BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] by and through [redacted] and [redacted]; [redacted] :
and [redacted] :
:
Petitioners, :
v. :
:
MUSCOGEE COUNTY SCHOOL DISTRICT, :
:
Respondent. :

Docket Nos. 1847454 & 1914159
1847454-OSAH-DOE-SE-106-KENNEDY
1914159-OSAH-DOE-SE-106-KENNEDY

ORDER GRANTING, in part, AND DENYING, in part,
PETITIONERS' MOTION FOR SUMMARY DETERMINATION
and
RESPONDENT'S COUNTER-MOTION FOR SUMMARY DETERMINATION

I. INTRODUCTION

Petitioner [redacted] is a student in the Muscogee County School District (MCSD) and is eligible for services under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C. §§ 1400 *et seq*.

On June 25, 2018, [redacted] and his parents, [redacted] and [redacted], filed a Due Process Hearing Request alleging issues related to Identification, Evaluation, Educational Placement, and the provision of a Free and Appropriate Public Education (FAPE).[1] MCSD filed a Response on July 16, 2018.

On August 7, 2018, [redacted] was found eligible for services at an eligibility meeting held with both parties present. Thereafter, both parties participated at an IEP meeting held on

[1] More specifically, Petitioners allege Respondent failed to: (1) evaluate [redacted] on all areas of suspected disability in connection with its initial psychological evaluation; (2) timely conduct a speech language evaluation; (3) convene an Eligibility determination on or before May 17, 2018; and (4) timely develop an Individualized Education Program (IEP) for [redacted]

September 12, 2018. During the September 12, 2018 meeting, an IEP was developed for [redacted] and Respondent began to implement services.

On October 19, 2018, Petitioners filed a Second Due Process Hearing Request alleging issues related to Identification, Evaluation, and FAPE.[2] In an accompanying letter, Petitioners indicate that there "are no real differences between [the two cases], but rather the second hearing request is a continuation of the issues initiated in the first hearing request." On October 30, 2018, Respondent filed its Response to the Second Due Process Hearing Request. Respondent also filed a Motion to Dismiss that has not yet been ruled on. Petitioners' have not filed a response to the Motion to Dismiss.

On January 10, 2019, Petitioners filed a Motion for Summary Determination (Motion). On January 30, 2019, Respondent filed its response in opposition to Petitioners' Motion and a Counter-Motion for Summary Determination (Counter-Motion). On February 20, 2019, Petitioners' filed a Brief in Opposition to Respondent's Counter-Motion. On March 1, 2019, Respondent filed a Supplemental Brief in Support of Respondent's Counter-Motion.

In Respondent's Supplemental Brief, Respondent requests dismissal of both Due Process Hearing Requests based on a belief that Petitioners are refusing Special Education Services. To support Respondent's contention that Petitioners have refused services, Respondent includes a Parental Consent for Special Education Services form signed by [redacted] on February 11, 2019, indicating that she does not agree with [redacted], participating in Special Education Services under the Eligibility Category of Autism. On the form, [redacted] states she knows [redacted] has Autism Spectrum Disorder, but asserts he also has Mixed Receptive and Expressive Language Disorder, Auditory Processing difficulties, Significant Social Communication Disorder, and Executive Functioning

deficits that should support a finding of eligibility under the category of Speech Language Impairment in addition to eligibility under the category of Autism. Finally, [redacted] states she knows [redacted] is eligible for special education services, but she disagrees with his current IEP because she believes it does not address [redacted] Speech Language impairments. Upon receiving the Parental Consent for Special Education Services indicating Petitioners do not agree with [redacted] participation in Special Education, Respondent's requested clarification of whether Petitioners are refusing services or whether they are stating they consent to his receipt of services but do not waive their claims that the evaluation and IEP are inappropriate. As of the date of the filing of the Supplemental Brief, Petitioners have not responded or clarified their position.

Having considered the pleadings and arguments set forth before the Court, and based on the undisputed material facts set forth below, Petitioner's Motion for Summary Determination is **GRANTED, in part,** and **DENIED, in part,** and Respondent's Counter-Motion for Summary determination is **GRANTED, in part,** and **DENIED, in part.**

II. FINDINGS OF UNDISPUTED MATERIAL FACT

1.

[redacted] is 13 years old. He and his family reside in Muscogee County. *(Petitioners' Exhibit 1)*

2.

[redacted] is currently enrolled at Richards Middle School within the Muscogee County School District. *(Petitioners' Exhibit 1; Respondent's Robin B. Barber Aff.)*

3.

Richards Middle School is not [redacted] zoned school, and he did not place into the school's magnet program. Instead, his placement at Richards Middle School is the result of an

[2] More specifically, Petitioners' primary issues raised in the second Due Process Hearing Request relate to [redacted] eligibility for Speech Language Pathology services, and Petitioners' entitlement to reimbursement for a private

administrative transfer approved by Respondent as part of negotiations between the parties to resolve the pending litigation. *(Respondent's Barber Aff.)*

4.

Between 1st grade and 7th grade, Respondent's staff often characterized [redacted] as a bright student, but one who struggled with paying attention, being defiant, being disrespectful, exhibiting frequent tantrums, exhibiting crying episodes, being off-task, and not working well with others. *(Petitioner's Exhibits 3, 7)*

5.

