

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

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

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

[7] The IEP in place was due for annual review on January 21, 2020. (Ex. R-15 at 1). Although the incident took place on February 13, 2020, an overdue IEP review in and of itself, does not necessarily deny a student a FAPE. See Doug C. v. Haw. Dept' of Educ., 720 F.3d 1038, 1046 (9th Cir. 2013) (explaining that services do not lapse as a result of an untimely annual IEP review); 34 C.F.R. § 300.324(b)(1).

[8] According to Ga. Comp. R. & Regs. 160-4-7-.21(7), a BIP is "[a] plan for a child with disabilities, included in the IEP when appropriate, which uses positive behavior interventions, supports and other strategies to address challenging behaviors and enables the child to learn socially appropriate and responsible behavior in school and/or educational settings."

discussion of his behavior with an adult, being offered choices, or, if [redacted].'s non-compliance was sustained and harm imminent, appropriate procedures as outlined in the Mindset curriculum. (Ex. R-15 at 6-7).

A. Safety Plan

4.

On or about September 11, 2019, a student Safety Plan was instituted for [redacted] (Ex. R-2). Kendal Freeman, [redacted]'s special education teacher, drafted the Safety Plan. (Testimony of [redacted], Testimony of Kendal Freeman). By its terms the Safety Plan "was created to ensure the safety of all students in the class setting;" however, it refers specifically to [redacted] throughout the document. For example, the document states that "[redacted].]" will participate in lessons about the bullying," there will be "follow-up with any incidents pertaining to acts of bullying against [redacted]" and "[redacted] will check in and out with the 6th grade counselor/or available counselor." The Safety Plan does not identify any student, other than [redacted]., by name. (Ex. R-2 at 1-2).

5.

The Safety Plan provides that "[s]tudents will transition with adult supervision." (Ex. R-2 at 1).

6.

Petitioners maintain that the IEP team added the Safety Plan to [redacted].'s IEP. In contrast, although acknowledging that the Safety Plan was "discussed" at an IEP meeting held on November 6, 2019, the District asserts it "was not formally adopted for implementation purposes." See email from Chase Collum to Kevin Westray (June 22, 2020).

7.

The undersigned finds that [redacted]'s IEP had been amended to incorporate the Safety Plan. On November 6, 2019, [redacted]'s IEP, under the section entitled "Plan Amendments," reflects the following: Amendment 4: (11/06/2019-01/21/20) "[a]dd safety plan." Moreover, IEP meeting notes indicate that the IEP team "[r]eviewed safety plan with [redacted] and [redacted] grandmother]," and several teachers and school administrators. (Ex. R-15 at 1, 14). As noted, the Safety Plan only identified one student by name, [redacted]. (Ex. R-2).[9]

B. Incident

8.

On or about February 13, 2020, [redacted]., along with several other students, pushed and kicked a student repeatedly as he lay on the floor. The incident took place in a hallway. Although no teacher or staff member was present, the altercation was captured via video. (Ex. R-7).

9.

During Petitioners' presentation, they maintained that the District had failed to implement [redacted]'s IEP because he should have been transitioning with adult supervision when the incident took place. (Testimony of [redacted]

10.

Mr. Kendal Freeman was [redacted]'s special education teacher. According to Mr. Freeman, on the day of the incident [redacted]. was having a "good day" and "managing himself." Typically, a paraprofessional would escort [redacted]. from Mr. Freeman's class to his next class, English/Language Arts ("ELA"). However, on the day of the incident, the paraprofessional was not available. Mr.

[9] See 20 U.S.C. 1414(d)(3)(D), (F) (discussing IEP amendments).

Freeman stood at the door to his classroom and monitored [redacted]'s transition to the ELA classroom. (Testimony of Kendal Freeman).

11.

Ronza Frye is a special education teacher at McDonough Middle School. In conjunction with a regular education teacher, she co-taught [redacted]'s ELA class. On the day of the incident, the special education students first reported to the ELA class. When these students arrived, they were directed to proceed to a separate "pull-out" class with Ms. Frye.[10] There is no dispute that [redacted]. was not monitored – either visually or by being physically escorted - during this transition. (Testimony of Kendal Freeman, Testimony of Ronza Frye).

12.

According to Ms. Frye, whenever [redacted]. came to class he was always escorted by a teacher. She "never" saw him come to class by himself. (Testimony of Ronza Frye).

13.

On the day of the incident, [redacted]. did not report to Ms. Frye's "pull-out" class. Ms. Frye asked another student to find [redacted] and bring him to the classroom. When the student returned, he informed Ms. Frye that [redacted] had used profanity indicating he would not be reporting to class. Instead, [redacted]. proceeded to engaged in the misconduct leading to the manifestation determination. (Testimony of Yvette Christian, Testimony of Ronza Frye; Ex. R-7).

