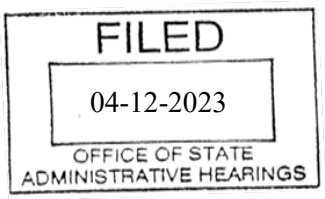
BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted], BY AND THROUGH [redacted],
Petitioner,

v.

SAVANNAH-CHATHAM COUNTY SCHOOL DISTRICT,
Respondent.

Docket No.: [redacted]-OSAH-DOE-SE-25-Malihi



For Petitioners:
Petitioner [redacted],[1] mother of student [redacted]

For Respondent:
Brian Dennison, Esq.

FINAL DECISION

I. INTRODUCTION

Petitioners [redacted] and [redacted] filed a due process complaint pursuant to the Individuals with Disabilities Education Act ("IDEA"). The Petitioners allege that Respondent Savannah-Chatham County Public School System (the "District" or "SCCPSS") violated the IDEA by denying [redacted] a free appropriate public education ("FAPE"). The due process hearing was held on February 2, 2023, in Hinesville, Georgia. The record remained open until March 16, 2023, to allow the parties an opportunity to review the transcript and submit proposed findings of fact and conclusions of law.

II. FINDINGS OF FACT

1.

The Petitioners called thirteen witnesses:

1. Petitioner [redacted], [redacted]'s mother,

[1] Although Petitioner [redacted] appeared *pro se*, she is a trained and competent former lawyer.

2. Petitioner [redacted], student at the [redacted], SCCPSS,

3. [redacted], [redacted]'s father,

4. Dr. Ann Levett, Superintendent, SCCPSS,

5. Susan Bryant, School Psychologist and Program Manager for the Department of Specialized Instruction, SCCPSS,

6. Michael Johnson, School Board Member, SCCPSS,

7. Jimmie Cave, Principal at [redacted] SCCPSS,

8. Lydia Taylor, Assistant Principal at [redacted], SCCPSS,

9. Heather Ogle, Social Studies Educator at [redacted], SCCPSS,

10. Donnie Allen, Educator at [redacted], SCCPSS,

11. Roshain Tyrill Martin, Special Education Educator at [redacted], SCCPSS,

12. Dr. Michelle Finch, Senior Director of Specialized Instructions SCCPSS, and

13. Leora Smith, Parent of a student at [redacted], SCCPSS.

No other witnesses were called by either party to testify.

2.

[redacted] is thirteen years old. She lives with her family, including her mother and father. She currently is enrolled at the [redacted] and is in the seventh grade. By all accounts, [redacted] is very intelligent, reserved, and articulate. (Test. of [redacted] T. 18; Test. of Taylor, T. 91; Test. of Allen, T. 154-55.)

3.

[redacted] is eligible for special education as a child with a disability under the category of Emotional and Behavioral Disorder.[2] She has anxiety and depression, and she experiences panic

[2] Although [redacted] testified that the eligibility category is Other Health Impairment (T. 189), the IEP indicates that it is Emotional and Behavioral Disorder (Ex. P-44, R-70). The Georgia Department of Education's definition for

attacks. [redacted] physically harmed herself at some time after November 2022 and bears scars on her arms as a result. [redacted] receives instruction outside of a school setting, pursuant to a hospital homebound ("HHB") placement that is dated October 19, 2022, and is scheduled to end May 23, 2023. R-70, R-86; Test. of S.B, T. 19-20, 36; Test. of Taylor, T. 98; Test. of Ogle, T. 128; Test. of Allen, T. 153-54.)

4.

[redacted] believes that [redacted] should return to a school setting. Both [redacted] and [redacted] state that [redacted] does not feel safe or supported at [redacted] According to [redacted]., in order for her to feel safe and supported at [redacted], she would need the school to follow her IEP and to take her issues seriously, rather than belittling them.[3] [redacted] believes that a private school called Memorial would be an appropriate school for her next year, and she would like to attend boarding school when she reaches high school.[4] (Test. of [redacted] T. 18-19, 22, 25-27; Test. of [redacted], T. 195-96.)

5.