As a result of the off-task and behavioral issues, Respondent initiated a Response to Intervention (RTI) process for [redacted] in 1st, 4th, 6th, and 7th grade. *(Petitioners' Exhibits 1, 2, 4, 5, and 6)*

6.

[redacted] behavioral issues began as early as August 2011, during A.E.'s 1st grade year. During that school year (2011-2012), [redacted] had five (5) behavioral incidents, four related to not completing assignments and one act of physical aggression (8/24/11; 8/29/11; 11/18/11; 12/9/11 and 1/31/12). *(Petitioner's Exhibit 7)* At that time, the only intervention, instruction, or support provided was the expectation that [redacted] teacher would send home a Behavior Chart on a daily basis and refer [redacted] for gifted testing when the window for such testing opened. *(Petitioner's Exhibit 2)*

7.

During [redacted] 2nd grade year (2012-2013), he had seven (7) behavioral incidents, one related to scratching another student, and the others for not following directions, having "a fit," throwing a tantrum and crying, and causing a disruption in class (8/21/12; 9/25/12; 10/17/12; 12/12/12; 2/13/13; 4/11/13 and 5/9/13). *(Petitioner's Exhibit 7)*

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speech language pathology evaluation obtained in Fall 2018.

22.

Dr. Kevin Evans, Respondent's school psychologist at the time, "waited until [redacted] provided [him] with information about the private evaluation before conducting any testing" because if he administered the same assessments that Dr. Montgomery did so close in time it would have invalidated the assessment results he obtained. On May 7, 2018, [redacted] sent Dr. Evans a message disclosing the specific testing protocols that had been administered by Dr. Montgomery in March 2018. Immediately thereafter, Dr. Evans completed psychological testing of [redacted] on May 7 and 8, 2018. "Given the extent to which [redacted] had been tested in March, 2018," Dr. Evans elected to administer one measure of intelligence and one measure of academic achievement.[4] In addition, Dr. Evans administered one measure of social/emotional/behavioral functioning by obtaining a self-report from [redacted] and two teacher reports because he misread the referral and mistakenly believed he was expected to evaluate [redacted] in the area of social skills rather than referring [redacted] to the school's Speech and Language Pathologist for purposes of evaluating [redacted] social skills. In addition to the foregoing evaluation assessments, Dr. Evans also provided rating scales for [redacted] parents to complete, but Dr. Evans did not receive the completed parent rating scales prior to preparing his report. Accordingly, the draft psychological report Petitioners received did not include information related to the parent rating scales. *(Petitioners' Exhibits 13, 14 at p. 6; Respondent's Kevin Evans Aff. ¶¶ 4, 6, 8)*

23.

After Dr. Evans completed his evaluation, he offered to meet with Petitioners on May 11, 16, or 26, 2018 to discuss his evaluation report and proceed with a meeting to determine [redacted]

[4] Dr. Evans administered the Reynolds Intellectual Assessment Scales -2, to measure [redacted] intellectual functioning. He administered the Weschler Individual Achievement Test – Third Edition, to measure [redacted] current academic abilities. (Petitioner's Exhibit 14)

eligibility for special education. Petitioners indicated they were not available to meet those days. Instead, Petitioners indicated they would provide dates they could meet, but then never did so prior to filing the Due Process Hearing Request on June 25, 2018. *(Respondent's Evans' Aff. ¶¶ 10-11)*

24.

Although Respondent proceeded with a psychological evaluation after receiving consent in March 2018, due to an inadvertent oversight, a referral was not sent to the speech language pathologist for purposes of conducting an evaluation of [redacted] Social Skills as agreed upon. Respondent first learned of the oversight on June 26, 2018, upon receipt of the initial Due Process Hearing Request that was filed on June 25, 2018. *(Respondent's Evan Aff. ¶ 7; Respondent's Barber Aff. ¶ 21)*

25.

On July 9, 2018, Petitioners withdrew their consent to evaluate and informed Respondent they would not attend an Eligibility Determination meeting because they believed Respondent had insufficient information to proceed with such a meeting without an evaluation by a speech and language pathologist. *(Respondent's Barber Aff. ¶ 21; Respondent's Exhibit A)*

26.

On July 12, 2018, Respondent agreed to reimburse Petitioners for the Independent Educational Evaluation (IEE) completed by Dr. Montgomery, in an amount not to exceed $3,000, based on Petitioners' disagreement with Respondent's psychological evaluation even though the private evaluation was completed prior to the school's evaluation. Respondent also offered to expedite the speech language evaluation and provide nine weeks of compensatory services to address the

delay in completing the speech language evaluation, contingent upon [redacted] being found eligible for such services. *(Respondent's Barber Aff. ¶ 22; Respondent's Exhibit B)*

27.

On July 20, 2018, Petitioners reinstated their consent for an evaluation to be conducted by the school's speech and language pathologist, and agreed to make [redacted] available on July 27, 2018, for the evaluation. Kristen Adams, Respondent's speech and language pathologist, evaluated [redacted] pragmatic language skills on July 27, 2018.[5] Subsequently, Respondent provided Petitioners a copy of Ms. Adams' evaluation report on August 4, 2018. *(Petitioner's Exhibit 1, ¶ 20 at p. 7; Petitioner's Exhibit 16; Respondent's Barber Aff. ¶ 25; Respondent's Kristen Adams Aff. ¶¶ 2-3)*

28.

