IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

COBB COUNTY SCHOOL DISTRICT,	:	
	:	
Petitioners,	:	**Docket No.: 1732905**
	:	**1732905-OSAH-DOE-IEE-33-Woodard**
v.	:	
	:	
[redacted] BY AND THROUGH [redacted] and [redacted]	:	
	:	
Respondents.	:	
	:	

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DETERMINATION

INTRODUCTION

This matter is before the Court on the motion for summary determination filed by Petitioners on June 5, 2017. [redacted] is a Student with a disability who was eligible for special education services under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). [redacted]s Mother [redacted] (hereinafter the Respondent) requested two Independent Education Evaluations ("IEE") at public expense based on her son, [redacted], most recent physical therapy and psychoeducational evaluations. On February 15, 2017, The Cobb County School District (hereinafter "District" or "Petitioner") approved the IEE request for a physical therapy ("PT") evaluation, and provided a list of evaluators and an Authorization to Release Confidential Information Form. (Petitioner Ex. C). Respondent did not respond with the information necessary for an IEE provider to be selected.

On March 22, 2017, Respondent requested a second IEE for the psychoeducational evaluation. (Exhibit D to Coleman Affidavit). On March 23, 2017, the District requested additional information from the Respondent regarding the IEE request. (Exhibit E to Coleman Affidavit). On March 24, 2017, [redacted] turned twenty-two years old, and thus aged-out of IDEA as

he was no longer eligible for special education services under IDEA. The District denied the request for an IEE On March 31, 2017. (Exhibit F to Coleman Affidavit.)

On April 18, 2017, the District, filed a Due Process Hearing Complaint under IDEA regarding Respondent's ([redacted], Mother) request for an IEE for her son [redacted].. The District requests a finding that the psychoeducational evaluation and physical therapy evaluation are appropriate and meet the requirements of IDEA, and, therefore the Respondent is not entitled to an IEE at public expense. Respondent filed an initial response to Petitioners Due Process complaint on April 28, 2017, which contained a counter-claim for denial of FAPE and compensatory damages. Therefore, Respondent attempted to file a complaint under IDEA against the District. On May 10, 2017, Respondent filed a corrected response perfecting personal jurisdiction. The claims in Respondent's response may be summarized as follows: (1) the denial of the PT IEE was a retaliatory act by Petitioner following Respondents formal complaint with the Georgia Department of Education on March 23, 2017; (2) that 34 C.F.R. 300.502 states that a public agency may not impose conditions or timelines related to obtaining an IEE; (3) that the August 25, 2016, PT evaluation was unreliable and invalid; (4) The district willfully and purposefully delayed; and (5) that although 34 C.F.R. 300.502(b)(4) states that if a parent requests an IEE the agency may ask for the parents reason why they object to the public evaluation, the public agency may not *require* the parent to provide an explanation.

The District filed an Answer to Respondent's Response to Petitioner's Due Process Hearing Request on May 5, 2017. [redacted] and [redacted] filed "Respondents Response to Petitioner Cobb County District Answer to Respondent's Answer to Petitioner Cobb County School District Due Process Hearing Request." Then a "Respondents [redacted] and [redacted] Notice of Objection and Motion to Dismiss Motion to Amend" was filed in response to Petitioner's Notice of

Objection and Motion to Strike.

Petitioner filed an Entry of Appearance and Respondent filed an objection to the Entry of Appearance. Respondent then filed a "Notice of Objection and Motion to Dismiss to Petitioner Cobb County School District's Response to Respondent's Notice of Objection and Motion to Dismiss Motion to Amend." Additionally Respondent filed a "Notice of Complaint Against Petitioner CCSD and Attorney for Repeated Violations of Confidential."

Respondent responded to Petitioner's Motion for Summary Determination by filing "Respondents Response and Motion for Counter Summary Determination and Brief in Support to Petitioner's Cobb County Motion for Summary Determination and Brief in Support."

The parties held a Mediation session on July 11, 2017, but the parties did not reach a resolution. In Respondents' "Status Report: Mediation Meeting in Place of Resolution Meeting," [redacted] claimed that the District did not come in good faith and did not come to resolve the above matter. [redacted] further claimed that "the mediation was another tactic to cover up the fact that Petitioner did not hold a Resolution meeting violating IDEA timelines." Petitioner subsequently filed a "Response to Respondent's Status Report."

