FILED
OSAH
SEP 11 2014

Kevin Westray, Legal Assistant

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[REDACTED] by and through [REDACTED] and [REDACTED]

Petitioners,

v.

[REDACTED] COUNTY SCHOOL DISTRICT,

Respondent.

Docket No.:
OSAH-DOE-SE[REDACTED]SCHROER

FINAL DECISION

I. INTRODUCTION

On May 1, 2014, [REDACTED] through his mother, [REDACTED] filed a due process complaint pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). The due process hearing was held before the Office of State Administrative Hearings ("OSAH") on July 9 and 10, 2014. [REDACTED] appeared *pro se*. Respondent [REDACTED] County School District was represented by V[REDACTED] S[REDACTED], Esq. The record remained open following the conclusion of the hearing in order for the parties to file post-hearing briefs. The deadline for the issuance of this decision was extended pursuant to 34 C.F.R. § 300.515(c).

II. FINDINGS OF FACT

A. Introduction

1.

[REDACTED] is a severely-disabled, eleven-year old boy who lives with his mother and father in [REDACTED] County, Georgia. As an infant, [REDACTED] had a liver transplant and continues to take daily immunosuppressive medications. These medications compromise [REDACTED]s immune system and put him at greater risk of infection. Weighing the risk of exposure to sick individuals against the

limited educational benefit they expect to achieve in a traditional school setting, ’s medical doctors and his mother want to be educated in his home. The School District contends that will benefit from education in a school setting and that he can safely and appropriately be educated at School, a small public school that serves medically fragile students in County.

2.

s mother filed a due process complaint against the School District on May 1, 2014. In the complaint, she identified “educational placement (where the child receives IEP services)” as the sole reason for her hearing request. As relief, requested private school services, paid for by the School District and provided to in his home. In the alternative, requested homebound educational services for provided by the School District, including functional academics, speech-language pathology, physical therapy and occupational therapy. Finally, requested compensatory education “to make up for the fact that [has not received any educational services from [the School District] for 2012-2013 school year.”

3.

The due process hearing was initially scheduled for June 13, 2014, but was continued to July 9, 2014 because of the unavailability of the School District’s representative. Pursuant to the *Notice of Filing and Order* issued on May 5, 2014, the parties were deemed to have agreed to limit the presentation of evidence by both sides to one day as neither party filed a timely request for additional time. Nevertheless, because misunderstood the Court’s orders on the time limitations for the hearing, the Court allowed each party a full day to present evidence. presented Petitioners’ case on July 9, 2014, and the School District presented its case on July 10, 2014. The hearing transcripts were received on July 25, 2014, and the parties filed post-hearing

briefs on August 7, 2014.

B. ████s Medical and Educational Background

1. Medical Background

4.

████ was born with ornithine transcarbamylase ("OTC") deficiency, a genetic urea cycle disorder that causes seizures, coma and cardiac arrest. As an infant, ████s OTC deficiency led to the accumulation of excessive ammonia levels in his blood, which caused him to slip into a coma and suffer permanent brain damage. At age ten months, ████ received a liver transplant at the University of Pittsburgh to treat the OTC deficiency. Since that time, he has been on immunosuppressive medications to prevent rejection of the transplanted liver. These medications affect the functioning of T lymphocytes or "T-cells," which help the immune system defend against viral infections. ████ like all post-transplant patients on immunosuppressive medications, is considered "immuno-compromised" and more susceptible to recurring infections.[1] (Petitioners' Exhibits, pp. 215, 228; Tr. 95-96, 203-05.)

---

1 Laboratory tests conducted from 2008 through 2013 indicated that ████ had normal levels of both T-cell functioning and immunoglobulins or antibodies. However, Dr. ████ ████ M.D., a pediatric immunologist, warned against reading too much into these results. Although ████'s ability to produce antibodies, which primarily help fight bacterial infections, appears to have been restored, the normal lab results relating to his T-cell functioning should not be interpreted to mean that his body's ability to fight viral infections has been restored. According to Dr. ████, the T-cell function tests are crude measures only, and normal results on such tests do not mean an individual's immune system is fully intact. Individuals who take immunosuppressive medications do not have normally-functioning immune systems and "are generally more susceptible to infections, but the type of infection depends on the particular part of their immune system that's affected." Dr. K████ acknowledged that there is not a reliable, objective measure of impairment to ████s T-cell functioning, but opined that "there probably is some impairment of his immune system" based on the literature and accumulated medical knowledge, which indicates that post-transplant patients have increased susceptibility to certain types of viruses. (Petitioners' Exhibits, p. 230; Tr. 203-208, 223, 226-227.)