On August 7, 2018, an Eligibility Determination meeting was held. Both parties were present at the meeting. [redacted] was found eligible for special education and related services based on a medical diagnosis of Autism. Petitioners sought eligibility under the category of Speech Language Impairment as well. However, the other team members determined that [redacted] did not meet the eligibility criteria for Speech Language Impairment based, primarily, on Ms. Adams' and Dr. Montgomery's evaluations indicating that [redacted] pragmatic language scores were within "normal limits" or "average." However, a close reading of Dr. Montgomery's report indicates that [redacted] exhibits a relative weakness in the areas of Supralinguistic and Pragmatic Language. He further found that [redacted] exhibits an absolute weakness in the areas of Inference and Double Meaning. *(Petitioners' Exhibits 1, 15; Respondent's Barber Aff. ¶¶ 26-28)*

[5] Pragmatic language is the use of appropriate communication in social situations (knowing what to say, how to say it, and when to say it). *See* www.cincinnatichildrens.org/speech Speech-Language Pathology Pragmatic Language.

29.

As noted above, the school IEP team members found [redacted] did not meet the eligibility criteria under the category of Speech Language Impairment based on the following evaluation instruments and the standard scores derived from those instruments:

Assessment Instrument	Date	Evaluator	Standard Score
Social Language Development Test – Adolescent	7/27/18	Adams	102
Test of Pragmatic Language 2nd Edition	7/27/18	Adams	104
Comp. Assessment of Spoken Language 2nd Edition (Receptive)	3/14/18	Montgomery	113
Comp. Assessment of Spoken Language 2nd Edition (Expressive)	3/14/18	Montgomery	96
Oral Passage Understanding Scales	3/14/18	Montgomery	104
Peabody Picture Vocabulary Test 4th Edition	3/14/18	Montgomery	130
Pragmatic Language Skills Inventory	3/14/18	Montgomery	90/102

For each assessment, the standard score is 100 with 15 as a standard deviation, such that a score below 70 falls within the deficient or clinically significant range. [redacted] scores on each evaluation instrument indicate that his pragmatic speech/language skills are within normal limits. [redacted] lowest scores were on two subtests of the Comprehensive Assessment of Spoken Language (CASL-2) in the area of Inference (78) and Double Meaning (71). *(Petitioners' Exhibits 15, 16; Respondent's Adams Aff. ¶ 4)*

30.

On August 15, 2018, Petitioners' notified Respondent of their disagreement with Ms. Adams' evaluation, and requested an IEE for speech and language. Initially, Respondent indicated that their request would likely be approved, assuming it met District criteria. However, after reviewing Dr. Montgomery's evaluation report and recalling that he had assessed [redacted] pragmatic language similar to Ms. Adams, Respondent sought clarification regarding the exact

nature of the evaluation being sought so Respondent could determine if it would be appropriate to pay for a second IEE since Respondent had already agreed to reimburse Petitioners for the cost of Dr. Montgomery's evaluation as an IEE. Petitioners did not respond to Respondent's request for clarification. Instead, Petitioners proceeded with obtaining a private evaluation by Mindy Cohen, a certified Speech Language Pathologist, and filed a second Due Process Hearing Request on October 19, 2018. As of the filing of the Motion for Summary Determination in January 2019, Respondent has not agreed to pay for the private evaluation completed by Ms. Cohen, nor has Respondent filed a Due Process Hearing Request to defend the appropriateness of its speech language evaluation conducted by Ms. Adams on July 27, 2018. *(Petitioners' Exhibits 1, 17; Respondent's Barber Aff. ¶ 30; Respondent's Exhibit D)*

31.

Ms. Cohen completed a private comprehensive speech-language evaluation of [redacted] on September 6, 2018, and issued her evaluation report to Petitioners on December 2, 2018. Her report was shared with the Court and Respondent on December 4, 2018. In her report, Ms. Cohen raises concerns with the analysis and reporting of testing completed by both the school's Speech-Language Pathologist, as well as Petitioners' previous private evaluation by Dr. Montgomery, which Respondent agreed to pay for after Petitioners' initial request for an IEE.[6] Ultimately, Ms. Cohen diagnosed [redacted] with Mixed Receptive-Expressive Language Disorder, and Significant Social Communication Disorder.[7] She concluded that [redacted] "requires social language training by an experienced Speech-Language Pathologist to assist him with the 'hidden curriculum' of being social as well as social interaction, social cognition, and social pragmatics." *(Cohen's Evaluation Report at p. 19; Petitioners' Exhibits 20, 21; Respondent's Barber Aff.)*

[6] Cohen's Evaluation Report at pp. 3-4
[7] Cohen's Evaluation Report at pp. 17-18

32.

Upon learning that Petitioners had obtained a private speech language evaluation, Respondent scheduled an IEP meeting for November 7, 2018 to re-determine eligibility based on information from the new evaluation, as well as to determine if changes to the IEP developed September 12, 2018, were necessary. However, Petitioners informed Respondent that the evaluation report had not yet been received. Respondent's intent was to convene an IEP meeting once the private evaluation report was available. *(Respondent's Robinson Aff. ¶ 10 and accompanying Exhibit F)*

33.