During the fall semester of 2021, [redacted] and [redacted] made various complaints regarding a male student, [redacted] Assistant Principal Lydia Taylor responded to the complaints. The instances involving [redacted] were described as follows:

- On September 7, 2021, during school dismissal, a group of friends said that [redacted] liked [redacted], and a female friend grabbed [redacted] by the arm and tried to pull her over to [redacted] Because [redacted] was uncomfortable and the situation bothered her, [redacted] asked Ms. Taylor to speak with [redacted] and determine exactly what had happened. In response, Ms. Taylor interviewed eight students and [redacted]

Emotional and Behavioral Disorder is set forth in Ga. Comp. R. & Regs. 160-4-7-.05. The IDEA's terminology for the corresponding category is "serious emotional disturbance" or "emotional disturbance." See 34 C.F.R. § 300.8(c)(4)(i).

[3] Later, however, when asked on cross examination what she would like to see done to make her feel safe and supported, [redacted] testified, "I don't know what you can do." Regarding whether the teachers at [redacted] take her anxiety seriously, she further testified, "Some do; some don't." (Test. of [redacted] T. 34, 36.)

[4] Although [redacted] mentioned Memorial and boarding school, no evidence was presented as to why such a school would be considered an appropriate placement for [redacted]

- On October 25, 2021, [redacted] reported that [redacted] had been tapping her on the shoulder in the hallways. Ms. Taylor reviewed video, although she was not able to find any shoulder tapping incidents captured on tape. She contacted [redacted].'s parent and [redacted] and requested that [redacted] have no contact with [redacted].

- At some point thereafter, in yearbook club, [redacted] grabbed and held onto [redacted].'s shoulder for 30 seconds until a friend helped her get him to stop. Ms. Taylor, who had previously discussed separating [redacted] and [redacted] asked the instructor to place them in different groups.[5]

- On December 3, 2021, [redacted] brought an anime book to school with a risqué illustration on the front, depicting a character in a bra or a swimsuit. [redacted] chased either [redacted] or her friend with it to make them look at it.[6] Ms. Taylor investigated the incident.

Additionally, at some point, [redacted] whispered in [redacted]'s ear, although [redacted] did not report this to any school personnel. Ultimately, Ms. Taylor determined that the reported behavior did not rise to the level of sexual harassment, nor did anything else suggest such an issue. However, in light of emails from [redacted] referring to sexual harassment and sexual assault, the Title IX coordinator was called. (Test. of [redacted], T. 18, 28-31, 34-35, 38, 204-07; Test. of Taylor, T. 92-112.)

6.

In her current HHB placement, [redacted] meets with teacher Mr. Donnie Allen for three hours per week. Mr. Allen is certified to teach middle school math, social studies, science, and language arts, as well as high school English. [redacted] has requested that Mr. Allen focus solely on math, and [redacted] teaches all other subjects to [redacted]. Mr. Allen also currently acts as a liaison between the Petitioners and the other teachers. (Ex. R-81; Test. of Allen, T. 133, 154-55, 159; Test. of [redacted], T. 197-99.)

[5] [redacted] explained that she believed this meant [redacted]. and [redacted] would no longer be in the same room; however, Ms. Taylor explained that they were working in the same room but in different groups. (Test. of Taylor, T. 106-07.)

[6] [redacted] clarified, "I never said he was chasing me and I never said he tried to show it to me." (Test. of [redacted] T. 205.)

7.

[redacted]'s mother [redacted] zealously advocates on behalf of [redacted].[7] The evidentiary record contains numerous instances of email communications and telephone calls between [redacted] and personnel at [redacted] and within the District. Superintendent Levett and Mr. Johnson of the School Board also have received communications from [redacted] Many of the communications in evidence are professional and polite, containing legitimate questions and concerns raised by [redacted], and many of them show a willingness of the parties to work together. Other communications evince increasing exasperation on [redacted]'s part, and certain of the communications from [redacted] include offensive and intimidating language.[8] As a result of these types of communications, the relationship between the parties has become strained.

8.