5.

[redacted] has also been diagnosed with cerebral palsy. He is non-verbal, non-ambulatory, and has a gastrostomy tube ("g-tube') for feedings. [redacted] has global developmental delays, and he is dependent on adult caregivers for all activities of daily living, such as dressing, feeding, toileting, and bathing. Because his communication and interaction skills are so limited, it has not been possible to administer standardized tests or traditional cognitive assessments. However, in the most recent psychological evaluation of [redacted] conducted in June 2013, Dr. Rivkah Eidex, a clinical psychologist, used clinical observations, consultations with other professionals, and adaptive behavior scales completed by [redacted] to evaluate [redacted] Dr. Eidex determined that [redacted]s functioning in the areas of communication, daily living, socialization, and motor skills were below the first percentile, equivalent in age to an infant. Evaluations conducted by the School District in 2012 yielded similar results. (Petitioners' Exhibits, pp. 214-225, 228; Respondent's Exhibits, pp. D13, D102-103, D218; Tr. 97.)

2. Early Education

6.

In 2006, at age three, [redacted] began attending preschool in the School District. Because of his disabilities, he was eligible to receive special education services. When he first entered the School District, his local transplant physician, Dr. Rene Romero, completed a medical report and responded to questions from the School District about [redacted]s medical condition and needs. Dr. Romero stated that "universal precautions"[2] should be observed, and [redacted]s parents should be

---

2 Universal precautions are guidelines established by the Center for Disease Control and Prevention to prevent the spread of infection, including frequent hand-washing and the use of personal protective equipment, such as gloves and gowns, in the event of contact with blood or other body fluids. (Tr. 331-333)

notified of ill contacts, especially chicken pox exposure. He did not require [redacted] to be isolated or educated at home. At that time, Dr. R[redacted] opined that [redacted] was no more immunosuppressed than any other liver transplant patient. (Respondent's Exhibits, pp. D110, D209-210, D215.)

7.

Following preschool, [redacted] attended a special education kindergarten class at [redacted] Elementary School, a typical public elementary school in the School District. According to J[redacted] the school nurse assigned to Rock Springs at that time, [redacted] regularly attended kindergarten and did not have any prolonged absences due to illness. Dr. R[redacted] continued to recommend that universal precautions be practiced in the event [redacted] was exposed to blood in the hospital, doctor's office, or school setting. Dr. R[redacted] stated that "standard precautions," including hand washing or alcohol-based cleanser and the use of gloves when exposure to body fluid was anticipated, would likely apply in most school settings. Dr. R[redacted] stated that this level of protection was reasonable for [redacted] Dr. [redacted] F[redacted] [redacted]s pediatrician, recommended that [redacted] continue to have a personal aide to help limit his exposure to viral and bacterial contaminants. Neither Dr. R[redacted] nor Dr. F[redacted] recommended that [redacted] then four years post-transplant, be isolated from other students or teachers or that he be educated at home.[3] (Respondent's Exhibits, pp. D216-218; Tr. 344-45, 395.)

---

3 At the time of these recommendations, [redacted] was being treated for hypogammaglobulinemia, an atypical consequence of his liver transplantation that required "monthly infusions of intravenous immune globulin to help improve his ability to fight off infections and have a more normal immune response." As confirmed by Dr. K[redacted] at the hearing, sometime in late-2008 or 2009 [redacted] began producing normal amounts of antibodies on his own and was taken off the monthly gamma globulin therapy. (Respondent's Exhibits, p. D216; Tr. 225-27.)

3. School and Homebound Services (2009 – 2012)

8.

After s kindergarten year at e was transitioned to a special education class at Elementary School, another typical elementary school in the School District. Shortly after started at, in or around October 2009, the H1N1 pandemic flu virus began, with a significant increase in the number of documented flu cases and no effective vaccine. Dr. F requested that receive homebound educational services "until this high risk season ends," and s Individualized Education Program ("IEP") team agreed. (Respondent's Exhibits, p. D227; Tr. 346, 356-58, 360.)