Following receipt of Dr. Cohen's speech language evaluation report on December 4, 2018, Respondent scheduled an IEP meeting for December 18, 2018. Due to the short notice, Petitioners were unavailable to meet on December 18, 2018. Respondent rescheduled the meeting for January 10, 2019. The meeting was rescheduled to January 23, 2019, and then to February 7, 2019, because Petitioners' attorney had conflicts on the prior dates. *(Petitioner's Exhibit 22; Respondent's Robinson Aff. ¶¶ 14-17 and accompanying Exhibits G, H, I and J)*

34.

As noted, prior to receiving the private Speech Language evaluation report and prior to the filing of the second Due Process Hearing Request, the parties held an IEP meeting on September 12, 2018 to develop an IEP for [redacted] based on the August 7, 2018 eligibility determination. Respondent offered multiple dates to convene the IEP meeting after the August 7, 2018, eligibility meeting and prior to the 30-day deadline to hold an IEP meeting, including but not limited to, August 24, 28, and 30, 2018. The parties had mutually agreed to meet on August 24, 2018, but Respondent's legal counsel became ill and requested a reset.[8] Thereafter, the parties

[8] At 5:13 a.m. on August 24, 2018, Respondent's legal counsel emailed Petitioners' legal counsel to request that the IEP meeting be rescheduled because Respondent's legal counsel "got very little sleep due to congestion and chest

were not able to find a mutually agreeable date to reset the meeting prior to September 12, 2018. Respondent contacted the Court out of concern that the parties were not able to agree on a date to hold the IEP meeting on or before September 6, 2018. The Court informed the parties that so long as Respondent had offered dates to meet prior to the deadline and Petitioners did not make themselves available to meet that Respondent would not be in violation of the 30-day deadline if the meeting is held on the first available date that is mutually agreeable to both parties. *(Petitioner's Exhibits 1, 19; Respondent's Barber Aff. ¶ 31, 33; Respondent's Victoria A. Robinson Aff. ¶¶ 4-9 and accompanying Exhibits A-E)*

35.

At the September 12, 2018 meeting an IEP was developed. Although [redacted] attended the meeting with her legal counsel, Respondent inadvertently failed to obtain written consent from her for Respondent to implement the IEP that was developed and provide [redacted] special education services. *(Petitioners' Exhibit 1; Respondent's Barber Aff. ¶ 4 which is attached to Respondent's Supplemental Brief in Support of Respondent's Motion for Summary Determination)*

36.

Neither at the September 12, 2018 IEP meeting, or subsequently while the IEP was being implemented, did Petitioners advise Respondent that they disagreed with [redacted]placement or his receipt of special education services. Instead, Petitioners only advised Respondent that they disagreed with the IEP team's determination that [redacted] does not meet the eligibility criteria for the category of Speech Language Impairment, and further that they believed the IEP was not appropriate, in part, because it did not address speech language/social skills deficits. Petitioners

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wall pain" and had concerns whether she "could safely drive to Columbus." (Petitioner's Brief in Opposition to Respondent's Counter Motion for Summary Determination accompanying Exhibit 18)

have also indicated they do not agree with the IEP as written, asserting that it fails to provide specific and measurable goals. *(Petitioner's Brief in Opposition to Respondent's Counter Motion for Summary Determination and accompanying Exhibit 17; Respondent's Barber Aff. ¶¶ 5, 8-9, which is attached to Respondent's Supplemental Brief in Support of Respondent's Motion for Summary Determination)*

37.

Between September 12, 2018 and January 8, 2019, Respondent understood that Petitioners consented to [redacted]dentification as a child with a disability, and to the provision of special education and related services. However, Petitioners alleged in their Motion for Summary Determination that Respondent failed to obtain written consent for the initial placement and receipt of special education and related services. Thus, on February 7, 2019, Respondent requested that Petitioners sign a Parental Consent for Special Education Services form. At that time, Petitioners stated they would not sign the form, but would consider it. A few days later Petitioners returned the form having checked the box indicating they do not agree with [redacted] participation in Special Education Services. Petitioners' added a handwritten note stating that, although they acknowledge[redacted] has Autism Spectrum Disorder, he has also been found to have Mixed Receptive and Expressive Language Disorder, Auditory Processing difficulties, Significant Social Communication Disorder and Executive Functioning deficits, which Petitioners contend make him eligible to receive services under the category of Speech Language Impairment in addition to the eligibility category of Autism. *(Petitioner's Brief in Opposition to Respondent's Counter Motion for Summary Determination and accompanying Exhibit 17; Respondent's Barber Aff. ¶¶ 5, 8-9, which is attached to Respondent's Supplemental Brief in Support of Respondent's Motion for Summary Determination)*

38.