Having considered the pleadings and arguments set forth by the Court, and based on the undisputed material facts set forth below, the Court **GRANTS** the Petitioner's Motion for Summary Determination, and **DENIES** Respondent's Counter-Motion for Summary Determination.

II. FINDINGS OF UNDISPUTED MATERIAL FACT

1.

[redacted] enrolled in the District on August 12, 2016. Prior to 2016, the last time [redacted] enrolled in the District was January 5, 2010. Starting August 18, 2016, [redacted] enrolled in the Hospital

Homebound Program in Cobb Country School District. [redacted] was eligible for special education services under the category of Autism, Speech and Language Impaired. (Coleman Affidavit, Para 4)

2.

[redacted]s latest Individualized Education Program ("IEP") meeting took place on August 8, 2016.

3.

Prior to the IEP meeting, Sharon Thompson, Ph.D. and Jana Ladner, Ph.D. performed a psychoeducational Evaluation on March 2, 14 and 16 2016. ("Petitioner Ex. B.) The psychoeducational evaluation administered the following tests:

> Autism Diagnostic Observation Schedule, Second Edition, (ADOS-2) Module 3 – was administered to assess communication, reciprocal social interactions, interests and behaviors in individuals who may have an autism spectrum disorder. The Student's ADOS-2 Total Score did indicate autism spectrum disorder.
>
> The Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition (VMI-6) to assess Student's ability to integrate visual information with a motor output. Student performed in the Average range, suggesting that these skills were typical for a student his age
>
> Childhood Autism Ratings Scale, Second Edition (CARS2) – a checklist to determine the presence of and severity of autism. Student rated a 28.5 indicating a range of minimal to no symptoms of Autism Spectrum Disorder.
>
> The Gilliam Autism Rating Scales, Third Edition (GARS-3) to assist in the investigation of social communication behaviors. GARS-3 is a norm referenced test that has a rating scale to show if the individual has behaviors associated with autism. The parent ratings indicated an Autism Index Standard Score of 103, placing the probability of Autism Spectrum Disorder as very likely.
>
> The Kaufman Brief Intelligence Test, Second Edition (KBIT-2) as an initial screener to determine Student's intellectual ability as well as his cognitive abilities. His IQ composite score was 56 which fell in the very low range.

The Social Responsiveness Scale, Second Edition (SRS-2) to record social communication behaviors. Even though the student's age exceeded the range in which the SRS-2 is administered, the scores can provide helpful information about the Student's skills. Student's total score of 60T to 65T suggests mild behavioral difficulties.

The Vineland Adaptive Behaviors Scales, Third Edition (Vineland-3) Comprehensive Teacher and Parent Form to determine the Student's functioning in areas such as everyday life. The results of the parental form indicated that the Student's functioning in the Adaptive Behavior Composite ("ABC") was in the very low level when compared to the typical expectations for peers at his age within the range of mild intellectual disabilities.

The Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV) as a diagnostic assessment of the Student's cognitive and intellectual abilities. Student's Full-Scale IQ was 55 ranking at less than the first percentile when compared to age mates. In addition the General Ability Index (GAI) was given to further determine the Student's abilities. The Student scored a 61, ranking at the first percentile when compared to age mates. Both scores are in the very low range.

The Woodcock Johnson IV – Tests of Achievement (WJIV-ACH) to determine Student's academic ability across reading, math, and writing. Student's scores were in the low to very low range across the preceding academic areas. (**Ex. B.** to the Ladner and Thompson affidavits).

4.

Based on these evaluations, Ladner and Thompson determined that Student still exhibited behaviors consistent with the diagnosis of autism spectrum disorder. (**Ex. B.** to the Ladner and Thompson affidavits).

5.

Test findings indicated that the Student's global cognitive/intellectual skills fall in the very low range, consistent with scores often considered in the range of Mild Intellectual Disability with commensurate adaptive behavior functioning.

6.

Elizabeth Lowe PT, DPT performed Student's physical therapy evaluation on November 15, 2016. ("Petitioner Ex. B. to the Lowe Affidavit).

7.

Dr. Lowe administered The Dynamic Gait Assessment (DGI) to assess gait, balance and the fall risk. Student scored a 23/24 with only minor disruptions to his gait, which indicates a minimal to no fall risk.

8.

