BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] **BY AND THROUGH** [redacted] **AND** [redacted]

Petitioners,

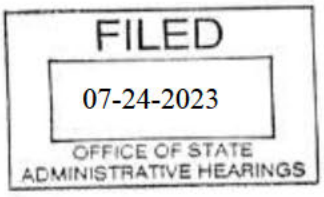
v.

GWINNETT COUNTY SCHOOL DISTRICT,

Respondent.

Docket No.:
2321963-OSAH-DOE-SE-67-Boggs

Agency Reference No.: 2321963



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

For Respondent:
Catherine Followill, Esq.
Audrianna Harris, Esq.
Pereira, Kirby, Kinsinger & Nguyen, LLP

FINAL DECISION

I. Introduction & Procedural History

Petitioner [redacted] is a student with a disability who is eligible for special education services under the Individuals with Disabilities Education Act of 2004 ("IDEA"). On March 8, 2023, [redacted] by and through her mother, Petitioner [redacted] filed a Due Process Complaint ("Complaint") against the Respondent, the Gwinnett County School District ("Respondent" or "District"). In their Complaint, the Petitioners allege that the District violated the IDEA with respect to [redacted]s identification, evaluation, and educational placement, as well as by denying her a free appropriate public education ("FAPE").

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[1] [redacted], [redacted]s stepfather, also appeared at the hearing as the Petitioners' advocate with special knowledge or training about [redacted] and her disabilities. Because Mr. Williams was neither a party to the case nor a licensed attorney, he was not allowed to represent the Petitioners at this proceeding. See 34 C.F.R. 300.512(a)(1); Ga. Comp. R. & Regs. 616-1-2-.34(1).

The evidentiary hearing took place on May 9, 2023, in Atlanta, Georgia.[2] At the conclusion of the Petitioners' case-in-chief, the Respondent moved for involuntary dismissal pursuant to Georgia Rule and Regulation 616-1-2-.35. The undersigned reserved ruling on this motion, and the Respondent proceeded to present its case-in-chief.

A week after the hearing's conclusion, on May 16, 2023, the Petitioners moved to introduce new evidence into the record. The Respondent opposed this motion. The Court denied the Petitioners' request in an order issued May 25, 2023.

The record officially closed on June 6, 2023, upon receipt of the transcript of the hearing.[3]

After consideration of the evidence and for the reasons explained herein, the Court hereby **GRANTS in part** the Respondent's motion for involuntary dismissal, for four of the six claims in the Petitioners' Complaint. The motion is **DENIED in part** for the remaining two claims. Upon review of the full evidentiary record, the Petitioners' request for relief on the remaining two claims is **DENIED**.

[2] At the start of the hearing, the Respondent made a standing objection to the admission of the Petitioners' exhibits. The objection was overruled. (See Tr. 8-10.)

[3] As noted in a previous order, the evidentiary record in this proceeding stayed open following the hearing solely for the receipt of the transcript, in accordance with Georgia Rule and Regulation 616-1-2-.26. (See Case File, Order, filed May 25, 2023.)

II. FINDINGS OF FACT[4]

A. Relevant Background

1.

Petitioner [redacted] was born on July 3, 2008; at the time of the instant hearing, she was 14 years old. As of September 2022, she lived with her mother, [redacted] her stepfather, [redacted]; and her older brother. (Tr. 52 [Williams Test.]; Ex. P-2, unnumbered p. 1.)

2.

[redacted] attended [redacted], a charter school in the District, from first grade through a portion of fourth grade. (Tr. 203 [[redacted] Test.]; Ex. P-2, unnumbered p. 2.) While there, she initially was found eligible for special education services in March 2017 under the category of Specific Learning Disability ("SLD"). (Tr. 212 [[redacted] Test.]; Ex. P-2, unnumbered p. 2.) [redacted] then attended [redacted] Elementary School [redacted]"), a District school, during both fourth grade and fifth grade. (Tr. 203 [[redacted] Test.]; Ex. P-2, unnumbered p. 2.)

3.

In January 2017, while at [redacted], [redacted] underwent a battery of evaluations, the results of which were included in a 2022 psychological report. (Ex. P-2, unnumbered pp. 2-3.) These 2017 results included scores from a test called the "Behavior Assessment for Children, 3rd Edition (BASC-3, Teacher)." The results were summarized as follows:[5]

- Externalizing Problems - At-Risk (Clinically Significant; aggression, conduct problems)
- Internalizing Problems - Within Normal Limits

[4] Citations to pages of the hearing transcript are denoted as "Tr. #." In certain instances, the transcript citation includes, in brackets, the name of the witness whose testimony is being cited. Citations to the Petitioners' exhibits are denoted as "Ex. P-#" and in some instances include page numbers for the document. Citations to the Respondent's exhibits are denoted as "Ex. R-#," with "#" referring to the Bates-stamped page numbers in the Respondent's exhibit book.