9.

returned to Elementary near the end of flu season in 2010, but became increasingly concerned about the risk of infection in the school setting. In particular, was concerned because she believed that one s teachers, C H had come to school and had contact with while she was sick and had what appeared to be a fever blister or cold sore on her lip. The Court finds that there is insufficient probative and reliable evidence in the record of this case to determine whether and to what extent H ad contact with while she was ill. However, P now the lead nurse for the School District, testified that she investigated s concerns about H and determined that was not placed at risk due to H's condition. (Petitioners' Exhibits, pp. 86-A, 86B-3; Tr. 239-240, 358-359, 360, 365, 412-413.)

10.

In September 2010, Dr. F recommended, based in large part on the concerns reported by regarding H, that receive homebound education services

indefinitely, but especially during cold and flu season. s IEP team acceded to Dr. F's recommendation at that time, and was provided homebound services by the School District during the 2010-2011 flu season. However, when flu season ended in or around April 2011, and Dr. F requested that continue to receive homebound services. Although both the School District's homebound services request forms and Georgia Department of Education regulations require a parent seeking homebound services to give permission to the School District to contact the treating physician to get information regarding the child's medical condition, repeatedly wrote on forms that she was not waiving her privacy rights and that the School District was required to get a separate consent from her each time it wished to seek medical information from Dr. F. (Respondent's Exhibits, pp. D230, D235-240; Tr. 366-367)

11.

Despite s failure to comply with the homebound services regulations regarding access to s physician, the IEP team agreed to follow Dr. F s recommendation until the end of the school year, which was just a month or two away. During the summer, in July 2011, Dr. F wrote another letter to the School District, repeating the information regarding s concerns regarding Hunczak's cold sore in 2009 and noting s more recent reports that homebound teachers were coming to her home with symptoms of bacterial and viral infections. Dr. F relying solely on this information from and without talking with any one from the School District,[4] recommended that "be educated at home for adequate management of

---

4 The Court was unable to assess the validity of s concerns regarding s homebound teachers' health and infection control practices because did not testify at the hearing regarding her observations. Rather, Dr. F testified that he received most, if not all, of his information about s teachers, their health, and their actions from Moreover, Dr. F, provided only a vague account of s concerns. Dr. Fotion's own, frequently-cited

health and sanitation and to ensure proper infection prophylaxis." In August 2011, Dr. F supplemented this letter, stating that he did not know how the School District could ensure that would not be exposed to sick individuals "due to the fact the school is full of sick children." Moreover, he opined that there were no accommodations that the School District could provide that would permit to attend school safely. Dr. F confirmed, however, that his orders required to be "homebound for school services only." He permitted to leave his home for all other activities, such as daily rehabilitation therapies, lab draws, sick and routine doctor's appointments, and other related outpatient medical services. In addition, Dr. F did not require to be isolated while in the home. In fact, the evidence in the record shows that other children visited in his home and that his family went on vacation, attended church, and visited other families outside the home. (Respondent's Exhibits, pp. D15, D233, D242-243; Tr. 263-265, 367, 434-35.)

12.

The IEP Team met on August 26, 2011, and agreed to accept Dr. F and s request for homebound education services for during the 2011-2012 school year pending a review of his case by a medical review panel. The medical review panel was not convened that school year, however, because the School District was unable to identify a physician willing to serve on the panel. remained on homebound instruction until sometime in May 2012, when declined further homebound services. (Respondents' Exhibits, p. D13; Tr. 328, 398, 433.)

---

views of public schools – namely, that they are full of sick kids at all times – appear to be based on his general experience as a pediatrician. Poole-Ross testified that she investigated s allegations regarding homebound teachers going to s home while sick and she determined that they were not true. (Tr. 119-120, 131-132, 175-176, 180, 185, 379.)

C. IEP Team Proposes Placement at [redacted] School

1. 2012-2013 School Year

13.

On May 17, 2012, [redacted]s IEP team met to review [redacted]s past IEP and develop a new IEP for the upcoming school year. [redacted] did not attend this meeting despite having agreed to do so. The team decided that for the last few weeks of the 2011-2012 school year, the School District would continue to offer [redacted] homebound instruction. However, beginning with the 2012-2013 school year, the team proposed that [redacted] gradually be transition back to a school setting at [redacted] School. (Respondent's Exhibits, pp. D11-47; Tr. 326-328.)