Dr. Lowe went on a walk with the Student for twenty-six (26) minutes and completed 1.2 miles on the paved ground in 90-degree weather. The student did not require rest breaks and was able to speak throughout the walk. He was also able during the walk to scan for signs, people, curbs, etc. Student's neuromuscular status (tone, ROM, strength, balance) were are all within functional limits.

9.

Dr. Lowe concluded that Student required no adaptive equipment to assist with his mobility and demonstrated the ability to independently transition from the floor to a standing position as well as to walk on stairs without the use of handrails.

10.

Dr. Lowe observed during the evaluation that the Student has flat feet and limited ankle dorsiflexion, which results in a toe-ing out gait pattern. Dr. Lowe recommended that [redacted] receive foot orthotics to correct his failing arches and to continue to stretch his ankles. (**Ex. B.** to the Lowe affidavit).

11.

Dr. Lowe testified that she had [redacted] sit on the sofa so she could examine his feet. Further, Dr. Lowe had [redacted] sit on the floor to examine his range of motion (ROM) in his ankles and feet. (Lowe Affidavit, Para. 11).

12.

Dr. Lowe observed how well [redacted] could perform that transition as well as to observe how well he walked barefooted by asking [redacted] to stand up from a seated position on the floor. (Lowe Affidavit, Para. 11 and 12).

13.

Dr. Lowe watched [redacted] walk from the sofa to the garage to assess ROM, foot placement and arch support in his foot. Based on those observations, Dr. Lowe made certain recommendations for stretching and shoe inserts. (Lowe Affidavit, Para. 13).

14.

On January 31, 2017, The Cobb County School District received from Respondent a request for IEE at the public's expense due to her disagreement with the physical therapy evaluation completed by Dr. Lowe on Behalf of the district. (Exhibit A to Coleman Affidavit.)

15.

The District responded to the Respondent's request on February 2, 2017, requesting additional information. The District received no additional information on the request. (Exhibit B to Coleman Affidavit.)

16.

On February 15, 2017, the District granted the IEE on the physical therapy evaluation and enclosed a letter requesting a response from Respondent containing the District's list of

evaluators and an Authorization to Release Confidential Information Form. (Exhibit C to Coleman Affidavit.)

17.

Respondent has not responded to the information for the IEE provider to be selected. (Exhibit C to Coleman Affidavit.)

18.

Respondent disagrees with [redacted] physical therapy evaluation performed on November 15, 2016, by Elizabeth Lowe. ("Petitioner Ex. B.)

19.

On March 22, 2017, Respondent requested an additional IEE for the psychoeducational evaluation. (Exhibit D to Coleman Affidavit.)

20.

Respondent disagrees with the psychoeducational evaluation performed on March 2, 14, and 16, 2017 by Sharon Thompson, Ph.D. and Jana Ladner, Ph.D. ("Petitioner Ex. B.)

21.

On March 23, 2017, the District requested additional information from the Respondent on the psychoeducational IEE request. The District never received any additional information. (Exhibit E to Coleman Affidavit.)

22.

The District denied the request for a psychoeducational IEE on March 31, 2017. (Exhibit F to Coleman Affidavit.)

23.

On March [redacted], 2017, [redacted] turned 22 years old, and therefore is no longer eligible for special education services under IDEA. The student is no longer enrolled in the District. (Petitioner Due Process Request).

III. STANDARD ON SUMMARY DETERMINATION

Summary determination in this proceeding is governed by Office of State Administrative Hearings ("OSAH") Rule 15, which provides, in relevant part:

> Any party may move, based on supporting affidavits or other probative evidence, for a summary determination in its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

GA. COMP. R. & REGS. r. 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party "is entitled to a judgment as a matter of law on the facts established." G.J. v. Muscogee Cnty. Sch. Dist., 2010 U.S. Dist. LEXIS 28764 (N.D. Ga. 2010); A.B. v. Clarke Cnty. Sch. Dist., 2009 U.S. Dist. LEXIS 47701 (N.D. Ga. 2009).

Further, under OSAH Rule 15:

> When a motion for summary determination is made and supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination in the hearing.

GA. COMP. R. & REGS. r. 616-1-2-.15(3). See Lockhart v. Dir., Envtl. Prot. Div., Dep't of Natural Res., OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at *3 (OSAH 2007) (citing Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)). In this case, as set forth below, the Court concludes that no genuine issue of material fact remains for determination and that the Petitioner is entitled to the relief sought.

