

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

█, by and through █,
Petitioners,

v.

**PAULDING COUNTY SCHOOL
DISTRICT,**
Respondent.

Docket No.: █
█-OSAH-DOE-SE-110-Schroer

FINAL DECISION

█, by and through his mother, █ (“Petitioners”), filed a due process complaint pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA” or “Act”), 20 U.S.C. §§ 1400 to 1482, and its implementing regulations, 34 C.F.R. Part 300, against Respondent Paulding County School District (“Respondent” or the “District”) alleging a denial of a free appropriate public education (“FAPE”) and an inappropriate educational placement. For the reasons set forth below, Petitioners’ request for relief is **DENIED**.

I. RELEVANT PROCEDURAL HISTORY

A. Due Process Complaint

Petitioners filed their due process complaint on April 27, 2023. In the complaint, Petitioners identified problems with (i) special education services provided to █ while at █ Elementary School during the 2022-2023 school year and (ii) Respondent’s decision to move █ to a more restrictive placement at █ Elementary School for the 2023-2024 school year.

With respect to the past school year, Petitioners identified the following problems:

- 1) █ did not have an updated behavioral intervention plan (“BIP”), resulting in behavior issues and his frequent removal from the classroom.
- 2) The school psychologist established a “check-in” mentorship program, but Petitioner █ only knows of three visits this past school year.

- 3) A referral for therapy “has not been executed.”
- 4) ■■■ has “been made to schedule dates” to observe ■■■’s classroom and give suggestions and support to his teachers.

With respect to the proposed educational placement for the next school year, Petitioner identified the following problems:

- 5) ■■■’s Individualized Education Plan (“IEP”) team’s decision to change ■■■’s placement from an inclusion classroom at ■■■ Elementary to a self-contained classroom at ■■■ Elementary was a violation of the IDEA’s least restrictive environment (“LRE”) provisions.
- 6) The decision to change ■■■’s placement to ■■■ Elementary was pre-determined by the school members of the IEP team.
- 7) The decision to change ■■■’s placement was premature because the District did not allow sufficient time to implement new behavior strategies in a less restrictive environment.
- 8) The decision to change ■■■’s placement was made without input from a certified behavior specialist and was inconsistent with an “official report” from a private psychologist, which diagnosed ■■■ with attention deficit hyperactivity disorder (“ADHD”) and not an Emotional and Behavior Disorder (“EBD”).

The District filed its Response to Petitioners’ Request for a Due Process Hearing on May 10, 2023.

B. Pre-Hearing

On May 2, 2023, the Court issued a Notice of Filing, Notice of Hearing, and Pre-Hearing Order (“Notice”). The Notice set the evidentiary hearing for June 2, 2023 at the Office of State Administrative Hearings (“OSAH”) in Atlanta. The Notice also required the parties to exchange witness lists and any exhibits with the opposing party at least five business days before the hearing.¹ According to OSAH’s court records, the Notice was emailed to Respondent’s counsel and to DeAnna Thrasher, the advocate identified by Petitioners on the due process hearing request

¹ Federal and state regulations governing due process hearings under IDEA also have a five-day disclosure requirement. See 34 C.F.R. § 300.512(a)(3) (a party may prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing); Ga. Comp. R. & Regs. 160-4-7-.12(3)(l)(3).

form.²

On May 12, 2023, the District filed a status report, indicating that the parties had met for an early resolution session, but were not able to reach an agreement. The status report stated that the parties intended to schedule mediation, but it did not give the date for the mediation or request to continue the hearing. On May 26, 2023, five business days before the hearing date, the District filed a witness list and exhibits with OSAH and served copies on [REDACTED] by email. Petitioners did not file a witness list or exhibits with OSAH and did not otherwise disclose their evidence to the District. On May 31, 2023, the District filed another status report, indicating that the parties had been unable to schedule mediation and were ready for the hearing.