14.

[redacted] School is a unique, state-of-the-art school operated by the School District and designed to support medically fragile children. Only 49 students attend [redacted] School, and each class has only three to five students and a minimum of three adults (a special education teacher and two paraprofessionals). The other students in [redacted]s classroom would be non-ambulatory and wheelchair-bound, thereby greatly diminishing the opportunity for inadvertent student-to-student physical contact. In addition, [redacted] School has a full-time registered nurse, who is responsible for training staff members on universal precautions and other measures relating to sanitation and infection control, as well as each student's individual health management plan.[5] (Tr. 329-330, 447-448, 450.)

---

5 Among the infection control measures employed at [redacted] School are cleaning of the classroom a minimum of three times a day with a hospital-grade germicide and color-coded rags; providing each student with their own set of educational materials; equipping each classroom with a sink, hand sanitizer, and gloves for staff use when necessary. In addition, the school's ventilation system prevents the exchange of air between classrooms. (Tr. 452-56.)

15.

In July 2012, prior to the start of school, Dr. F[redacted] completed a Medical Referral Form for homebound services for [redacted] He repeated his prior statements that [redacted] should not be exposed to sick individuals and that basic hand washing and infection control are required for those working with [redacted] However, Dr. F[redacted] again acknowledged that [redacted] was not confined to his home or the hospital. Rather, he stated that homebound services were required because [redacted]s health "is endangered at school." [redacted] signed the form under the statement that "[p]arent signature gives GCPS staff permission to speak with the treating physician who signed this report about the student named above for the purpose of speaking [sic] clarification of diagnosis, prognosis, or any other comment by the physician 'related to the present diagnosis' to assist with educational programming." However, as with past homebound request forms, [redacted] handwrote under her signature the following:

> Parents must be contacted, included and notified before speaking to physician. And informed of what information is requested of physician at all times. In addition, I do not voluntary [sic] consent nor agree that GCSD can condition my entitled receipt of services on waiver of my rights under HIPPA. I expect such rights to be maintained and expect notice of all persons who seek access to these records.

[redacted] included the same statement on the authorization for exchange of health and education records between Dr. F[redacted] and P[redacted], which she signed on August 14, 2012. In addition, she added the following handwritten statement: "Discussion regarding reason for homebound 2012-2013 on case by case situation that each situation requires separate consent." (Petitioners' Exhibits, pp. 44-47, 189-190; Respondent's Exhibits, pp. D261, D263-264; Tr. 381-386.)

16.

[redacted] did not send [redacted] to [redacted] School, and he did not attend school in the School District or receive special education services during the 2012-2013 school year. In

August 2012, the principal of C, sent a letter to requesting that she set up a telephone conference with Dr. F to discuss the request for homebound services. She emphasized the importance of allowing Poole-Ross to speak directly with Dr. F, and she invited to be present during and participate in the telephone conference. did not respond to C or allow P to speak directly to Dr. F during the 2012-2013 school year. P confirmed that she wanted to speak with Dr. F about 's medical condition, but her attempts to do so were either rebuffed by Dr. F or restricted by [6] (Respondent's Exhibits, pp. D53, D60, D258; Tr. 380-381, 458-61, 489-490)

2. 2013-2014 School Year

17.

In May 2013, presented the IEP team with Dr. F's request for homebound services for the upcoming 2013-2014 school year. Dr. F wrote the following in his letter:

> [is significantly immune deficient due to liver transplants. Therefore, it is recommended that he not be exposed to sick people. In addition, developmentally he has shown very little progress, so he would not benefit from a typical learning environment. I highly recommend that he receive homebound educational services or homeschooling for his entire school career to ensure limited exposure to unhealthy or unsanitary environments.

Later, in September 2013, he reiterated his orders that all caregivers sanitize their hands and any educational materials before coming into contact with and that they exercise basic infection control precautions, such as frequent hand washing and wearing gloves and mouth masks.