IV. Conclusions of Law

A. IDEA and Right to an IEE at Public Expense

IDEA permits parents of a child with a disability the right to obtain an Independent Educational Evaluation ("IEE") of their child. 20 U.S.C. § 1415(b)(1). Federal regulations implementing IDEA permit parents to request an IEE at public expense if they disagree with the evaluation conducted by a school district. 34 C.F.R. § 300.502. When the district is presented with a request for an IEE, the district must without unnecessary delay, either ensure that an IEE is provided at public expense or file a due-process complaint to request a hearing to show that its evaluation is appropriate. 34 C.F.R. § 300.502 (b)(2)(i-ii). Here, the district adequately demonstrated that its evaluations were appropriate.

1) Respondent Never Selected An Evaluator for the Physical Therapy IEE

Respondent never submitted any request for an independent evaluator to the District, therefore she forfeited her right to a physical therapy IEE. A.L. v. Jackson County School Bd., 635 Fed. Appx. 774, 782 (11th Cir. Fla. 2015). In *A.L.*, the Court found that when the parent requested an IEE above the cost limit at a facility 200 miles away, the parent was effectively sabotaging the IEE, and therefore the parent was not entitled to an IEE. Here, upon the district's approval of the physical therapy IEE, the district sent a letter containing a list of evaluators for Respondent to choose one to conduct the IEE. Respondent did not respond, thus the district was

unable to select an evaluator for the physical therapy IEE. The district subsequently denied the request.

If a parent's action significantly hinders or frustrates the development of an IEE, courts may be justified in denying equitable relief on that ground alone. Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d at 1319 n. 10. Thus, even if Petitioners had proven that the delay caused substantive harm, the Court concludes that [redacted]s refusal to select an evaluator and her imposition of unreasonable conditions are grounds to deny her relief on this claim.

2) Satisfaction of IDEA Standards Regarding Evaluation

The sole relevant inquiry in an IEE hearing filed by a school district is the appropriateness of the district's evaluation. Homes v. Millcreek Township Sch. Dist., 205 F.3d 583, 591 (3d Cir. 2000); Jack B. v. Council Rock Sch. Dist., 2008 U.S. Dist. LEXIS 78329 (E.D. Pa., Oct. 3, 2008). Once, a school district demonstrates that it complied with the required evaluation procedures outlined in federal and state regulations, the standard is met, and the evaluation must be considered appropriate. 34 C.F.R. § 300.502; Gwinnett County School District, 59 IDELR 21 (2012) (Held that a school district's evaluation was appropriate after it concluded the evaluations complied with the applicable regulations) North St. Francois County R-1 School District, Missouri State Educational Agency, 59 IDELR 179 (2012)("[t]he various courts and administrative panels that have addressed the appropriateness of district evaluations focus on whether the evaluations satisfied the requirements set out in Section 300.304");

Further, in determining whether a school district's evaluation is appropriate ALJ's must focus on whether the evaluation reasonably complies with the evaluation procedures under IDEA and state law. *Raytown C-2 School District, Missouri State Educational Agency*, 39 IDELR 149 (2003). This analysis is to be procedural in nature as "[t]he IDEA does not prescribe substantive

goals for an evaluation..." J.S. v. Shoreline School Dist., 220 F.Supp.2d 1175, 1185 (W.D. Wash. 2002); Grapevine-Colleyville Indep. Sch. Dist. v. Danielle R., 31 IDELR 103 (N.D. Tex. 1999). To elaborate, [t]he question of whether the evaluations were appropriately conducted may be less an issue of fact, as it involves comparing the evaluations to a statutory standard." Timothy F. v. Antietam County School District, 2014 WL 1301955, *4 (E.D.Pa., March 31, 2014).