Little to no evidence was presented regarding [redacted]'s current educational progress. Mr. Allen testified that [redacted] has experienced some learning loss in math and had been working on some sixth grade assignments along with seventh grade assignments. Much of the evidence regarding her achievement in other subjects focused on confusion over what assignments were due and where or how the information was posted electronically. Another consistent issue is whether "skeleton notes" had been provided, pursuant to the IEP. (Ex. P-23, P-32, P-35; Test. of Allen, T. 154-55,

[7] The record reflects that [redacted] has filed two Special Education Formal Complaints with the Georgia Department of Education, Case Number 23-339778 and Case Number 23-339840. The complaint that initiated this due process hearing includes the same document that was filed in Case Number 23-339840, entitled "[redacted] SPED Facts for Formal Complaint II." (Ex. R-66, R-78.)

[8] An example of one of the more offensive emails is Exhibit P-15, which [redacted] herself submitted into evidence in this case. In the email, which was sent on November 18, 2021, from [redacted] to twelve recipients at the District, [redacted] called the recipients "dumb mother fuckers" and stated, "Anyone with an educational license, welcome to the sodomy without lube you delivered onto me."

158; Test. of Cave, T.121-23; Test. of Ogle, T. 130-32; Test. of Finch, T.171, 176.; Test. of [redacted] T. 193-94.)

9.

The IEP currently in place was implemented on March 16, 2022, and ended on March 15, 2023. Notes indicate that [redacted] was to be evaluated for ADHD and PTSD "in the near future" and that the results would be provided to the school. The family was "trying to determine the best type of therapy" for [redacted], and [redacted] requested that the District provide a psychologist to address school-related anxiety. Ultimately, the services provided through an organization called Front Porch were declined by [redacted] (Ex. R-70, R-80, R-83; Test. of Finch, T. 168-70.)

10.

The Court has carefully reviewed the initiating documents for this case (specifically, the "[redacted] SPED Facts for Formal Complaint II") and "additional information," filed in this tribunal on December 20, 2022. The undersigned has endeavored to identify all relevant issues raised by the Petitioners, even if they were not highlighted by the Petitioners in the outline required by the Court's Prehearing Order issued on January 18, 2023.[9] Petitioners identify accommodations in the IEP that are not being followed, including those related to communication, provision of skeleton notes and/or study guides, and explanation of directions and expectations of assignments. They allege that the District has failed to (1) have all appropriate personnel on the IEP team (because a general education teacher was not included, although no dates are provided as to when this occurred), (2) consider appropriate evaluative data for [redacted], and (3) timely implement the IEP. They state generally that [redacted] was denied meaningful participation in the IEP process because the

[9] Relatedly, to the extent that the Petitioners raised an issue for the first time in their outline, the issue has been disregarded. This is, in part, the subject of the Respondent District's Motion to Exclude Irrelevant Claims and Fact Patterns from the Court's Consideration in this Case. Petitioners did not file a response to this Motion. The Motion hereby is **GRANTED**.

IEP had been predetermined. Finally, [redacted] also states that [redacted]. "is being assessed for ADHD, PTSD, and now high functioning 'spectrum'[10] as suggested by her private psychological services provider." As set forth in the Findings of Fact, evidence was presented relating to communication and implementation of the IEP. In addition, Mr. Allen testified that he was present at the November 3, 2022, IEP meeting in the capacity of a general education teacher. The Court has carefully reviewed the record to glean any evidence related to the remaining allegations. The Court has identified no evidence presented concerning predetermination or further evaluations.

III. CONCLUSIONS OF LAW

1.

This case is governed by the enabling act for the IDEA found at 20 U.S.C. § 1400, et seq.; its implementing federal regulations, 34 C.F.R. § 300.01, et seq.; and the Rules of the Georgia Department of Education, Ga. Comp. R. & Regs. 160-4-7-.01, et seq. Procedures for the conduct of the administrative hearing are found in the Georgia Administrative Procedures Act, O.C.G.A. § 50-13-1, et seq., and the rules of the Office of State Administrative Hearings found at Ga. Comp. R. & Regs. 616-1-1, et seq.

2.