[5] The full results from the 2017 BASC-3 were not offered into evidence at the hearing.

- School Problems - Clinically Significant (Clinically Significant; learning problems)
- Behavioral Symptoms Index - At-Risk; (At-Risk; attention problems)
- Adaptive Skills - Within Normal Limits (At-Risk; adaptability)

(Ex. P-2, unnumbered p. 2.) As for the other tests, [redacted]s intellectual functioning skills were assessed in the "Very Low to Low Average" range; however, the 2022 report noted that [redacted]s motivation and sustained effort were inconsistent across the various assessments, which resulted in varying test results. Other results showed [redacted]s overall adaptive functioning skills to be in the "Average" range. (Ex. P-2, unnumbered p. 3.)

4.

While at [redacted], [redacted] remained eligible for special education services and had an Individualized Education Plan ("IEP") implemented. (Tr. 212 [[redacted] Test.].)

5.

[redacted] attended school in the District through the 2018-2019 school year. (Tr. 50 [[redacted] Test.].) Sometime in May 2019, [redacted] and her mother, [redacted] filed an IDEA due process complaint against the District. A memorandum for the complaint, drafted by the Petitioners' attorney, alleged the District had made an improper manifestation determination following an unspecified disciplinary incident. The memorandum further claimed that [redacted] had shown signs of needing an evaluation for an emotional or behavioral disorder, and it mentioned past acts of misconduct by [redacted] such as being disrespectful to staff, not following directions, insulting teachers, and threatening to kick an administrator. While the memorandum itself included citations to several education records, none of these supporting documents were offered into evidence during the

hearing. (Ex. P-1.[6]) The attorney who authored the memorandum also did not testify at the hearing.

6.

The due process complaint filed in May 2019 was dismissed by this Court on June 7, 2019, after [redacted] and [redacted] filed a notice of dismissal. (Tr. 331-332 [Wragg Test.]; Ex R-172.)

7.

For sixth through eighth grades, [redacted] elected to place [redacted] in private school.[7] (Tr. 203-204, 267 [[redacted] Test.]; Ex. P-2, unnumbered p. 2.) [redacted] was homeschooled for a portion of this period because of the COVID-19 pandemic. (Tr. 204 [[redacted] Test.].) While attending the private school [redacted] Academy, [redacted] made As and Bs in her coursework, which [redacted] described as "great." (Tr. 210 [[redacted] Test.]; Exs. R-126, R-127.) On her seventh- and eighth-grade report cards, [redacted] received scores for categories of social/emotional development, the majority of which appear as satisfactory. (Exs. R-126, R-127.)

B. <u>July 2022 — Re-enrollment in the District</u>

8.

[redacted] re-enrolled [redacted] in the District on or around July 29, 2022. (Tr. 212 [[redacted] Test.].)

9.

At the hearing, the Petitioners offered into evidence a document titled "Modification to IEP's Without a Meeting" ("Modification Agreement"), which lists a meeting date of July 29, 2022. The following provisions are outlined in this document:

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[6] The highlighting on certain portions of the memorandum were made by [redacted] and Mr. Williams. The handwritten notes are [redacted]s. (Tr. 170-171 ([redacted] Test.].)

[7] [redacted] testified [redacted] attended [redacted] Preparatory School for all three grades. (Tr. 204 [[redacted] Test.].) In contrast, the report from the District's 2022 psychological evaluation states that [redacted] attended both [redacted] Preparatory and [redacted] Junior Academy during this period. (<u>See</u> Ex. P-2, unnumbered p. 2.)

> It is agreed between the parent and the school that certain minor changes to the student's IEP are appropriate, but that a formal IEP meeting is unnecessary to make such changes. Therefore, the parent and the school agree that the following changes in the IEP shall be effectuated and that this document shall be attached to and made a part of the student's IEP until modified by future agreement or decision of the IEP team:
>
> Offer of comparable services to: [redacted] Elementary IEP date 3/27/2019
>
> Language Arts Resource
> Math - Resource
> Science - Co-taught
> Social Studies - Co-taught
>
> By signing this agreement, the parent acknowledges that he/she has the right to an IEP meeting to discuss these changes and freely and voluntarily waives such right. Parent waives a notice of IEP meeting. Parent also acknowledges that he/she has had the opportunity to participate in a discussion with school staff regarding these changes. Finally parent acknowledges receipt of written notice of such changes if the changes involve identification, evaluation, or placement of his/her child. It is understood that all changes on this form will be made in IEP Online as soon as possible but not later than three school days.