3) *Standards for an Appropriate Evaluation Under IDEA.*

IDEA requires that evaluations meet the following standards:

> (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining--
> (i) Whether the child is a child with a disability under § 300.8; and
> (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);
> (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and
> (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
> (c) Other evaluation procedures. Each public agency must ensure that--
> (1) Assessments and other evaluation materials used to assess a child...
> (i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;
> (ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;
> (iii) Are used for the purposes for which the assessments or measures are valid and reliable;
> (iv) Are administered by trained and knowledgeable personnel; and
> (v) Are administered in accordance with any instructions provided by the producer of the assessments.
> (2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.
> (3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking

skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).
(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;
(5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.
(6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

34 C.F.R. § 300.304. The Court concludes that the District's evaluations met all of the requirements.

a. **The District's Psychoeducational Evaluation satisfied IDEA requirements.**

The psychoeducational evaluation performed by Dr. Thompson and Dr. Ladner met all of the standards as outlined in 34 C.F.R. § 300.304. It appears that Dr. Buchanan (Respondent's psychologist) agrees that the evaluation met the criteria outlined in 34 C.F.R. § 300.304(c)(1)-(5) as well as (7). (Thomson Ex. C.)

Regarding 34 C.F.R. § 300.304(c)(6), Dr. Buchanan pointed out that the evidence did not support the criticism by Respondent's psychologist regarding the lack of rating scales from teachers.

As noted in the psychoeducational report, the teacher checklists were distributed but were not returned at the time that the report was prepared. As noted in the report the results of teacher

checklists could be used in the determination of eligibility for Special Education services when returned. Teacher checklists were returned and are ready to be included in the Eligibility report as it is prepared.

Despite the criticism by Respondent's psychologist alleging that the evaluation failed to address categories of 1) attention and concentration and 2) emotional functioning particularly [redacted]'s anxiety, the evaluation adequately addressed eligibility criteria for categories of which [redacted] is currently eligible. Since attention and concentration factors, and anxiety, were not specifically requested within the IEP discussion, and previous evaluations consistently demonstrated that [redacted] has an autism spectrum disorder and intellectual disability, the district conducted an evaluation consistent with those previous evaluations and best practices. Therefore the district conducted an assessment of anxiety and fears as part of the evaluation of characteristics of an autism spectrum disorder including direct assessment with [redacted] and interview with his mother.

As presented in report findings, the District conducted a psychoeducational evaluation to facilitate the re-evaluation of [redacted]s eligibility as a component of the comprehensive evaluation offered through Special education. [redacted]s historical evaluations across clinical and educational arenas consistently yielded findings of Autism Spectrum Disorder and Intellectual Disability. The District conducted a formal assessment of intellectual functioning, adaptive functioning, behavioral functioning and academic functioning. [redacted]s anxiety and attention were evaluated as components of the assessment of Autism Spectrum Disorder within the arena of behavioral functioning, included a parent interview as well as consideration of both the historical and current contexts of [redacted]s intellectual functioning and developmental history. Altogether, the preceding psychoeducational evaluation met the criteria under the IDEA.

b. The District's Physical Therapy Evaluation satisfied IDEA requirements.

The evaluation performed by Elizabeth Lowe, DPT met all of the standards as outlined in 34 C.F.R. § 300.304. Consistent with 34 C.F.R. § 300.304(b)(1), and used a variety of assessment tools and strategies to provide educationally relevant findings regarding functions. Dr. Lowe collected data systematically and also directly observed [redacted]

Using various tools, the physical therapist developed a report that contained all of her findings and recommendations regarding the functions. Dr. Lowe's conclusions were reasonable, in that the target behaviors she identified were corroborated by data.

Consistent with 34 C.F.R. § 300.304(b)(2), Dr. Lowe did not rely on any single measure or assessment as the sole criterion for determining function. The variety of tools cited included records, direct observation, and data. Also, the report complied with 34 C.F.R. § 300.304(b)(3) because she used technically sound instruments.

Likewise, and consistent with 34 C.F.R. § 300.304(c)(1)(i) and (ii), Dr. Lowe administered the evaluation so as not to discriminate based on race or culture. Further, Dr. Lowe administered in a language most likely to yield accurate information from [redacted] To the extent that the assessment was non-observational, it was administered in English, which is [redacted]s native language. In regards to 34 C.F.R. § 300.304(c)(1)(iii), assessment tools were used for purposes for which they are valid and reliable.

The evaluation also complied with 34 C.F.R. § 300.304(c)(1)(iv) as it was administered by trained and knowledgeable personnel. Ms. Lowe's qualifications are not in dispute, and she has testified as to her qualifications in the area of physical therapy. (Lowe Affidavit, Para. 5-7).

In compliance with 34 C.F.R. § 300.304(c)(2), the evaluation was also "tailored to assess specific areas of educational need".