C. Hearing

The hearing was held on June 2, 2023. The District was represented by Tom Cable, Esq. and Amy Penn, the District's Senior Executive Director for Special Education and Student Services. Petitioner [REDACTED], who arrived late to the hearing, represented herself and her son, [REDACTED], who was not present. At the outset, Petitioner acknowledged that she had not disclosed her witness list or exhibits to the District, but she stated that she did not receive a copy of the Notice until fairly recently and she was unsure how to proceed. She conceded that she did not request a continuance prior to the hearing date, nor did she attempt to provide the District with her exhibits once she learned of her obligation to disclose evidence in advance. The Court granted the District's motion to prohibit Petitioner's presentation of exhibits or witnesses not disclosed by the statutory deadline, but, without objection from the District, permitted Petitioner [REDACTED] to testify on her own behalf and

² The OSAH Form 1, filed with OSAH by the Georgia Department of Education, gave the wrong email address for Petitioner [REDACTED]. Consequently, the OSAH Calendar Clerk emailed the Notice to Petitioner's advocate, but not to Petitioner directly.

to introduce exhibits listed on the District's exhibit list.³ See J.N. v. S.W. Sch. Dist., 55 F. Supp. 3d 589, 597 (M.D. Pa. 2014) (“[T]he ‘five-day rule’ furthers the IDEA’s goal of prompt resolution of disputes by reducing the potential for protracted hearings due to untimely disclosures.”) (citations omitted); see also T.O. v. Cumberland Cnty. Bd. of Educ., 2017 U.S. Dist. LEXIS 35293, at *11-14 (E.D.N.C. Mar. 13, 2017) (ALJ properly exercised authority under federal regulations to bar non-attorney parents from introducing any documentary or testamentary evidence due to their failure to disclose evidence they intended to use in due process hearing by required deadline).

█ testified for almost two hours, and then Petitioners rested. At the close of Petitioners’ case, the District moved for involuntary dismissal under Administrative Rule of Procedure 616-1-2-.35. The Court granted the District’s motion, with the exception of one issue: whether it was appropriate for the IEP team to decide to change █’s placement to a more restrictive placement in April 2023 before new behavior strategies had been fully implemented. The District presented evidence on this claim by calling three witnesses and tendering four exhibits.⁴

D. Post-Hearing

At the request of the parties, the record remained open to allow the parties to file post-hearing letter briefs. The District filed its brief on June 9, 2023, and Petitioners filed their brief on June 12, 2023. The deadline for issuing the decision is July 11, 2023. See 34 C.F.R. § 300.515.

³ The Court notes that Petitioner did not introduce any exhibits during her case in chief notwithstanding this ruling.

⁴ In addition to the District’s representative, Ms. Penn, the District called Dr. Tameka Walker, the principal of █ Elementary during the 2022-2023 school year, and Jill Morrow, one of █’s first grade teachers. The District’s Exhibit R-8 is a January 5, 2023 IEP for █, Exhibit R-9 is a March 13, 2023 IEP, Exhibit R-10 is an April 17, 2023 IEP, and Exhibit R-22 is a two-page document emailed by █ to someone at the District in late April 2023, which appears to be an unofficial draft of a report by an unidentified private psychologist.

II. FINDINGS OF FACT

1.

█████ is seven years old and was in first grade during the 2022-2023 school year. Although he has had an IEP since he was three years old, he has only attended ██████ Elementary for two years. ██████ has been found eligible for special education services under the categories of Significant Developmental Delay (“SDD”) and Speech/Language Impairment. According to his mother ██████, ██████ was diagnosed with ADHD by a private psychologist in or around March 2023, but the Court finds that she has not provided sufficient documentation to the District or to the Court to prove this diagnosis by a preponderance of the evidence. (Testimony of T.V, A. Penn; Exs. R-8, R-22.)

2.

█████ is described as a sweet and affectionate child, who is large for his age and very strong-willed. When he comes to school, he is often hungry and very tired. One of the para-professionals in his class purchased honeybuns with her own money to give him in the morning and when he returned from specials, and the principal would sometimes let him nap in her office. Even when he is not hungry or tired, ██████ frequently refuses to do work or follow directions, and will become physically aggressive when he does not get his way. He can also be “handsy” and will often tantrum when confronted with work demands. According to his teacher, Ms. Morrow, ██████ is “capable of learning,” but his disruptive behaviors are “holding him back.”⁵ Ms. Morrow testified