---

6 E the executive director of special education and psychological services for the School District, participated in a number of IEP meetings with where the School District attempted to obtain a release for P to speak with s medical providers about the need for homebound services. She testified that first required School District staff to prepare written questions for the doctor, which they did. However, they did not receive a response to their questions. E also attempted to arrange a telephone conversation with the doctor and offered to allow to participate. "declined those requests, to either participate in the phone call or to allow the nurse to call." (Tr. 490-491, 493-496)

Finally, he stated that [redacted] required monitoring by a nurse or a highly trained nurse's assistant while being educated to ensure that adequate infection control measures are used. (Respondent's Exhibits, pp. D196-197, D199, D202-203; Tr. 386.)

18.

Once again, Dr. F[redacted] confirmed that [redacted] was not confined to his home generally, only for his education services "due to the high risk of contamination at school." The Court finds that Dr. F[redacted]'s recommendation was based on his general view of schools "being full of sick kids" and not on any personal knowledge of [redacted] County Schools generally or [redacted] School in particular. The evidence in the record shows that Dr. F[redacted] has never visited [redacted] [redacted] or talked to any School District employees about its facilities, staff, or infection control practices. There is also no evidence that Dr. F[redacted] has visited any school in [redacted] County. Moreover, Dr. F[redacted] acknowledged that his own office, which sees almost 200 pediatric patients a day, half of whom are sick patients, does not follow all of the infection control procedures he is mandating for [redacted]s school. For example, he and his staff do not wear masks or gloves on a regular basis with other patients or with [redacted][7] (Respondent's Exhibits, p. D197; Tr. 132, 165-168, 170-172, 388-390.)

19.

[redacted]s IEP team met on September 3, 2013 to consider [redacted]s request for homebound services for the 2013-2014 school year. The team reviewed the psychological evaluation from

---

7 Similarly, Dr. K[redacted] testified that she and her office staff did not wear masks when [redacted] was examined, and that they generally do so with other immuno-compromised patients only when they feel that they may be becoming ill. Also, like Dr. F[redacted] Dr. K[redacted] did not know anything about [redacted] School. However, unlike Dr. F[redacted], Dr. K[redacted] was reluctant to comment on the appropriateness of the proposed placement without knowing more details, such as how many students would be in [redacted]s class, their ages, and their conditions. (Tr. 227, 229, 401)

Dr. E and discussed Dr. F's orders and the School District's ability to comply with them at At the end of the meeting, requested that the School District pay for a medical evaluation of The School District agreed to do so. Arrangements were made for the evaluation to be conducted by Dr. K, who, unbeknownst to the School District, had examined on two prior occasions.[8] Dr. Kobrynski examined on December 4, 2013, at which time she reported that was being homeschooled and had not received homebound services from the School District since May 2012. Dr. Kobrynski concluded that was more susceptible to infections because of the immunosuppressive medications, and that he should avoid unnecessary exposure to ill individuals, especially those who are symptomatic. "Since it is difficult to ascertain infection status in all individuals, infectious precautions may include wearing a surgical mask, hand washing and using hand sanitizers." At the hearing, she testified that caregivers who care for other students may need to wear gloves if they come in contact with their secretions, but that other necessary infection control measures were just "basic things." (Respondent's Exhibits, pp. D102-108; Petitioners' Exhibits, pp. 203, 224-225, 228-232; Tr. 228, 239, 244.)

20.

In February 2014, the IEP met to review Dr. K's report. The consensus of the team, including the school nurse and educators, continued to be that Dr. K's and Dr. F's recommended precautions could be implemented at School. The

---

8 The School District was unaware of Dr. K's prior examinations because has refused to share 's medical records with the School District, including any information from his transplant physicians. In fact, objected strenuously when P attempted to obtain medical records from Dr. F's office in order pass them on to Dr. K before her December 2013 medical evaluation. contends that Poole-Ross' attempt to obtain s medical records from Dr. F was a violation of s privacy rights and impermissible under the terms of s conditional releases. (Tr. 399, 401.)

team updated the IEP to include that [redacted] would have his own set of materials and equipment, which would be sanitized on a daily basis. Adaptive equipment would be limited to solid items that could be sanitized. In addition, the proposed IEP called for [redacted] full-time nurse to develop a health management plan with [redacted] and train all staff working with [redacted] on proper hand-washing technique. Finally, all staff would be required to wear a surgical mask when in contact with [redacted] [redacted] participated in the IEP meeting, but did not agree with placement [redacted] at [redacted] (Respondent's Exhibits, pp. D110-134.)