As for 34 C.F.R. § 300.304(c)(4), [redacted] was assessed in "all areas related to the suspected disability." Once again, there is no issue over the scope of the evaluation. There was no inter-district transfer in the same year, so 34 C.F.R. § 300.304(c)(5) is inapposite.

Consistent with 34 C.F.R. § 300.304(c)(6), the evaluation was sufficiently comprehensive to identify all of the child's special education needs in the area of physical therapy. Consistent with 34 C.F.R. § 300.304(c)(7), the evaluation produced relevant information to assist the IEP team in determining the educational needs of the child.

B. Respondent 'Aged Out' of Eligibility for IDEA.

[redacted]s date of birth is March 25, 1995. (Coleman Affidavit, Para 4). Respondent requested a psychoeducational IEE on March 22, 2017. However, on March [redacted], 2017, the student reached the age of 22. Therefore Respondent is no longer eligible for any further services under the IDEA. See 20 USCS § 1412 (a)(1)(A) (In general. A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21); 20 USCS § 1415(Generally, under Individuals with Disabilities Education Act (IDEA), 20 USCS §§ 1400 et seq., disabled student does not have right to demand public education beyond age of twenty-one).

C. Respondent Claims That She Did <u>Not</u> File Any Counterclaim; Any Claim Prior to April 28, 2017, Is Barred By the Applicable Statute of Limitations.

Respondent claimed that she has no pending claims in this administrative proceeding which she characterizes as a "Lawsuit", is an *in judicio* admission. <u>Piedmont Aviation v.</u>

Washington, 181 Ga. App. 730, 353 S.E. 2d 847 (1987). Therfore the Court denies any request for relief by Petitioner regarding FAPE, retaliation or compensatory damages.

To the extent that the Respondent has asserted any counterclaims, such counterclaims accruing earlier than April 27, 2015, are barred by the applicable two year statute of limitations. Here, Respondent appears to have asserted a claim for a violation of IDEA when [redacted] was handcuffed while he was a student at the school district. (Respondent's Response/Counterclaim, p. 5.) However, the incident occurred more than two years ago while [redacted] was in ninth grade, and [redacted] was not enrolled in the school district in the 2014-2015 academic year. Further [redacted] was aware of the incident in 2010.

Claims made more than two years before the due process hearing request are barred *if the parent was on notice of shortcomings or deficiencies in the school district's programming.* Courts uniformly have held that causes of action under the statute accrue, and the statutory period begins to run when a parent becomes aware of the injury or event that is the basis for the claim, regardless of whether the parent knows the injury is actionable. See, e.g., A.B. v. Clarke Cnty. Sch. Dist., Case No. 3:08-CV-041-CDL, 2009WL902038 (N.D. Ga. March 30, 2009); Richards v. Fairfax Cnty. Sch. Bd., 798 F. Supp. 338, 340-41 (E.D. Va. 1992), aff'd, 7 F.3d 225 (4th Cir. 1993) (interpreting the Education of the Handicapped Act, the precursor to the IDEA); M.S. v. Fairfax Cnty. Sch. Bd., Case No. 1:05CV1476-JCC, 2006 WL 1390557, *3 (E.D. Va. May 17, 2006) (finding the reasoning in Richards to apply to the IDEA). With knowledge of the injury or event, the parents are on "inquiry notice with the consequent duties to seek the details of the harm that were reasonably discoverable." M.S., 2006 WL 1390557, *3 (citing Kubrick, 444 U.S. at 122-23).

The precedent is based on the United States Supreme Court's use of the "discovery rule," which finds the accrual of a cause of action to occur when a plaintiff becomes aware of both the injury and the individual who inflicted the injury, and no later. US v. Kubrick, 444 U.S. 111, 118-22 (U.S. 1979). As other courts have stated in the context of IDEA litigation, once aware of an injury, the potential plaintiff is on "inquiry notice," and has a duty to investigate whether an actionable claim exists. See, e.g., M.S., 2006 WL 1390557, *3; Miller v. San Mateo-Foster City Unified Sch. Dist., 318 F. Supp. 2d 851,860-61 (N.D. Cal. 2004) ("Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, [he] must decide whether to file suit or sit on [his] rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; [he] cannot wait for the facts to find [him]."). The Kubrick "discovery rule" is a "knew or should have known" standard, as is the standard under the IDEA. *See* White v. Mercury Marine Division of Brunswick, Inc., 129 F.3d 1428, 1435 (11th Cir. 1997).