The document includes [redacted]s signature. (Ex. P-14.) At the hearing, [redacted] referred to the Modification Agreement as "documentation speaking about the modification [of the] IEP without a meeting." (Tr. 158-159 [[redacted] Test.].) However, she confirmed she had agreed to the four listed classes. (Tr. 213 ([redacted] Test.].)[8] "Resource" classes have smaller groups of special education students so the teacher can assist students one on one. (Tr. 283 [Anderson Test.].) "Co-taught" classes are general-education classes with a second teacher for special education. (Tr. 75-76 [[redacted] Test.].)

[8] At the hearing, [redacted] testified that this document shows a "date change in July 2022, even though the IEP is dated September 29, 2023. (Tr. 158-159.) She contended that this date is incorrect. (Tr. 159.)

10.

[redacted] further testified she signed a consent form on July 29, 2022, so that the District could evaluate [redacted] (Tr. 214 [[redacted] Test.].) She stated she had been advised that [redacted] would be evaluated during the summer, though she did not specify who told her this. (Tr. 66, 216 [[redacted] Test.].)

11.

[redacted] began ninth grade at the District's [redacted] ([redacted]) beginning August 2022. (Ex. P-2, unnumbered pp. 1, 2, 7.)

C. <u>August 2022 — Initiation of 504 Plan</u>

12.

While attending [redacted], [redacted] requested that [redacted] receive accommodations pursuant to Section 504 of the Rehabilitation Act of 1973 (hereinafter "Section 504" or "504"). (Tr. 224 [[redacted] Test.].) [redacted]s need for accommodations arose from a slip-and-fall injury she sustained prior to attending [redacted].[9] (Tr. 38 [Williams Test.]; Tr .71, 224-225 [[redacted] Test.].) She suffered injuries to her low back and knee. (Tr. 38 [Williams Test.]; Tr. 71, 132 [[redacted] Test.]; Ex. P-2, unnumbered p, 2; Ex. P-6, Disability Determination, unnumbered p. 1 and Physician's Evaluation.[10]) At the hearing, [redacted] testified that [redacted] needed accommodations because her classes were on different buildings and on different floors, which would lead to "a lot of wear and tear" on her body. (Tr. 71 [[redacted] Test.].) [redacted] also explained that her back problems affected the frequency of [redacted]s bathroom use, because holding her urine caused more pain. (Tr. 71-72 [[redacted] Test.].)

[9] [redacted] at first testified the injury occurred in "the summertime of 2021." (Tr. 71 [[redacted] Test.].) Later in her testimony, she stated the injury happened in January 2022. (Tr. 224-225 [[redacted] Test.].)

[10] Exhibit P-6 consists of six distinct documents related to [redacted]s 504 plan and accommodations; however, only five of those documents (encompassing the sequential pages 1 through 12) were tendered and admitted into the record. Those admitted five documents are the Disability Determination; an Individualized Accommodation Plan, or IAP; the minutes from a 504 meeting held August 30, 2022; the Final Audit Report; and a Physician's Evaluation.

13.

A 504 meeting took place on or around August 30, 2022. (Tr. 228, 269-270 [Test.]; Ex. P-6.) According to school records, the meeting was attended by , school counselor; and , a 504 coordinator. (Ex. P-6, IAP, p. 4 and Minutes, unnumbered p. 1; see also Tr. 123 [Test.].) ultimately was found eligible for 504 accommodations based on her low-back and knee injury that substantially limited her walking. (Ex. P-6, Disability Determination, unnumbered pp. 1-2.)

14.

Based on this determination, the attendees at the 504 meeting developed an Individualized Accommodation Plan ("IAP") to determine s appropriate accommodations, effective August 30, 2022 ("August 2022 IAP"). (Ex. P-6, IAP, p. 1.) The accommodations listed in this August 2022 IAP included the following:

- Excusing s absences due to illness, upon receipt of an excuse form from
- Scheduling for Physical Education after the 2022-2023 school year;
- Allowing to bring a back pillow to support her back;
- Providing a chair in each class so can prop up her leg;
- Allowing to stretch her leg and back when needed;
- Allowing to leave class a few minutes before dismissal so she has enough time to board the bus;
- Preventing from "receiving consequences" for tardies that are due to her knee injury, and further noting that "[t]eachers have been made aware that she may be tardy to class if having problems with her knees"; and
- If is absent from class, allowing her to turn in assignments during the next class and speak with teachers regarding additional days for assignments.