D. Hospital/Homebound and Nursing Services in the School District

21.

The School District educates 173,000 [redacted] County students. During the 2013-2014 school year, approximately 400 of these students were on hospital/homebound instruction for some or all of the school year, the vast majority of whom were pregnant girls. During that same period, the School District's nurses provided case management services to 49 students who were post-transplant. Of those 49 students, three students received hospital/homebound services in the six to ten weeks immediately following their transplants, and one patient received full-time hospital/homebound services during the year following transplant surgery. The remaining post-transplant students attended schools within [redacted] County and were provided nursing case management services in that setting. In addition to transplant cases, the School District's nurses provided case management services to other immuno-compromised students who attend schools within [redacted] County, including cancer patients undergoing chemotherapy and students with severe cerebral palsy, cardiac disease, blood disorders, systemic lupus, Graves' disease, and rheumatoid arthritis. (Tr. 318-323.)

E. Educational Programming and Benefit from Small Group Setting

22.

Contrary to Dr. F s conclusion that will receive little if any benefit from being educated in a school setting,[9] the School District contends that it is important for to be educated in the least restrictive environment with other children and educators as long as appropriate infection control measures can be implemented. K P, an experienced special education teacher at who has provided homebound instruction to both recently and in the past, describes as a social, inquisitive child. He beams when anyone comes in to talk to him and is very motivated to learn. In particular, she has worked with him on using electronic communication devices and she believes that he has the capacity to develop greater communication skills. According to P, would not only be a safe place for to receive his education, given the presence of a full-time nurse, the school's infection control measures, and the medical training provided to staff members, but would flourish academically and socially in dynamic learning environment. Pelletier testified that it is important, as gets older, that he be given the opportunities and skills to express his preferences for sights, sounds, and smells, and be a more active participant in choosing the things and activities that are meaningful to him. (Tr. 498-505, 513-515.)

---

9 Dr. F testified that "just cannot learn much, so his amount of benefit from school is far less than most children. I don't know that he's benefitted at all from school, he may have, I just – it's clear he's not benefitted much from school." Dr. F further testified that he might be able to endorse a program in the school setting if it was "one-on-one," but only if would benefit from it. "I think at this point the question is how much will he benefit from any program, and that's, as I've seen him over the years, ... it's obvious he's not … making a lot of progress." Dr. F defined educational benefit as being able to talk more, walk, think, and function in society. Conversely, Dr. F has repeatedly checked the box on the request for homebound services form to indicate that would "be able to participate in and benefit from an instructional program" while confined to his home. (Petitioners' Exhibits, p. 50; Tr. 146-47.)

III. CONCLUSIONS OF LAW

A. General 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. ("Ga. DOE Rules"), Ch. 16-4-7.

2.

Petitioners bear the burden of proof in this matter. *Schaffer v. Weast*, 546 U.S. 49 (2005); Ga. DOE Rule 160-4-7-.12(3)(l); OSAH Rule 616-1-2-.07. The standard of proof on all issues is a preponderance of the evidence. OSAH Rule 616-1-2-.21(4).

3.

Claims brought under IDEA 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), 511(e).

4.

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. DOE Rule 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).

5.

The United States Supreme Court has developed a two-part inquiry to determine whether a school district has provided FAPE: "(1) whether the school district complied with the

procedures set forth in the act; and (2) whether the IEP was reasonably calculated to enable the child to receive educational benefit in the least restrictive environment (LRE)." *A.K. v.* [redacted] *County Sch. Dist.*, 556 Fed. Appx. 790, 2014 U.S. App. LEXIS 2774, *4 (11th Cir. 2014), *citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982).[10] As in *A.K.*, Petitioners in this case have not argued that the School District has failed to follow the procedural safeguards under IDEA. *Id.* Accordingly, the issue in this case is whether the School District's proposed placement at [redacted] was reasonably calculated to enable [redacted] to receive educational benefit in the least restrictive environment. *Id.*

B. <u>The School District Offered [redacted] FAPE in the Least Restrictive Environment.</u>

6.

As set forth above, IDEA and the Georgia Department of Education ("Georgia DOE") regulations require school districts to educate children with disabilities in the least restrictive environment ("LRE"). 20 U.S.C. § 1412(a)(5).