Based on Petitioners' indicating they do not consent to the provision of special education and related services, Respondent provided prior written notice regarding the implications of the refusal to consent, proposed a solution for possible issues related to the consent form,[9] and inquired about the available dates for a Section 504 meeting. Respondent advised Petitioners that if Respondent did not receive clarification or response by February 25, 2019, Respondent would have no choice but to accept Petitioner's execution of the "no consent" resulting in Respondent changing [redacted] identification to that of a regular education student and stopping implementation of the IEP, including no longer collecting data or progress monitoring to measure progress toward goals and objectives. As of March 1, 2019, Petitioners had not provided clarification or a response. *(Petitioner's Brief in Opposition to Respondent's Counter Motion for Summary Determination and accompanying Exhibit 17; Respondent's Barber Aff. ¶¶ 5, 8-9, which is attached to Respondent's Supplemental Brief in Support of Respondent's Motion for Summary Determination; Respondent's Exhibit C attached to Respondent's Supplemental Brief in Support of Respondent's Motion for Summary Determination)*

39.

[redacted] has not had any behavioral incidents during the current school year (2018-2019) at Richards Middle School. Additionally, [redacted] is performing well academically. His grades are as follows:

- Language Arts – first grading period 100, second grading period 91;
- Math – first grading period 81, second grading period 83;

[9] On February 20, 2019, Respondent's reached out to Petitioners for clarification of the Petitioners' indication on the form that they do not consent to the provision of special education and related services. Respondent advised Petitioners that Respondent believed Petitioners agreed with the provision of special education and related services, but took issue with the nature and scope of the services listed in the IEP. Respondent offered if Petitioners had an issue with the form to simply submit a written notification that Petitioners consent to the provision of special education and related services, but do not waive their claims related to the appropriateness of the September 12, 2018 IEP. Petitioners have not responded.

- Physical Education – first grading period 83, second grading period 90;
- Science – first grading period 97, second grading period 98;
- Georgia Studies – first grading period 78, second grading period 88; and
- Advanced Chorus – first grading period 92, second grading period 79.

(Respondent's Barber Aff. ¶ 35; Respondent's Barber Aff. ¶ 6 attached to Respondent's Supplemental Brief in Support of Respondent's Motion for Summary Determination)

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:

> A 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. 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." Pirkle v. Envtl. Prot. Div., Dep't of Natural Res., OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (OSAH 2004) (citing Porter v. Felker, 261 Ga. 421 (1991)); see generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2006) (noting that a summary determination is "similar to a summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by summary adjudication).

Further, pursuant to 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. 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)).

IV. CONCLUSIONS OF LAW

A. Respondent did not violate its "Child Find" obligation

Petitioners assert that Respondent violated its "Child Find" obligation by failing to identify [redacted] as a student in need of special education, related aids and services, and by further failing to evaluate him in all areas of need or suspected need.

Under IDEA, its implementing regulations, and the Georgia Department of Education rules, school districts have an obligation to identify, locate, and assess all children who are suspected of having a disability and who may need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(1)(i); and Ga. R. & Regs. 160-4-7.03.

A school district's "Child Find" obligation is triggered when there is reason to suspect a disability and that special education services may be needed to address the disability, and to allow students to progress through the curriculum satisfactorily. Department of Education v. Cari Rae S., 158 F. Supp. 2d 1190 (D. Haw. 2001). In order to establish that a school violated its obligation to identify a child with a disability under IDEA, a party "must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate." Clay t. v. Walton Cty. Sch. Dist., 952 F.Supp. 817 (M.D. Ga. 1997), cited by Bd. Of Educ. v. L.M., 478 F.3d 307, 313 (6th Cir. 2007) (adopting Clay T. standard); J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d. 635, 661 (S.D.N.Y. 2011) (same).

Between [redacted] first and seventh grade school years, Respondent documented social and behavioral difficulties [redacted] experienced in school. During this time, Respondent referred [redacted] to the Response to Intervention (RTI) process several times to address his tantrums, non-compliance, refusals, classroom disruptions, inability to get along with peers, aggression towards others, as well as organizational and study skills. RTI refers to a multi-tiered system, where students who are struggling in the classroom "are provided increasingly intense and tailored instruction before they are determined eligible for special education." Angela Ciolfi and James Ryan, Race and Response-to-Intervention in Special Education, 54 How. L.J. 303, 305 (Winter 2011). In Georgia, RTI is mandatory. See Ga. Comp. R. & Regs. 160-4-7-.03(2). In Georgia, RTI is mandatory. Ga. Comp. R. & Regs. 160-4-7-.03(2). It is reasonable when dealing with a young child to use the RTI process unless there are circumstances that indicate a significant disability that precludes access to instruction. This is true, in part, because it "is difficult to assess whether a very young child is disabled or merely developing at a rate different from his peers, and the educational experts involved all seem to indicate that a hasty referral for special education can be damaging to a child." Bd. Of Educ. v. L.M., 478 F.3d at 313-14.

In August 2011, at the start of [redacted] 1st grade year, the RTI team developed a goal for [redacted] to follow school rules and work cooperatively with teachers, students and other adults. The only intervention, instruction, or support provided was the expectation that [redacted] teacher would send home a Behavior Chart on a daily basis and refer [redacted] for gifted testing. By [redacted]s 3rd grade year (2013-2014), his disruptive behaviors decreased significantly. The following year, Respondent used the RTI process to address educational progress rather than behaviors. In September 2014, the RTI process created a goal of improving math/reading by at least one grade level. To meet this goal, Respondent provided that [redacted] teacher would use Reading Wonders

and Envision Math to teach and provide support, and would also ensure that [redacted]s reading on an independent (non-frustration) level by checking books and doing book talks, as well as maintaining open teacher/parent communication. In each instance the RTI team also provided expectations for [redacted] and his parents because education is a cooperative process between the school, child and parent to ensure a child's success. Finally, and most recently, because [redacted] behaviors increased significantly in his 7th grade year and was adversely impacting his education, the RTI team developed a goal for [redacted] to decrease his use of aggressive language and behaviors, and also referred [redacted] for evaluation to determine if he was eligible to receive special education and related services.