⁵ The January 10, 2023 IEP reports that ██████’s scores on an evaluation of nonverbal intelligence were in the above-average development range, and his scores for receptive vocabulary, visual skills, and fine-motor skills were in the average range. His scores on evaluations relating to speech and language were below average, however, and the IEP stated that he had a moderate-to-severe articulation disorder and requires maximum redirection and cues due to his behaviors. The IEP also reported that he was severely delayed in academic achievement due to his “chronic and acute hyperactivity, impulsivity and inattention,” which cause him “to be removed from the classroom and miss instruction.” Finally, with respect to his social, emotional, and behavioral skills, the IEP team noted that he was severely delayed in general adaptive skills, including communication and socialization, and that he requires “intermittent to pervasive support in order to cope, adaptively, in home, school, and community settings.” (Ex. R-8.)

that if [REDACTED] is told “no” or that he must stop playing and begin working, his behavior can become very aggressive, including throwing or tearing up his papers, screaming, running around the classroom, throwing his body into other students, pulling chairs out from under them, lying down on the floor, or jumping on or crawling under the furniture.⁶ (Testimony of [REDACTED], T. Walker, J. Morrow.)

3.

[REDACTED] began kindergarten in August 2021 at [REDACTED] Elementary. He was placed in an inclusion kindergarten classroom with both regular education and special education peers. All District kindergarten classrooms have one teacher and one paraprofessional, and [REDACTED]’s inclusion classroom had an additional special education para-professional to provide supportive instruction to [REDACTED] and other children with disabilities. His IEP team also developed a Behavior Intervention Plan (“BIP”) for him in kindergarten. At that time, the behavior that was identified as interfering with his learning was leaving his assigned area without permission, which occurred an average of 16 times a day. The BIP stated that when [REDACTED] is given a task or is transitioning, he will walk around the room, go to a preferred area, or walk out of the classroom, and that his teachers spend an average of 3 to 4 hours per day dealing with this behavior. The BIP identified several behavioral strategies, including scheduled breaks and the use of “break cards,” access to preferred items as a reward for staying in the proper area, and reduction of task demands. (Testimony of T. Walker, J. Morrow; Ex. R-8.)

⁶ Both [REDACTED] and Dr. Walker testified regarding an incident where [REDACTED] grabbed the arm of a para-professional, who was knocked off balance and hurt her arm. Although the evidence suggests that [REDACTED] was disciplined for this incident, and possibly suspended, there was insufficient probative evidence regarding the incident or the consequences to make more detailed findings.

4.

In addition to the strategies in the BIP, ██████'s teachers tried other interventions to help ██████ manage his behaviors, but, for the most part, they were unsuccessful. When ██████ began his first-grade year at ██████ Elementary in August 2022, he was again placed in an inclusion classroom, but the District soon began pulling him out of that class for small-group instruction in a special education resource room, first for one academic class, and eventually for three. Although ██████ was concerned about ██████'s behaviors at the beginning of first grade, she testified that she did not ask the District to revise the BIP from the previous year until the IEP team met in January 2023.⁷ At that meeting, ██████ told the team, as she testified at the hearing, that ██████ “responds well to a firm person who loves him but he needs someone who is very firm and stern.” ██████ inquired about a one-on-one paraprofessional to assist ██████, and the team stated that he essentially had a “one-on-one para” now. (Testimony of ██████, T. Walker; Ex. R-8.)

5.

At the January 2023 meeting, for the first time, ██████'s IEP team discussed whether ██████ would benefit from a placement in a self-contained classroom. The IEP refers to this placement as an “EBD classroom” at ██████ Elementary, which, despite its name, is not exclusively for children who are eligible for special education under the EBD category. Rather, the EBD classroom at ██████ is a smaller, highly-structured classroom, with a special education teacher, a special education para-professional, and between 4 and 8 children with a variety of disabilities who need behavioral supports. The EBD classroom has limited transitions throughout the day because the students receive both small-group academic instruction and intensive social skills and

⁷ The District suggested that it attempted to schedule the annual review of ██████'s IEP beginning in August 2022, but that it was difficult to reach ██████ to select a date. Although ██████ could not remember the efforts to schedule the IEP meeting during the fall, the preponderance of the evidence proved that the IEP team did not meet until January 10, 2023, and ██████ admitted that she had not requested an updated BIP until that meeting.

behavioral training in the same room with the same teachers. The children in the EBD classroom still receive instruction in the general education curriculum and have access to general education peers during lunch, specials, and recess. (Testimony of T. Walker, J. Morrow, A. Penn; Ex. R-8.)

6.