(Ex. P-6, IAP, pp. 1-2 and Minutes, unnumbered pp. 1-2; see also Tr. 123-131 [[redacted] Test.].) Mr. Williams testified that he had been present at the August 2022 504 meeting, where "it was noted" that [redacted] would be allowed to go to the restroom. (Tr. 50-51 [Williams Test.].) However, nowhere in the 504 documentation from August 2022 proffered by the Petitioners is there mention of a provided accommodation regarding bathroom visits. (See generally Ex. P-6.)

15.

The minutes from the August 2022 504 meeting also stated that [redacted] had mentioned concerns "regarding [[redacted]s] learning that were previously addressed through an expired IEP." (Ex. P-6, Minutes, unnumbered p. 1.) The minutes noted that Ms. [redacted] confirmed the school was "in the process" of reevaluating [redacted] for special education services. (Ex. P-6, Minutes, unnumbered p. 1.)

D. September 2022 — Reevaluation

16.

On September 6, 2022, [redacted] underwent psychological testing by the District to reevaluate her eligibility for special education services ("September 2022 Reevaluation"). (Ex. P-2, unnumbered p. 1.) The reevaluation report was completed by psychologist Larris Boston, Ed.D, a certified school psychologist and a licensed professional counselor in the state of Georgia.[11] (Tr. 309 [Owen Test.]; Ex. P-2, unnumbered p. 1.)

17.

Dr. Boston's report from the September reevaluation included a section titled "Background Information," which stated that the information therein "was gathered from file review and student interview." This section referred the reader to [redacted]s "supplemental file" for information regarding

[11] Dr. Boston did not testify at the hearing.

the student's background and development; however, this supplemental file was not proffered at the hearing. (Ex. P-2, unnumbered p. 1.) The same section went on to describe [redacted]s then-current courses at [redacted]—as reflected in the Modification Agreement from July 2022—while also noting that "[m]ltiple interventions and modifications have been implemented such as repetition, breaking material into manageable parts, extended time, guided notes, daily after-school tutorials, and frequent one-on-one instruction." (Ex. P-2, unnumbered p. 2.)

18.

The "Background Information" section also included an overview of [redacted]s evaluation results from January 2017, as well as this statement regarding the 2017 evaluation:

> Behaviorally, teacher report and informal observations, revealed no significant concerns; however, it was noted that [redacted] did have some confrontations with other female peers and that [redacted] did attempt to challenge authority with some staff members.

(Ex. P-2, unnumbered pp. 2-3.)

19.

Dr. Boston's report also includes the results of tests completed for [redacted]s 2022 reevaluation. (Ex. P-2 unnumbered pp. 3-8.) On the Wechsler Intelligence Scale for Children - Fifth Edition ("WISC-V"), which assesses intellectual functioning, [redacted] tested with a 75 Full Scale IQ score that was labeled "Borderline." (Ex. P-2, unnumbered pp. 3-4.) Overall, she was characterized as being in the "Very Low" range for cognitive ability, with strengths in visual working memory and weaknesses in visual spatial reasoning and visual motor integration. (Ex. P-2, unnumbered pp. 5, 7.) [redacted] also completed the Developmental Test of Visual-Motor Integration, described as "a paper and pencil measure of visual-motor skills." [redacted] was reported to be within the "Low" range for her chronological age, and Dr. Boston wrote that such scores were "commensurate" with the measures of [redacted]s intellectual ability. Additionally, [redacted] was

administered "portions of" the Kaufman Test of Educational Achievement Third Edition ("KTEA III") by school personnel. These "academic assessment" scores "fell within the average to very low ra[n]ge." (Ex. P-2, unnumbered p. 7.) [redacted]s reading comprehension and written expression were average; her reading fluency and math computation skills were below average; and her math reasoning and word reading skills were below average. (Ex. P-2, unnumbered pp. 2, 7.) Nowhere in Dr. Boston's report does it indicate that [redacted] was administered a behavioral assessment. (See generally Ex. P-2.)

20.

Dr. Boston's report on the September 2022 Reevaluation concluded with the following observation:

> [redacted]s processing weaknesses appear to negatively impact her academic functioning in school. Her manner of functioning is characteristic of a student with a learning problem. Based on the present re-evaluation, it is suggested that [redacted] will benefit from specialized instruction and supports.