Courts have followed *Kubric* in IDEA cases and have determined that a plaintiff's claim accrues when the plaintiff becomes aware of shortcomings in the school district's programming. For instance, If a parent knew the child was having difficulty, or rejected an IEP offered by the school system, or disagreed with the decisions made by the school system regarding the child's educational program, then the parent was on notice of a potential injury. See, e.g., R.R. v. Fairfax Cnty. Sch. Bd., 338 F.3d 325, 332 (4th Cir. 2003) (finding that in the context of an IDEA dispute, an injury "is an allegedly faulty IEP or a disagreement over the educational choices that a school system has made for a student")); see, also, Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 300 n.2 (4th Cir. 2005). In such circumstances, a claim under the IDEA accrues and the statute of limitations acts to bar the claim if a hearing is not requested within two years. Therefore, any alleged claim not filed within two years will be dismissed.

D. Any Claim Under Section 504, Section 1983 Or ADA Fails

To extent Respondent seems to assert claims under Section 504, Section 1983, and ADA claims, among others, these claims are dismissed because this Court does not have jurisdiction over such claims.

1. This Court Lacks Jurisdiction Over Section 504, Section 1983, and ADA Claims

Respondent's counterclaims are not clear, but are inmaterial as this Court does not have jurisdiction over Section 504, Section 1983, or ADA claims. In a previous case before OSAH, an administrative law judge preserved the plaintiff's Section 504 and ADA claims, as OSAH lacked jurisdiction to hear such claims. K.C. v. Fulton County Sch. Dist., OSAH-DOE-SE-0401453-60-Rauh-Ference (Oct. 30, 2003). The District Court affirmed the ruling on appeal. K.C. v. Fulton County Sch. Dist., 2006 WL 1868348 (N.D. Ga. 2006).

In addition, as Petitioner conceded that, these claims "are outside the known jurisdiction of this Court." ¶¶ 9 and 75, Petitioner's Complaint; see also, Atlanta Indep. Sch. Sys. V. S.F. ex rel. M.F., No. 1:09-CV-2166-RWS, 2011 WL 721488, at *6 (N.D. Ga. Feb. 22, 2011) (stating that, "[r]equiring the ALJ to determine whether these same allegations constitute violations of Section 504, the ADA, and/or Section 1983—a task which appears to lie outside the ALJ's jurisdiction and the scope of the IDEA administrative proceeding under Georgia law—does not further any of the four purposes identified by the Eleventh Circuit as the basis for requiring exhaustion.").

V. Order

After careful consideration of the arguments and submissions of the parties, the Petitioner's Motion for Summary Determination is **GRANTED,** and the Respondent's Counter-Motion for Summary Determination and all claims against the District are **DENIED**.

SO ORDERED, this 4th day of August 2017.

PATRICK WOODARD
Administrative Law Judge

NOTICE OF FINAL DECISION

Attached is the Final Decision of the administrative law judge. The Final Decision is not subject to review by the referring agency. O.C.G.A. § 50-13-41(e)(3). A party who disagrees with the Final Decision may file a motion with the administrative law judge and/or a petition for judicial review in the appropriate court.

Filing a Motion with the Administrative Law Judge

A party who wishes to file a motion to vacate a default, a motion for reconsideration, or a motion for rehearing must do so within 10 days of the entry of the Final Decision. Ga. Comp. R. & Regs. 616-1-2-.28, -.30(3). All motions must be made in writing and filed with the judge's assistant, with copies served simultaneously upon all parties of record. Ga. Comp. R. & Regs. 616-1-2-.04, -.11, -.16. The judge's assistant is Kevin Westray - 404-656-3508; Email: kwestray@osah.ga.gov; Fax: 404-818-3769; 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303.

Filing a Petition for Judicial Review

A party who seeks judicial review must file a petition in the appropriate court within 30 days after service of the Final Decision. O.C.G.A. §§ 50-13-19(b), -20.1. Copies of the petition for judicial review must be served simultaneously upon the referring agency and all parties of record. O.C.G.A. § 50-13-19(b). A copy of the petition must also be filed with the OSAH Clerk at 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303. Ga. Comp. R. & Regs. 616-1-2-.39.