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A); Ga. Comp. R. & Regs. r 160-4-7-.07(1). As the Eleventh Circuit recently held in *A.K.*, IDEA clearly "favors reintegrating children into the school setting, where

---

10 In *A.K.*, the Eleventh Circuit affirmed the decision of the district court that held that a student with severe autism failed to justify the need for in-home schooling in order for the child to receive a special diet in a low-stress environment. 2014 U.S. App. LEXIS 2774, at *2, 6. The Court pointed to several factors that supported this decision, including that the diet was not prescribed by a medical doctor and the child did not have a life-threatening condition being treated by a physician. *Id.* "Most importantly, though, [parent] provides no evidence that GCSD will be unable to adequately supply [student] with her special diet." *Id.*

they can socially interact with other children." *A.K.*, 2014 U.S. App. LEXIS 2774, at *5-6. *See also Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 695 (11th Cir. 1991), *citing Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1045 (5th Cir. 1989) (in order to meet the LRE requirement, a disabled student who cannot be satisfactorily educated in a regular classroom must be mainstreamed to the maximum extent appropriate).

7.

Along the continuum of alternative placements, from least restrictive to most restrictive, home instruction is one of the most restrictive. 34 C.F.R. 300.115.[11] Georgia DOE regulations provide guidance as to the circumstances under which it is appropriate to place school-age children in the most restrictive alternative placements. Ga. Comp. R. & Regs. 160-4-7-.07(d)(4) & (5). First, "Home-Based" instruction may be appropriate "as a short-term placement option on occasions when the parent and [the school district] agree at an IEP meeting with the following considerations:"

> (i) A free and appropriate public education (FAPE) is provided and includes access to the general curriculum and opportunity to make progress toward the goals and objectives included in the IEP;
>
> (ii) homebased services must be reviewed no less than quarterly by the IEP team; and
>
> (iii) all IEPs that require home-based placements will include a reintegration plan for returning to the school setting.

Ga. Comp. R. & Regs. 160-4-7-.07(d)(4). Second, as to Hospital/homebound ("HHB") instruction programs, the Georgia DOE regulations provide that HHB services may be used "for students with disabilities who are placed in a special education program and have a medically

---

11 The continuum of alternative placements under IDEA regulations is "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. 300.115(b)(1).

diagnosed condition that will significantly interfere with their education and requires them to be *restricted* to their home or hospital for a period of time." Ga. Comp. R. & Regs. 160-4-7-.07(d)(5) (emphasis added). The regulations further provide that HHB services for students with disabilities must comply with the Georgia DOE's general regulations for HHB services, which apply to all students. *Id.*, *citing* Ga. Comp. R. & Regs. 160-4-2-.31.[12]

8.

Of course, the placement must be an appropriate one for the individual child, and both the federal and state regulations provide that "[i]n selecting the LRE, consideration [must] be given to any potential harmful effect on the child or on the quality of services that he or she needs." 34 C.F.R. 300.116(d); Ga. Comp. R. & Regs. 1604-7-.07(2)(d). *See Greer*, 950 F.2d at 696, *quoting Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1045 (5th Cir. 1989) ("[N]o single factor will be dispositive under this test. 'Rather, our analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs.'"). This balancing of considerations – potential harm versus quality of necessary services – in order to determine the LRE is a task delegated to the IEP team under IDEA. *R.L. v. Miami-Dade County Sch. Bd.*, 2014 U.S. App. LEXIS 12841 (11th Cir. July 2, 2014) ("Among the decisions that must be made by the IEP team is the educational placement – that is, the setting where the student will be educated—which must be 'based on the child's IEP'"), *citing* 34 C.F.R. § 300.116(a)-(b); *Marc V. v. North East Indep. Sch. Dist.*, 455 F.Supp.2d 577, 594 (W.D. Tex. 2006), *aff'd* 242 Fed. Appx. 271 (5th Cir. 2007) (IEP team not required to consent to homebound placement prescribed by physician and, in fact, there is no authority under IDEA for an IEP team to delegate its duty to ensure an

---

12 *See infra*, at Section III.C.

IEP in the least restrictive environment).

9.