(Ex. P-2, unnumbered p. 7.)

E. September 2022 — IEP Eligibility Meeting

21.

Following [redacted]s reevaluation, records indicate that a meeting took place on September 13, 2022, to discuss [redacted]s eligibility for special education services. (Ex. P-3, p. 1; Ex. R-79.) [redacted] testified at the hearing that she did not attend this meeting; instead, she stated that [redacted], [redacted]s case manager, called [redacted] and "told [her] about the information," and then later emailed [redacted] a sheet to sign. (Tr. 69, 220-222 [[redacted] Test.].) The minutes from that meeting, however, state that [redacted] attended the meeting via Zoom along with [redacted] and a school psychologist, and that [redacted] provided input about [redacted]s performance in math. (Ex. R-81.) School records indicate the IEP team agreed on the final outcome, which found [redacted] eligible under the

SLD category. (Ex. R-90, Ex. R-91; see also Ex. P-3, p. 2.) [redacted] testified at the hearing that she never disagreed with the SLD eligibility. (Tr. 220 [[redacted] Test.].)

22.

At the hearing, the District proffered a "Special Education Eligibility Report," which has an electronic signature from [redacted] dated September 20, 2022 ("2022 Eligibility Report"). (Tr. 221 [[redacted] Test.]; Ex. R-79, R-90.) Under the question, "Does the child have other significant issues not covered in the previous questions (such as attendance, discipline, etc.?)", the "No" box was checked. (Ex. R-80.) The report noted that [redacted] "has the opportunity to come in for tutoring afterschool [*sic*], which she has done daily," though she still struggled with math. (Ex. R-81.) The section for parent input further stated that [redacted] had reported how [redacted] wants to succeed in school, though she "has the tendency to shut down when she feels frustrated and overwhelmed with schoolwork." (Ex. R-84; see also Tr. 234-235 [[redacted] Test.].) Additionally, the report stated [redacted] did not present any concerns with adaptive behavior, she presented with appropriate self-help skills, and she could communicate effectively with both adults and peers. (Ex. R-82, R-83.) The report concluded by stating that [redacted] demonstrated deficits that adversely affected her educational performance in the areas of academics and psychological processing. (Ex. R-90.)

23.

Regarding [redacted]s conduct, the 2022 Eligibility Report stated that [redacted] was "very distracted by her cell phone." (Ex. R-83.) However, the report did not identify any other behavioral concerns. Per the report's notes for the "Emotional/Behavioral" domain, dated September 12, 2022, teacher observations and input indicated that [redacted]s strengths included building and maintaining relationships with others, and exhibiting age-appropriate socio-emotional functioning. Under the section for emotional/behavioral weaknesses was the following note: "No significant

concerns indicated." (Ex. R-84.) Additionally, according to the notes for the "Social" domain, dated September 12, 2022, teacher reports and observations indicated that [redacted] was able to get along with her peers and adults, and that no concerns with social skills were indicated. (Ex. R-88.)

F. September 2022 — IEP Meeting

24.

Following [redacted]s eligibility determination, an IEP meeting took place sometime in late September 2022. The IEP documentation indicates the meeting took place on September 26, 2022, and the two school officials in attendance signed the IEP on that date. (Exs. R-2, R-15.) According to the meeting minutes, they were the only two people in the meeting; neither [redacted] nor [redacted] were listed as meeting participants. (Tr. 233 [[redacted] Test.]); Ex. R-15.) In her testimony, [redacted] stated she did not recall attending an IEP meeting on September 26, 2022. (Tr. 233 [[redacted] Test.].) Instead, she asserted that [redacted] would fill out the IEP and then speak with [redacted] one-on-one before the latter signed it. (Tr. 236-238 [[redacted] Test.]).

25.

On September 27, 2022, [redacted] electronically signed the IEP dated September 13, 2022 ("September 2022 IEP"). (Tr. 233-234 [[redacted] Test.].) She testified that she signed the document because she agreed with "certain things" in the IEP; however, she did not specify the provisions with which she disagreed. (Tr. 235 [[redacted] Test.].)[12]

[12] [redacted] testified that she did attend an IEP meeting on September 29, 2022, rather than September 26. (Tr. 69, 159, 220-221, 232, 237 [[redacted] Test.].) She stated she was told during this meeting that, due to a lack of data, the IEP team would "have to go based off of [[redacted]s] fifth grade IEP documentations because of the length of time they have to complete her IEP." (Tr. 69-70 [[redacted] Test.].) However, nothing in the evidentiary record corroborates this claim that an IEP meeting took place on September 29. Furthermore, the IEP team's purported statement to [redacted] appears more consistent with the decision made on ***July*** 29, 2022, to offer IEP services that were "comparable" to the ones [redacted] received as a fifth-grader at Winn Holt. (Compare Ex. P-14.)