█████ did not want █████ in an EBD classroom. She testified at the hearing that she was worried about the peer group in an EBD classroom, which she considered to be potentially “violent,” as opposed to █████, whom she described as acting “silly” rather than being deliberately aggressive. The team agreed to conduct a new FBA and meet again to discuss amendments to his IEP. █████ also suggested the District try items such as a “wobble seat” or a weighted neck wrap, and the District obtained such items. According to █████ Elementary’s principal, Dr. Walker, the school agreed to try all of the strategies or assistive technologies that █████ suggested, in addition to other behavioral interventions and supports, but his behaviors continued. At the hearing, █████ agreed that the educators at █████ Elementary tried to work with her, and to do the best for █████, but that she began to feel like they were “giving up on him” around this time. (Testimony of █████, T. Walker; Ex. R-8.)

7.

Following the January meeting, the District conducted a new functional behavioral assessment (“FBA”), and the IEP team reconvened in March 2023 to consider it. The FBA report identified three behaviors that interfered with his learning or the learning of others. The first was the same as in kindergarten: leaving his assigned area without permission in order to escape work. During the 9 days of assessment, █████ was observed out of his area or seat 195 times, for a total 5 hours and 22 minutes, or 45% of the time charted. Two additional behaviors were also identified in the FBA – physical aggression, which was observed 105 times for 3 hours and 8 minutes, and

work refusal, which was observed 52 times for 3 hours and 23 minutes. These behaviors occurred when █████ wanted to escape work or when he wanted attention. The IEP team considered the results of the FBA and adopted a more detailed BIP, including changing the card system █████ used for requesting breaks, as well as adding other behavioral supports, some of which his teachers had already been using with █████ (Testimony of █████, T. Walker, J. Morrow; Exs. R-9, R-10.)

8.

During the March 13, 2023 IEP meeting, the IEP team agreed to implement the new BIP and meet again in four weeks. The team discussed the possibility of the EBD classroom at █████ Elementary in more detail and clarified that the goal of such a placement was to teach █████ behavioral and social skills that would allow him to return to the general education setting. Some members of the team expressed that they thought such a placement would be a good fit for █████, and █████ agreed to go visit the EBD classroom.⁸ (Testimony of █████, T. Walker; Ex. R-9.)

9.

The team met again on April 17, 2023, approximately four weeks after the last meeting. By April 17, the new BIP had been in place for a little over four weeks, although one of those weeks was Spring Break while school was out of session. Although the District witnesses testified that they had seen some improvements based on the changes to the BIP, the preponderance of the evidence in the record proved that █████'s behaviors continued to interfere with his education and the education of his classmates in the month after the revised BIP was implemented, and in some cases, his behaviors actually worsened.⁹ Dr. Walker, Ms. Morrow, and Ms. Penn all testified that

⁸ █████ testified that although she was permitted to see the classroom at █████ she was not permitted to observe while students were in the classroom.

⁹ Ms. Morrow testified that the new card system actually resulted in █████ doing less work, rather than more, because it allowed him unlimited options to choose a break, rather than working. Dr. Walker also testified that █████'s behaviors were essentially "still the same" after implementing the new BIP in March 2023. During the April 17, 2023 meeting, teachers detailed continued behavior issues since the implementation of the new BIP, including throwing

the District did not need an extended period of time to determine whether the new strategies were working in the current placement, which required ██████ to transition multiple times per day between his inclusion class and three different small-group classes, which were located in different parts of the school and were taught by different teachers with different peer groups. They testified that although ██████ needed the structured, more individualized environment of his pull-out classes, his behaviors were most often triggered during these transitions. They further testified that some of the strategies included in the new BIP in March 2023 had been used with ██████ well before they were officially added to his IEP, and they had not been effective in significantly reducing ██████'s behaviors. (Testimony of T. Walker, A. Penn, J. Morrow; Ex. R-10).

10.

The District's witnesses also persuasively testified about the importance of early intervention during the critical early years of learning, when children are developing foundational skills such as reading. The preponderance of the evidence proved that despite progressively intensive services and supports provided to ██████ during his first two years at ██████ Elementary, his behaviors were preventing him from accessing almost all meaningful instruction. In addition, the evidence proved that the frequency and nature of ██████'s behaviors while he was in the classroom negatively affected not only his own access to instruction, but the access of his fellow students. Consequently, the District members of ██████'s IEP team recommended that ██████ be placed in the EBD self-contained classroom at ██████ Elementary. ██████ did not agree with the proposed placement, and she testified that the District's position on placement during the IEP meeting seemed "rehearsed." She admitted, however, that she did not have any "concrete evidence" that this was true, and that the possibility of a more restrictive placement had been raised

cards at a student, flipping a chair, running out of the classroom, hitting other students, yelling, and refusing to do work. (Ex. R-10.)

in both prior IEP meetings in January and March.