[10] School Districts deliver special education services through a variety of methods. Pull-out services refer to services provided to a student outside his regular education classroom, usually in a small-group or individual setting. See generally Ga. Comp. R. & Regs. 160-4-7-.07(e)(d)(2).

C. Manifestation Determination

14.

As a result of his misconduct, [redacted]. was charged with a violation of Rule 3.4 of the Henry County Schools' Code of Conduct, Excessive Physical Contact. Prior to the disciplinary hearing, a subset of [redacted]'s IEP team (or "manifestation team") convened to determine whether his behavior was either a manifestation of his disability, or the direct result of the District's failure to implement his IEP. The manifestation team included regular education teacher, Debra Lord, special education teacher, Ideer Walker, and Jane Cantrell, ESE Hearing Facilitator.[11] (Testimony of Yvette Christian, Testimony of Debra Lord, Testimony of Ideer Walker).

15.

The manifestation determination was conducted on February 26, 2020. After reviewing [redacted]'s IEP, educational records, and a video recording of the incident, the team found that [redacted]s conduct was not caused by, or did not have a direct and substantial relationship to, his disability. The team observed that [redacted]. had not been provoked; instead, he had made a deliberate choice to engage in the misconduct. It also concluded that the alleged misconduct was not a direct result of the school district's failure to implement the IEP. (Testimony of Yvette Christian, Testimony of Debra Lord, Testimony of Ideer Walker).

16.

Summer Cox is the District's Director of Exceptional Student Education. She has extensive training and experience in the field of special education. Noting that there was no triggering event precipitating [redacted]s conduct, she affirmed the manifestation team's conclusion

[11] [redacted] was unable to attend the manifestation determination because her daughter was ill. (Testimony of [redacted] As the manifestation determination already had been rescheduled once before, the team elected to proceed with the manifestation determination. (Testimony of [redacted]).

that [redacted] behavior was inconsistent with either EBD or an autism spectrum disorder because the behavior was unprovoked. (Testimony of Summer Cox).

17.

After the team made its manifestation determination, the matter was referred to a Disciplinary Hearing Officer to determine whether [redacted]. violated the Student Code of Conduct. On February 28, 2020, the Disciplinary Hearing Officer found that [redacted] had violated the Henry County Schools Code of Conduct for engaging in excessive physical contact and imposed an expulsion lasting through the initial weeks of September 2020. He was enrolled at EXCEL Academy for the remainder of the 2019-2020 school year. (Testimony of Yvette Christian; Exs. R-6, R-20).

III. CONCLUSIONS OF LAW

1.

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

2.

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

3.

[redacted]. is a student with a disability eligible for services under IDEA. Ga. Comp. R. & Regs. 160-4-7-.05(a). If a student with a disability commits a violation of a school district's code of conduct, and the school district seeks the child's removal for more than ten consecutive school days, the district must conduct a manifestation determination to determine whether the misconduct is a manifestation of the child's disability. See 34 C.F.R. § 300.536. As part of the manifestation determination, the local educational agency, the parents, and relevant members of the child's IEP team must "review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents" to determine if the conduct in question was (1) caused by, or had a direct and substantial relationship to, the child's disability, or (2) the direct result of the local educational agency's failure to implement the child's IEP. 20 U.S.C. § 1415(k)(1)(E)(i). A manifestation determination must be conducted within ten school days of any decision to change the placement of a child with a disability as a result of a code of conduct violation. 34 C.F.R. § 300.530(e)(5).

4.

If, after a manifestation determination, the misconduct is determined to have been caused by, or have a direct and substantial relationship to, the student's disability, or is the direct result of the school district's failure to implement the child's IEP, then the school must return the student to the original placement unless the parents and the school district agree otherwise. See 34 C.F.R. §§ 300.530(e) & (f), 300.536.[12] However, if the student's conduct is determined not to be a

[12] In circumstances involving weapons, drugs, or serious bodily injury, the statute still allows schools to unilaterally remove a student to an interim educational setting for up to forty-five days without first holding a manifestation determination. 34 C.F.R. § 300.530(g).

manifestation of the disability, then "school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities. . . ." 34 C.F.R. § 300.530(c). Even if the school impose disciplinary measures, the IDEA requires that the District ensure a student continue to receive educational services so as to enable him to progress toward meeting IEP goals. 34 CFR 300.530 (d)(1)(i).

5.

Petitioners contend the District's manifestation team erred in finding that [redacted] misconduct was not caused by, or did not have a direct and substantial relationship to, his disability or was not the direct result of the District's failure to implement the child's IEP. Petitioners bear the burden of proof in this matter. Schaffer v. Weast, 546 U.S. 49 (2005); Ga. Comp. R. & Regs 160-4-7-.12(3)(l); Ga. Comp. R. & Regs. 616-1-2-.07(1). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).[13]

6.