26.

According to the September 2022 IEP, as proffered by the District during the hearing,[13] [redacted] was to be served in the "interrelated" program. (Ex. R-14.) She would be in the co-taught setting for language arts and science, and in the resource setting for math and social studies. (Ex. R-3, R-14.) The IEP described [redacted]s strengths as getting along with her peers, asking for help when needed, and participating in class discussions. The IEP also noted her strengths in reading comprehension and written expression. [redacted]s identified needs included work on math concepts and applications, as "it is difficult for her to understand the information, even after frequent repetition." (Ex. R-3.) Regarding parental concerns, the IEP noted that [redacted] mentioned [redacted] "has the tendency to shut down when she feels frustrated and overwhelmed with school work." (Ex. R-4.) Ultimately, the IEP stated that [redacted] would benefit from "specialized instruction and extended time to assist with her struggles to retain and retrieve information," and she was given goals and objectives related to mathematics. (Exs. R-4, R-7.)

27.

Regarding behavior and conduct, the September 2022 IEP included a teacher report that [redacted]s phone often could be a distraction, though she usually would put the phone away after redirection. (Ex. R-3.) The IEP further stated that [redacted] did not have behavior that impeded her learning or the learning of others, and that a Behavioral Intervention Plan ("BIP") was not required. (Ex. R-9; see also Tr. 52 [Williams Test.].)

[13] [redacted] objected to the IEP at the hearing, stating that the document was "not familiar" to her. (Tr. 335.) The objection was overruled. Given that the document includes [redacted]s electronic signature, the Court does not find [redacted]s assertion credible.

28.

As for accommodations, the IEP listed seven to be applied in all academic/core classrooms: (i) allow extra time to respond; (ii) break material into manageable parts; (iii) check work frequently to ensure understanding; (iv) extra time if student effort is shown; (v) preferential seating; (vi) provide immediate feedback; and (vii) repeat directions as needed. (Ex. R-11.) The IEP also listed the following three testing accommodations, applicable to all academic/core classes: (i) frequent monitored breaks; (ii) extended time; and (iii) "small group." (Ex. R-11, R-12.)

29.

Under the heading "Medical Limitations/Concerns," the September 2022 IEP stated the following: "[recently fell which resulted in injuries to her lower back and knee." (Ex. R-14.) No accommodations related to s injuries are listed in the IEP, nor does the IEP mention anything pertaining to s bathroom visits. (Exs. R-2 through R-16.)

G. <u>September and October 2022 — Math Tutoring</u>

30.

In September and October 2022, received after-school teaching once a week from , her math teacher. (Tr. 252, 272 [Test.]; Tr. 283 [Anderson Test.]; <u>see also</u> Ex. R-137.) reported seeming more productive during these 30-minute tutoring sessions. (Tr. 283 [Anderson Test.]; <u>see also</u> Ex. R-137.) According to during this time s math grades were "great" during this period, and she was understanding the math.[14] (Tr. 273 [Test.].)

[14] The September IEP mentioned that was attending tutoring "daily." (Ex. R-3.) However, nothing else in the evidentiary record suggests attended tutoring that frequently.

G. October 2022 — Incident Involving Brittany Anderson

31.

On or around October 17, 2022, [redacted] was involved in an incident with [redacted] (Tr. 89-90 [redacted] Test.]; Tr. 285-292 [Anderson Test.]; Ex. P-8, unnumbered p. 3; Ex. P-27.) [redacted] taught [redacted] in the student's two resource math courses, Algebra I and Algebra I Strategies. (Tr. 89-90 [redacted] Test.]; Tr. 282 [Anderson Test.]; Ex. P-5.) Footage from a hallway camera at [redacted] captured the incident. (Tr. 38-45 [Williams Test.]; Ex. P-27.) In the footage, which lasts about 20 seconds, [redacted] and [redacted] are seen leaving a classroom and entering a hallway. [redacted] attempts to walk away, and [redacted] steps in front of her several times. At one point after [redacted] steps in front of [redacted] the two of them bump up against some lockers, and there appears to be some physical contact between them, though its exact nature could not be ascertained from the video. [redacted] then walks around [redacted] who briefly holds [redacted]s arm before [redacted] walks farther away. (Ex. P-27.)