The IDEA enables a parent to bring challenges to the "identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to [the] child" by filing a due process complaint. 20 U.S.C. § 1415(b)(6)(A); see also Schaffer v. Weast, 546 U.S. 49, 53-54 (2005). In this case, the Petitioners bear the burden of proof and must produce sufficient evidence to support the allegations raised in the Complaint. Schaffer, 546 U.S. at 62; see also Ga. Comp. R. & Regs. 160-4-7-.12(3)(n) ("The party seeking relief shall bear the burden

[10] The Court observes that during the hearing [redacted] asked certain witnesses about their general knowledge regarding autism spectrum disorder, but she did not indicate whether [redacted] had received such a diagnosis. (See T. 147-48, 180.)

of persuasion with the evidence at the administrative hearing."). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

3.

Claims brought under the 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).

4.

This Court's review is limited to the issues the Petitioners presented in their Complaint and/or Amended Complaint. 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d); Ga. Comp. R. & Regs. 160-4-7-.12(3)(j); see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 (E.D.N.Y. 2012). A petitioner who files a due process complaint may raise no other issues at the hearing unless the opposing party agrees. 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).

5.

The goals of the IDEA are "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs" and "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(A)-(B); see also J.N. v. Jefferson Cnty. Bd. of Educ., 12 F.4th 1355, 1362 (11th Cir. 2021). Related services include the following:

> transportation[11], and such developmental, corrective, and other supportive services (including speech-language pathology and . . . physical and occupational therapy . . .) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26)(A). In addition, the IDEA includes a directive that disabled children be

[11] During the hearing, the parties announced that they have independently resolved all transportation related issues in this case.

placed in the "least restrictive environment" or "LRE." Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991), withdrawn, 956 F.2d 1025 (11th Cir. 1992), reinstated in part, 967 F.2d 470 (11th Cir. 1992). Under IDEA, students with disabilities should be educated with children who are not disabled "to the maximum extent possible," and should be removed from the regular educational environment 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).

6.

The rules of the Georgia Department of Education set forth requirements related to LRE and HHB instruction. HHB is the most restrictive placement on the continuum of alternative placements. See Ga. Comp. R. & Regs. 160-4-7-.07(3)(d) .

> Hospital/homebound instruction program (HHB) is used for students with disabilities who are placed in a special education program and have a medically diagnosed condition that will significantly interfere with their education and requires them to be restricted to their home or a hospital for a period of time. The LEA shall provide hospital/homebound instruction to students with disabilities, under the requirements found in Georgia rule 160-4-2-.31 Hospital Homebound Services.

Ga. Comp. R. & Regs. 160-4-7-.07(3)(d)(6). Rule 31 provides extensive and detailed requirements for an HHB placement. One such requirement addresses instruction:

> HHB instruction shall be provided by a certified teacher, who is selected by the LEA in which the student is enrolled. Students eligible for services under the Individuals with Disabilities Education Act (IDEA) shall be served by appropriately certified personnel.

Ga. Comp. R. & Regs. 160-4-2-.31(4)(a). Additionally, "Although the local school team or IEP team shall determine the number of hours necessary to meet the instructional needs of the student, the student must receive at a minimum three hours of HHB instruction per school week to be considered present by the school." Ga. Comp. R. & Regs. 160-4-2-.31(4)(c).

7.

The IDEA requirement to provide FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester Co., et al. v. Rowley, 458 U.S. 176, 189 (1982); see also W.C. v. Cobb Cnty. Sch. Dist., 407 F. Supp. 2d 1351, 1359 (N.D. Ga. 2005). In Rowley, the U.S. Supreme Court developed a two-part test for determining whether FAPE has been provided. Rowley, 458 U.S. at 206. The first inquiry is whether the school district complied with the procedures set forth in the IDEA. Id. The second inquiry is whether the IEP developed through these procedures is "reasonably calculated to enable the child to receive educational benefits." Id. at 206-07.

8.

Under the first prong of the Rowley test, a procedural violation is not a *per se* denial of FAPE. Weiss by and Through Weiss v. School Bd., 141 F.3d 990, 996 (11th Cir. 1998). This Court is authorized to find that the Petitioners were deprived of FAPE only if the procedural inadequacies

> (I) impeded the child's right to a free appropriate public education;
>
> (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
>
> (III) caused a deprivation of educational benefits.

20 U.S.C. § 1415(f)(3)(E)(ii); see also 34 C.F.R. § 300.513(a)(2).

9.