Petitioners' assert that Respondent used the RTI process to delay and deny [redacted] a timely initial evaluation as a student suspected of having a disability. They further assert that Respondent punished [redacted] for his behaviors rather than identifying him as a child who may have a disability and evaluating him to determine if he was eligible for special education in the form of behavioral supports. In support of their assertions, Petitioners argue that [redacted] behaviors escalated in severity and intensity over the years, but the evidence does not support Petitioner's assertion. Rather, [redacted] behaviors were significant in 1st and 2nd grade, but then improved between 3rd and 6th grade. Although [redacted] ontinued to occasionally exhibit inappropriate behaviors in 3rd to 6th grade, the incidents were less frequent and occurred during a short period of time when they did occur. However, in 7th grade, [redacted] behaviors escalated significantly and it became apparent that his behaviors were adversely impacting his education. Accordingly, a referral to special education was requested by [redacted] mother and agreed to by Respondent to determine if [redacted] was eligible to receive special education and related services.

Based on the undisputed material facts, the Court concludes that Respondent did not violate its Child Find obligations. When it became apparent that [redacted] behaviors could not be addressed appropriately through the RTI process and were adversely impacting his education, a referral for suspected disability was made in a timely manner and Respondent proceeded with obtaining information to determine eligibility for special education and related services. Moreover, Respondent agreed to evaluate [redacted] in the areas of suspected disability that included psychological and social skills.

B. Respondent committed a procedural violation as it relates to Evaluation and Eligibility Determination Statutory Timeframes

Petitioners assert that Respondent failed to comply with the 60-day statutory timeframe for conducting [redacted] evaluations for the purpose of determining eligibility for special education. IDEA provides that a school district must evaluate a child and determine eligibility within 60 days of receiving parental consent to evaluate. 20 U.S.C. § 1414(a)(1)(C)(i)(1); 34 C.F.R. § 300.301(c)(1)(i); Ga. R. & Regs. 160-4-7-.04. [redacted] parent signed a parental consent to evaluate on March 9, 2018. Although the comprehensive psychological evaluation was completed by May 8, 2018, the speech language evaluation was not completed until July 27, 2018 due to an oversight by Dr. Evans who failed to refer [redacted] to the speech pathologist for an evaluation of Social Skills. Dr. Evans failed to make the referral because he misread the form and incorrectly believed that he was completing the evaluation for all areas of suspected disability, including Social Skills. After both school evaluations were completed, an eligibility determination meeting was not held until August 7, 2018, at which time [redacted] was determined eligible to receive special education and related services under the eligibility category of Autism. Thus, it is undisputed that Respondent did not complete the Speech Language Evaluation within

the 60-day statutory timeframe, and Respondent did not hold the eligibility meeting within the 60-day statutory timeframe since the deadline for such actions would have fallen on May 17, 2018. However, Respondent did make attempts to schedule a meeting in May 2018, at which time the parties could have reviewed Dr. Evans and Dr. Montgomery's evaluations. Petitioners advised Respondent they were not available to meet on the proposed dates in May, 2018. Petitioners further advised Respondent that they would confer with their schedules and propose dates they could meet, but they never provided any possible meeting dates prior to file a Due Process Hearing Request on June 25, 2018.

"Not every procedural defect results in a violation of the IDEA. Rather, "'[i]n evaluating whether a procedural defect has deprived a student of a FAPE, the court must consider the impact of the procedural defect, and not merely the defect *per se*.'" G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258 (11th Cir. 2012), *citing* Weiss by Weiss v. School Bd. Of Hillsborough Cnty., 141 F.3d 990 (11th Cir. 1998). In matters alleging a procedural violation of IDEA, the undersigned may find that a child did not receive a FAPE only if the procedural inadequacies: (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a).

Based on the undisputed material facts, the Court concludes that Respondent did not hold a timely eligibility determination meeting since a meeting was not held on or before May 17, 2018. However, based on the undisputed material facts, it has not been shown that [redacted] suffered substantive harm as a result of the procedural violation.

C. Respondent Committed a Procedural Violation as it relates to the Creation of IEP Statutory Timeframe & Statutory Requirement to have an IEP in Place on the First Day of School

[redacted] was determined eligible for special education and related services on August 7, 2018, one day prior to the start of the new school year. Thereafter, the parties did not complete an Individual Education Program (IEP) for [redacted] until September 12, 2018. Based on the foregoing, Petitioners assert that Respondent failed to comply with the mandate found at U.S.C. § 1414(d)(2)(A), which requires school districts have an IEP in effect at the beginning of each school year for each disabled child in its jurisdiction, as well as the requirement that an IEP be developed within thirty (30) days of establishing eligibility for services. *See* 34 C.F.R. § 300.323(c)(1).