32.

Accounts differ on what precisely transpired during this interaction. According to [redacted] [redacted] knew about [redacted]s bathroom needs, and the teacher was not allowing [redacted] to use the bathroom. (Tr. 73 [redacted] Test.]; Ex. P-7, Meeting Notes, p. 1.) [redacted] and Mr. Williams contend that during the incident, [redacted] blocked and physically obstructed [redacted] almost kneed her, and grabbed her arm. (Tr. 38-39, 43, 45 [Williams Test.]; Tr. 175 [redacted] Test.].) [redacted] in turn, maintains she did not deny [redacted] the opportunity to use the bathroom, nor did she block, hit, or hold back [redacted] (Tr. 291-292, 295 [Anderson Test.].) Instead, [redacted] testified that [redacted] had arrived in class late, had gotten upset and "started to cause a scene," and then asked to use the restroom. (Tr. 285 [Anderson Test.].) [redacted] testified that she replied yes, but that first

[redacted] had to see the assistant principal so he could escort her. (Tr. 285, 286, 295 [Anderson Test.].) When she saw [redacted] walking toward the bathroom instead of the assistant principal's office, [redacted] "stood in the middle of the hallway" while [redacted] walked around her. (Tr. 286 [Anderson Test.].)

G. October 28, 2022—504 Meeting

33.

A 504 review meeting took place on October 28, 2022. (Tr. 73, 104 [[redacted] Test.]; Ex. P-7, IAP, p. 1.[15]) Attending the meeting were [redacted]; [redacted], the school counselor; [redacted], the 504 coordinator; [redacted], an Instructional Technology Innovation Coach and Visual Arts teacher; [redacted]s case manager; and [redacted]s math teacher. (Ex. P-7, IAP, p. 4 and Meeting Notes, unnumbered p. 1.)

34.

According to notes from this meeting, [redacted] expressed her concern about [redacted] being able to use the bathroom as needed at school and cited the incident with [redacted] earlier that month. (Ex. P-7, Meeting Notes, p. 1.) Also included in the packet of documents from this 504 meeting was a physician's note dated October 15, 2022, stating that [redacted] should be allowed to use the restroom as needed. (Tr. 73 [[redacted] Test.]; Ex. P-7, Physician's Evaluation dated Oct. 15, 2022; Ex. P-15.)

[15] Exhibit P-7 consists of seven distinct documents related to [redacted]s 504 plan and accommodations; all seven documents were tendered and admitted into the record. Those documents are the Individualized Accommodation Plan, or IAP; Meeting Notes from October 28, 2022; an Email dated October 10, 2022; a Physician's Excuse Form, dated October 21, 2022; a Physician's Evaluation dated October 15, 2022; another Physician's Evaluation dated August 20, 2022; and a Meeting Invitation.

35.

Based on this meeting, a revised 504 IAP was created ("October 2022 IAP"). (Ex. P-7, IAP.) [redacted] retained her previous 504 accommodations, with the following additions and changes:

- [redacted] would have the ability to move if she needed to prop up her leg;
- [redacted] could leave class two minutes early to arrive at the next class on time;
- [redacted] could pick up an elevator pass at the clinic when needed, with the pass returned at the end of the day; and
- Regarding homework, [redacted] would be allowed to turn in assignments the next day if she misses class, and she could speak with [redacted] regarding any additional time needed.

(Tr. 71 [redacted] Test.]; Ex. P-7, IAP, pp. 1-2.)

36.

At the hearing, [redacted] conceded that the October 2022 IAP did not include an accommodation for [redacted] to use the bathroom upon request. (Tr. 231-232 [redacted] Test.]; see generally Ex. P-7.) [redacted] further testified that the 504 coordinator had advised her there was no need to put the bathroom request in the IAP because [redacted] allows all students to use the restroom. (Tr. 72-73 [redacted] Test.].)

H. October 31, 2022 — IEP Amendment

37.

An IEP amendment meeting took place at [redacted]s request on October 31, 2022 ("October 2022 IEP") so that [redacted] could be moved from the resource math classroom taught by [redacted] to co-taught math classes taught by another teacher. (Tr. 76, 90, 112, 239, 268 [redacted] Test.]; Ex. P-3, pp. 1, 15; Ex. P-5.) [redacted] testified that she wanted [redacted] removed from [redacted] classroom because she did not feel her daughter was safe. She stated she also agreed with [redacted] the assistant principal, and [redacted] that "it will be good for [redacted] to go to a co-taught setting."