When a party with the burden of proof has completed the presentation of 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. Ga. Comp. R. & Regs. 616-1-2-.35. Following the presentation of the Petitioners' case, which consisted solely of [redacted]s testimony, the District moved for Involuntary Dismissal. As noted, the undersigned granted Respondent's motion with respect to two of Petitioners' claims, but reserved ruling regarding their challenge to the District's

[13] In post-hearing briefing, Petitioners complain that their "expert witnesses were not even called to speak on behalf of [redacted]." (Post-hearing briefing dated June 23, 2020 at 1). As the parties seeking relief, it is the Petitioners' burden to call witnesses and submit evidence to prove the claimed violations.

manifestation determination. Although the District argues that, given Petitioners did not tender either expert testimony or [redacted]s IEP, Involuntary Dismissal is appropriate, Petitioners presented sufficient evidence regarding the IEP's relevant content and applicability. The undersigned finds that Petitioners have carried their burden, and now considers the merits of Petitioners' claims.

7.

Petitioners first assert that the manifestation team erred in failing to find [redacted].'s misconduct was caused by, or had a direct and substantial link to, his disabilities. Other than [redacted]s conclusory opinion that [redacted]. acted impulsively and aggressively because of his disabilities, Petitioners presented no evidence regarding this claim. In contrast, Summer Cox, the District's Director of Exceptional Student Education, testified that a "triggering" event is a precondition to eliciting an aggressive response from a child with EBD or an autism spectrum disorder. After examining [redacted]'s IEP, school records and the video recording, members of the manifestation team stated that they believed that [redacted]s behavior was not due to a "triggering" event. Further, the [redacted]'s BIP does not identify physical aggression as a targeted behavior.

8.

The undersigned concurs with the manifestation team's conclusion there was no indication of an event or provocation having a direct relationship to [redacted]s disabilities that would have caused his behavior. Instead, the evidence demonstrated that [redacted]. made a deliberate choice to engage in the misconduct. See J.H. v. Rose Tree Media Sch. Dist., No. 17-4766, 2018 U.S. Dist. LEXIS 157803, at *8-9 (E.D. Pa. Sept. 17, 2018) (Manifestation teams must do more than consider what a "is typical for students with [the disability]," but also evaluate "the specific circumstances of the incident and the alleged conduct.") (internal citations omitted).

9.

Petitioners next contend that [redacted] misbehavior was the direct result of the District's failure to implement [redacted]s IEP. The undersigned agrees. Even if Mr. Freeman initially formulated the Safety Plan for a group of students, [redacted]s IEP was amended to incorporate the Safety Plan. Accordingly, his IEP required that he be monitored by an adult during transitions. Cf. 34 C.F.R. § 300.324(2)(i) (stating that IEP teams must consider the use of positive behavioral interventions and supports and other strategies that may help address problematic behaviors).

10.

The District's argument that traveling from the ELA classroom to the second "pull-out" classroom did not constitute a "transition" for Safety Plan purposes is unpersuasive. In Merriam-Webster's Dictionary, transition is defined as passage from one state, stage, subject, or **place** to another. https://www.merriam-webster.com/dictionary/transition (last visited July 7, 2020) (emphasis supplied). The evidence is undisputed that [redacted]. had been directed to transition from an ELA class to a "pull-out" class located in another room. See generally Ga. Comp. R. & Regs. 160-4-7-.07(3)(d)(2) (pull-out services refer to services provided to a student outside his regular education classroom, usually in a small-group or individual setting.) While the District correctly points out that the Safety Plan did not require [redacted]. to be escorted during such transitions, it plainly stated that he needed to be monitored by an adult. Unmonitored, [redacted] ran through the hall and engaged in the behavior resulting in his expulsion. His misconduct was the direct result of the school's failure to implement special education services.

11.

The IDEA instructs a manifestation team that a manifestation exists when the misconduct was the "direct result" of the school's failure to implement the IEP. 20 U.S.C. §

1415(k)(1)(E)(i)(II). As discussed in the aforementioned Findings of Fact and Conclusions of Law, the preponderance of the evidence supports the Petitioners' claim that [redacted]'s misbehavior was the direct result of the District's failure to implement his IEP.

IV. DECISION

Having determined that [redacted]'s misconduct was the result of the District's failure to implement his IEP, the undersigned **ORDERS** [redacted]. returned to the McDonough Middle School, the placement from which the child was removed.[14] 20 U.S.C. § 1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2)(i). Accordingly, Petitioners' request for relief is **GRANTED**.

SO ORDERED, this 8th day of July.

Ronit Walker
Administrative Law Judge

[14] At the outset of the hearing Petitioners requested [redacted] be placed in a private school. IDEA requires that a Complaint describe "the nature of the problem of the child relating to the proposed or refused change including facts relating to the problem" and "[a] proposed resolution to the problem to the extent known and available to the party at the time." 34 C.F.R. §300.508(b)(5) and (6). Private school placement was not a remedy sought by Petitioners in their Complaint, and thus is not available as a resolution.