It is undisputed that, following the August 7, 2018 eligibility meeting, an IEP meeting was not held until September 12, 2018. Although the parties attempted to meet in August 2018 to develop an IEP, due to Petitioners' unavailability on certain dates and Respondent's legal counsel's last minute concerns regarding an illness, the meeting was not able to be held until September 12, 2018.

Under 34 C.F.R. § 300.323(c)(1), an IEP must be developed within 30 days of establishing eligibility for services. Although in this matter the IEP was not developed until thirty-three (33) days after determining eligibility, Respondent worked in good faith to schedule a date within the 30-day timeline, but Petitioners were not available for several of the proposed dates and Respondent's legal counsel was ill on the one agreed-upon date. Accordingly, the failure to meet and develop an IEP within the 30-day statutory timeline following the eligibility determination was attributable to both parties.

Based on the undisputed material facts, a technical procedural violation occurred, but the court concludes that there is insufficient evidence that the 3-day delay caused substantive harm that would entitle the Petitioners to relief on this issue.

D. Respondent Failed to Obtain Written Parental Consent for Participation in Special Education

Petitioners assert that Respondent failed to obtain written parental consent for initial services or placement either at the September 12, 2018 IEP meeting that [redacted]other and legal counsel attended, or afterwards, in violation of 20 U.S.C. § 1414(a)(1)(D)(II). However, even though litigation was pending, at no time did Petitioners advise Respondent that Petitioners did not consent to [redacted] receiving the special education and related services that were implemented following the creation of an IEP on September 12, 2018. Based on the undisputed material facts, the Court concludes that a procedural violation occurred because Respondent did not obtain written parental consent. However, there is insufficient evidence that the procedural violation caused substantive harm.

E. The Procedural Violations Do Not Establish that Respondent Failed to Provide a FAPE

[redacted]s entitled to a FAPE. 20 U.S.C. § 1400(d)(1)(A); 34 C.F.R. § 300.101(a). FAPE is achieved through the timely and consistent implementation of an IEP tailored to meet the needs of each particular child. Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309 (11th Cir. 2003). "Each IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide." Schaffer v. Weast, 546 U.S. 49 (2005); 42 U.S.C. § 1414(d)(1)(A).

Petitioners assert that Respondent has failed to provide [redacted] with a FAPE, in part, because Respondent did not comprehensively or accurately assess [redacted]n all areas of suspected

disability. Petitioners argue that, without a comprehensive and accurate assessment, [redacted] IEP cannot contain measurable goals, nor does it specify the specific nature of the special services Respondent will provide. However, at the time eligibility was determined and later when the IEP was developed, the IEP team had the school psychologist's report, the school's speech and language evaluation, as well as the comprehensive private evaluation Petitioners obtained. Based on the extensive information available at that time, [redacted] was found eligible for services and an IEP was created to address those areas known, at that time, to require attention. Petitioners assert that the IEP is deficient and, as a result, the "gaps between [redacted] skills in the areas of auditory processing, language, social language and executive functioning and those of his peers are widening." However, the record does not contain sufficient evidence for the Court to determine the accuracy of this particular claim. Instead, the record shows that [redacted] is performing well at Richards Middle School, both behaviorally and academically. Based on the undisputed material facts, the procedural violations do not establish that Respondent failed to provide [redacted] a FAPE. However, a disputed issue remains as to whether the IEP developed for [redacted] was appropriate and provided a FAPE.

F. Respondent Provided Prior Written Notice

Petitioners assert that Respondent failed to provide Prior Written Notice when Petitioners disagreed with Respondent's evaluations, eligibility determination, and IEP. Petitioners sought to have [redacted] determined eligible under the category of Speech Language Impairment in addition to Autism. The IEP Team school members determined that [redacted] did not meet the eligibility criteria for Speech Language Impairment. "If a school district wishes to deny the request, it must provide written notice to the parents explaining that it refuses to conduct an initial evaluation and provide an explanation as to why it does not suspect the child has a disability and what records or

evaluations it used as the basis for its decision." Timothy O. v. Pso Robles Unified Sch. Dist., 822 F.3d at 1110, citing 34 C.F.R. 300.503(a) & (b). When provided with such information, a parent can then choose to accept the school district's decision or challenge it by filing a due process hearing request or a state complaint. Id., citing 34 C.F.R. 300.507, 300.153. The Eligibility Report along with the Parental Rights provided to Petitioners at the Eligibility Determination meeting satisfies the prior written notice requirements. The Eligibility Report includes a description of the action refused and an explanation of why Respondent did not take certain action. 34 C.F.R. § 300.503(b)(1)-(2). Additionally, a detailed description of each evaluation procedure, assessment, record or report Respondent used as a basis for its refusal to take certain action is set forth in the Eligibility Report. 34 C.F.R. § 300.503(b)(3). Respondent also met its obligations set forth in 34 C.F.R. § 300.503(b)(4) through (7) by the detailed information provided in the Eligibility Report. Accordingly, based on the undisputed material facts, the Court concludes that Respondent met its obligation to provide Prior Written Notice.

G. Request for Speech Language IEE

Petitioners assert that Respondent must pay for the private evaluation conducted by Ms. Cohen because Respondent failed to either provide an IEE in the requested area of speech/language or request a due process hearing to defend its evaluation.