Important procedural rights for the student and parents include the right to give informed consent and the right to participate in the decision-making process. See 20 U.S.C. § 1415(b), (f) ;

34 C.F.R. § 300.322. Parents also have the right to be members of "any group that makes decisions on the educational placement of their child." 20 U.S.C. § 1414(e). In Weiss, the Court held that where a family has "full and effective participation in the IEP process," the purpose of the procedural requirements is not thwarted. Weiss, 141 F.3d at 996.

10.

Regarding the second prong of the Rowley inquiry, the U.S. Supreme Court provided the following clarification in 2017: "To 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. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017). Endrew F. does not require that an IEP bring the child to grade-level achievement; if it is not reasonable to expect a child to achieve grade-level advancement, then his IEP need not aim for such. Id. at 1000-01. Nevertheless, "his educational program must be appropriately ambitious in light of his circumstances." Id. at 1000. Importantly, the Court in Endrew F. noted that its lack of clarity in defining what exactly "'appropriate' progress will look like" is not an excuse for reviewing courts "'to substitute their own notions of sound educational policy for those of the school authorities which they review.'" Id. at 1001 (quoting Rowley, 458 U.S. at 206).

11.

Also under the second prong of the Rowley test, a school district is not required to provide an education that will "maximize" a student's potential. Instead, the IDEA mandates only "an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction." Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1312 n.1 (11th Cir. 2003) (quotation and citations omitted); see also JSK v. Hendry Cnty. Sch. Bd., 941 F.2d 1563, 1573 (11th Cir. 1991); Doe v. Ala. State Dep't of Educ., 915 F.2d 651,

655 (11th Cir. 1990). However, as Endrew F. made clear, this standard is "more demanding than the 'merely more than *de minimis'* test." Endrew F., 137 S. Ct. at 1000.

12.

Contrary to the Petitioners' assertions, the evidence presented does not support a finding that the District violated the IDEA. The Petitioners have not shown that the IEP as developed and amended was not "reasonably calculated to enable [redacted] to receive educational benefits." See 20 U.S.C. § 1415(f)(3)(E)(ii). Nor was the evidence sufficient to prove a violation of the IDEA as far as implementation of the IEP. See L.J. v. Sch. Bd., 927 F. 3d 1203, 1207 (holding that a material deviation from the content of an IEP violates the IDEA). At the same time, the status quo is not tenable. The parties must communicate with each other respectfully and openly. Additionally, although neither party raised the issue, the Court is concerned that the current HHB arrangement, with [redacted] acting as the instructor for every subject other than math, is outside the parameters of appropriate HHB services. Even if this arrangement was [redacted]'s preference, the District surely is aware that HHB instruction is not the same as home schooling. HHB instruction is to be conducted by a certified teacher. Should this placement continue to be the appropriate LRE for [redacted], the parties must ensure that appropriate instruction occurs. Further, the Court is without information to understand [redacted]'s current evaluations or diagnoses. Setting aside the issue of missed assignments, is [redacted] learning the material? Would different or additional services be appropriate? The inordinate focus in this case on the complaints about student [redacted] (which were fully investigated and addressed) and the communication challenges between the parties, along with the desire of the Petitioners to leave [redacted] for a private school, as yet undetermined, have eclipsed these important issues. Relatedly, the Court is without information to determine whether placement in a private school or boarding school is an appropriate or feasible plan.

IV. DECISION

The Petitioners have failed to prove, by a preponderance, that the Respondent violated the IDEA. In accordance with the foregoing Findings of Fact and Conclusions of Law, the Petitioners' request for relief under the IDEA is hereby **DENIED**. However, as discussed above, the Petitioners suggest that certain new evaluations of [redacted] have occurred. Moreover, the March 2023 annual review of the IEP and the impending end date for HHB call for a renewed consideration of placement. Accordingly, the Respondent is hereby **ORDERED** to commence an IEP meeting to consider the Petitioners' recent evaluations and discuss placement, among any other relevant matters. This meeting shall be commended within 30 calendar days of the date of this Decision. All other requested relief not specifically granted above is hereby denied.

SO ORDERED, this 12th day of April, 2023.

Michael Malihi

Michael Malihi, Judge