11.

At the hearing, the District asserted that [REDACTED] withdrew [REDACTED] from Paulding County Schools near the last day of school in May 2023. However, in the post-hearing letter briefs, the parties notified the Court that the withdrawal has not been fully processed, and [REDACTED] remains a registered student in the District and was eligible for extended school year services from the District this summer.

III. CONCLUSIONS OF LAW

1.

Petitioners bear the burden of proof in this matter. Schaffer v. Weast, 546 U.S. 49, 62 (2005). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

Under both the IDEA and Georgia law, students with disabilities have the right to a free appropriate public education, or “FAPE.” See 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.101-300.102; Ga. Comp. R. & Regs. 160-4-7-.01(1)(a). The Supreme Court has developed a two-part inquiry to determine whether a school district has provided FAPE: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” Bd. of [REDACTED] v. Rowley, 458 U.S. 176, 206-07 (1982). Ultimately, 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., 580 U.S. 386, 399 (2017).

3.

The goals of 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); J.N. v. Jefferson Cnty. Bd. of Educ., 12 F.4th 1355, 1362 (11th Cir. 2021). In addition, IDEA includes a “specific directive” that disabled children be 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). Specifically, IDEA provides that

(2) Each public agency must ensure that –

- (i) To the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled; and
- (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the uses of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a)(2); 20 U.S.C. § 1412(a)(5)(A). The federal regulations provide that when an IEP team is “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).

4.

The scope of an IDEA due process hearing is limited to those issues raised in the due process complaint. See 20 U.S.C. § 1415(f)(3)(B). As mentioned above and for the reasons set forth on the record, at the close of Petitioners’ case, the Court granted the District’s motion for involuntary dismissal with respect to the claims raised in the due process complaint, with the

exception of Petitioners' claim that the proposed placement at [REDACTED] Elementary was premature and violated the LRE provisions of IDEA. Having weighed the evidence in the record, the Court concludes that Petitioners failed to prove this claim as well.

5.

The Eleventh Circuit has adopted a two-part test to determine whether a placement meets the LRE or "mainstreaming" requirement of the Act:

First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily. . . . If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.

S.M. v. Gwinnett Cnty. Sch. Dist., 646 Fed. App'x. 763, 764 (11th Cir. 2016) (quoting Greer, 950 F.2d at 696). The Court concludes that the preponderance of the evidence in the record of this case proved that despite numerous supplemental aids and services provided to [REDACTED] at [REDACTED] Elementary throughout his first-grade year, he was unable to access his education in the regular education setting. The evidence proved that the District offered services to [REDACTED] in an inclusion class, with almost one-to-one paraprofessional support, as well as through small-group special education classes, while at [REDACTED] Elementary, but that [REDACTED] continued to struggle, both academically and behaviorally.

6.

In addition, the Court credits the testimony of the District's witnesses regarding [REDACTED]'s urgent need for intensive behavioral supports and training so that he can develop the skills to participate in instruction at this critical time in his education. See Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001) (11th Circuit recognizes that great deference must be paid to the educators who develop the IEP). The Court concludes that the District educators

were properly concerned that the interventions adopted in March did not lead to meaningful change in ■■■■■'s behaviors by the time the IEP team met in April, and Petitioners did not present any reliable evidence to prove that additional time would have yielded more positive results, or that there were additional interventions that the District could have offered in his current placement and did not. Rather, the Court concludes that the proposed placement in a self-contained classroom with intensive behavioral supports offered ■■■■■ FAPE in the least restrictive environment, and that the April IEP was reasonably calculated to enable ■■■■■ to make appropriate progress in light of his unique needs.

IV. DECISION

For the reasons stated herein, Petitioners' request for relief is **DENIED**.

SO ORDERED, this 11th day of July, 2023.

Kimberly W. Schroer

Kimberly W. Schroer
Administrative Law Judge