When a local education agency (LEA) performs an evaluation of a student, the student's parents have the right to seek an Independent Education Evaluation (IEE) as a procedural safeguard if they disagree with the evaluation. 20 U.S.C. § 1415(b)(1). In *Schaffer v. Weast*, the Supreme Court recognized the central role that access to a publicly-funded IEE may play in addressing the natural advantage in information and expertise that schools have over parents. 546 U.S. 49, 60-61 (2005) ("IDEA thus ensures parents access to an expert who can evaluate all the

materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition."). More recently, in *Phillip C. v. Jefferson County Bd. Of Education*, the 11th Circuit Court of Appeals reaffirmed the importance of independent assessments of students, finding "[t]he right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP," and without an IEE some children "would not receive, as the IDEA intended, 'a free and appropriate public education' as the result of a cooperative process that protects the rights of parents." 701 F.3d 691, 698 (11th Cir. 2012).

If a parent requests an IEE at public expense, the local education agency has two alternatives, either: "(i) file a due process complaint to request a hearing to show that its evaluation was appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria." 34 C.F.R. § 300.502(b)(2); Parker v. West Chester Area Sch. Dist., 2017 U.S. Dist. LEXIS 104068 *39 (E.D. Pa. 2017).

However, the right to obtain an IEE at public expense is qualified. 34 C.F.R. § 300.502 states the following in pertinent part:

> (b) Parent right to evaluation at public expense.
>
> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency subject to the conditions in paragraphs (b)(2) through (4) of this section.
>
> (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either –

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to require a due process hearing to defend the public evaluation.

Further, a school district may establish the criteria for funding an IEE. In terms of costs for an IEE, a school district may establish maximum allowable charges for specific tests if said maximum (i) allows a choice among qualified professionals, (ii) is not limited to the average fee customarily charged in that area, (iii) allows for exceptions for justified unique circumstances, and (iv) applies as well to the district when it initiates an evaluation. A school district may also establish reasonable cost containment criteria applicable to [both district and parent evaluators], but only with a provision for an exception when the parents show unique circumstances justifying a higher fee. See, e.g., Letter to Anonymous, 22 IDELR 637 (OSEP Feb. 2, 1995); see generally Letter to Thorne, 16 IDELR 606 (OSEP Feb. 5, 1990) ("[I]t should be noted that if the total cost for an IEE exceeds the district's cost criteria and there is no justification for the excess cost, the cost of the IEE must be publicly funded to the extent of the district's maximum allowable charge.").

In this matter, Petitioners' requested an IEE in the area of speech language. Respondent notified Petitioners that Respondent had already approved and agreed to pay for the private

evaluation conducted by Dr. Montgomery that included assessments in the area of pragmatic language that was also addressed by the school district's speech and language pathologist. Respondent believed it had already approved Petitioners' IEE request by agreeing to pay for Dr. Montgomery's private evaluation that included assessments of pragmatic language. However, the initial evaluation referral noted that a school psychologist would complete certain portions of the evaluation and a school speech and language pathologist would complete other portions of the evaluation. Petitioners' disagreed with both public evaluations and were entitled to request an IEE in response to disagreement over both evaluations. Respondent agreed to pay for an IEE by Dr. Montgomery, a psychologist. Respondent failed to, without unnecessary delay, either agree to pay for an IEE by a speech and language pathologist in response to Petitioners' request because of the disagreement with the school's speech and language pathologist's evaluation, or to file a due process complaint to defend the public evaluation. Thus, Respondent waived its position and is hereby Ordered to reimburse Petitioners' for the cost of the evaluation conducted by Ms. Cohen, up to the maximum allowable rate under Respondent's agency criteria for speech and language evaluations.

H. Attorney's Fees

In addition to the foregoing, Petitioners' also seek reimbursement for their reasonable attorney's fees. 20 U.S.C. § 1415(i)(3)(B)(i)(I), provides that a court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parent of the child with a disability who is a prevailing party. OSAH is not a court of record and, thus, may not have authority to award attorney's fees. However, if the undersigned has such authority, the request is declined.

V. ORDER

For the foregoing reasons, Petitioner's Motion for Summary Determination is hereby **DENIED** as it relates to Child Find, Procedural Violations and Attorney's Fees, as set forth above. Petitioners' Motion for Summary Determination is hereby **GRANTED** as it relates to reimbursement for the private evaluation conducted by Ms. Cohen up to the maximum allowable rate under Respondent's IEE criteria. Similarly, given that Respondent's Counter-Motion for Summary Determination raised the same issues, but sought a ruling in its favor, Respondent's Counter-Motion for Summary Determination is **GRANTED** as it relates to Child Find, Procedural Violations and Attorney's Fees, but is **DENIED** as it relates to reimbursement for the speech language evaluation conducted by Ms. Cohen.

Additionally, issues regarding the appropriateness of the IEP developed on September 12, 2018, remains an issue that cannot be decided based on the Motion or Counter-Motion.

Finally, Respondent's request for dismissal of both actions is hereby **DENIED.**

SO ORDERED, this 17th day of April, 2019.

Ana Kennedy

Ana Kennedy
Administrative Law Judge