In this case, s IEP team considered all the available information regarding s medical condition, as well as s educational abilities and needs. The preponderance of the evidence shows that the IEP team proposed a placement for that is uniquely designed to implement all of the infection control measures required by his physicians while offering the opportunity to engage with other students and interact with his teachers and his environment in a meaningful way. Moreover, even assuming that Dr. F's impression that schools are full of germs and sick children is generally true, Petitioners failed to prove that it is true at School. Rather, the evidence showed that with its small student population, highly-trained staff, and commitment to proper infection control precautions, is a reasonably safe setting for a student with 's health needs. In fact, Petitioners presented no evidence to prove that placement at with the accommodations proposed in the IEP, is any less safe an environment for than his frequent visits to therapists, his routine and sick medical appointments, or his visits with other children and caregivers in his home or at church, all of which were sanctioned by his physicians.

10.

The Court therefore concludes that is an appropriate placement for in the least restrictive environment, and that Petitioners failed to prove that a homebound placement is either appropriate to meet s educational needs or necessary to protect his medical needs.

C. [redacted]s Refusal to Allow Access to [redacted]s Medical Records and Providers Precludes Her from Seeking HHB Services for [redacted]

11.

Georgia DOE's Rules define Hospital/Homebound (HHB) Services as "academic instruction and other services provided to eligible students who are *confined* at home or in a health care facility for periods of time that would prevent normal school attendance based upon certification of need by the licensed physician . . . who is treating the student for the presenting diagnosis." Ga. Comp. R. & Regs. 160-4-2-.31(d) (emphasis added).[13] One of the eligibility requirements for HHB services, including HHB services for students with disabilities, is that "[t]he parent or guardian must sign the parental agreement concerning HHB policies and procedures and parental cooperation. A release for medical information relating to the reason for the request for HHB service may be required by the [school district]." Ga. Comp. R. & Regs. 160-4-2-.31(2)(3). Finally, Georgia DOE provides that prior to initiating HHB services, the school district may require the parent to provide a broad release of medical records and access to the student's physician.

> The [school district] may require the parent . . . to provide a properly signed release that complies with the requirements of the Health Insurance Portability and Accountability Act (HIPAA) that authorizes the licensed physician . . . who is treating the student to provide all requested records related to the condition related to the request for HHB services to the [school district] and to discuss the student's situation and the need for HHB services with the school team. If the release is required by the [school district], the form must be provided to the school team prior to any decision regarding the need for HHB services.

Id. at (3)(a).

---

13 Georgia DOE Rules distinguish between "Intermittent HHB" services (ten intermittent absences per year), "Long-term HHB" services (more than nine consecutive weeks absent per year), and "Temporary HHB" services (more than ten consecutive absences, but no more than nine weeks). *Id.*, at (f), (i), and (l).

12.

This requirement is consistent with judicial decisions under IDEA, which require parents seeking accommodations or services relating to their children's medical conditions to work collaboratively with their children's IEP teams and provide them access to treating physicians, medical records, and, if appropriate, the children themselves for evaluation. *See Shelby S. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450, 454-455 (5th Cir. 2006) (in order for school district to formulate IEP consistent with child's extreme medical conditions, school needed access to child's medical history and specialist); *R.C. v. Keller Indep. Sch. Dist.*, 958 F.Supp.2d 718 (N.D. Tex. 2013) (school district was not required to consent to restrictive homebound services, "particularly when considering the parents' refusal to allow communication between the recommending physician and school officials, and the school district's obligation to deliver the FAPE in the least restrictive environment"), *citing Marc V.*, 455 F.Supp.2d at 594.

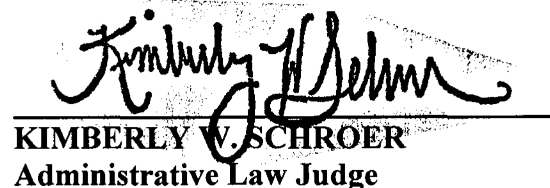
13.

Accordingly, given ███s refusal to allow the School District to review any of ███s medical records or speak with Dr. Fotion or ███s transplant physicians, in contravention to Georgia DOE Rules and IDEA case law, Petitioners have failed to prove that they are entitled to homebound services or that the School District's proposed IEP amounted to a denial of FAPE.

IV. DECISION

The School District offered ███ a free appropriate public education in the least restrictive environment. Accordingly, Petitioners' request for relief is **DENIED.**

SO ORDERED, this 10th day of September, 2014.



KIMBERLY W. SCHROER
Administrative Law Judge