(Tr. 75 [Test.]). The IEP team accepted the change, and subsequently moved classes at the end of October 2022. (Tr. 76, 90, 239, 268 [Test.].)

38.

Per the minutes from the October 2022 IEP meeting, the IEP team reviewed and discussed s IEP accommodations. (Ex. P-3, p. 16.) However, no changes were made from the September 2022 IEP, and no accommodation was added regarding bathroom use. (Ex. P-3, p. 10.) As for s behavior and conduct, the October IEP again reported there were no behaviors that impeded the learning of or others and a BIP was not needed. (Ex. P-3, p. 8.) The meeting minutes also did not mention requesting a BIP for (See generally Ex. P-3.)

39.

The October 2022 IEP listed s then-current grades for the ongoing semester at , which ranged from a low of 51 in Biology to a high of 81 in Algebra I Strategies. (Ex. P-3, p. 2.)

I. November 2023 — Text Exchanges

40.

contended that she requested a BIP for several times during s fall 2022 semester at , including once to in September 2022 and after the October 2022 incident with [16] (Tr. 222; Ex. P-8, unnumbered p. 3.) However, nothing else in the evidentiary record corroborates this testimony, with the exception of text

[16] testified that, when she asked about the BIP in September 2022, responded that did not need a BIP because was not showing any behavior problems. (Tr. 222 Test.].) also stated that the assistant principal, told her at some unspecified time that a BIP would be put in place. (Tr. 66 [Test.].) The Court gives this testimony little weight, as it contains hearsay that is not corroborated by any other evidence.

messages between [redacted] and [redacted] during November 2022, in which the former inquired about a BIP. According to [redacted]

- [redacted] texted on November 3, 2022, that she would send a form for the BIP and that [redacted] would first have to be evaluated for a few weeks.
- Four days later, on November 7, 2022, [redacted] again asked [redacted] about the BIP information, to which [redacted] responded that she would send the information by email.
- Three days later, on November 10, 2022, [redacted] again inquired by text about the BIP information, and [redacted] responded that she had sent the information the day before, and that she would check.

(Tr. 80, 101-103, 107-112 [[redacted] Test.]; Tr. 31 [Williams Test.]; Exs. P-16, P-18, P-19, P-20.) [redacted] confirmed that the BIP documents in question were emailed to her on November 10, 2022. (Tr. 80 [[redacted] Test.]; Ex. P-8, p. 3.) Nothing in the evidentiary record identifies exactly what the BIP documentation in question included, except for the mention of a form. The record also is silent as to what actions [redacted] or the IEP took—or did not take—after [redacted] received the documents on November 10.

41.

Also during these text exchanges in November 2022, [redacted] asserted to [redacted] that [redacted] was not receiving her testing accommodations from all her teachers. (Exs. P-18, P-19.)

J. <u>November 17, 2022 — IEP Meeting</u>

42.

Another IEP meeting took place on November 17, 2022, per [redacted]s request ("November 2022 IEP"). (Tr. 240-241 [[redacted] Test.]; Ex. R-34.) [redacted] asked for the meeting based on concerns that [redacted] was not receiving her IEP supports and accommodations. (Tr. 242 [[redacted] Test.]; Ex. R-36.) However, apart from [redacted]s November 2022 text message about missing testing accommodations, nowhere in the evidentiary record are these alleged missing accommodations

specifically identified or addressed in further detail. [redacted] who attended the meeting, also raised concerns about [redacted]s teachers purportedly "being out of certification" and about [redacted]s continued struggles in math and her reading scores. (Tr. 240-242 [[redacted] Test.]; Exs. R-36, R-50.) Additionally, [redacted] expressed concerns about [redacted]s restroom breaks, and the IEP team spoke about [redacted]s behavior. (Tr. 241 [[redacted] Test]; Ex. R-36.)

43.

As a result of this meeting, the IEP team agreed to add a "Behaviorally Related" accommodation, whereby [redacted] could request more frequent monitored breaks in all academic/core classes "when she is feeling anxious and/or overwhelmed in the classroom setting." (Tr. 244 [[redacted] Test.]; Exs. R-44, R-50.) Otherwise, the November 2022 IEP once again stated [redacted] had not exhibited any behavior that impeded her learning or the learning of others, and also that a BIP was not required.[17] (Ex. R-42.) As for [redacted]s remaining concerns, the minutes from the IEP stated that the team members "took a moment to address said concerns," though no specific actions related to these concerns were included in the IEP. (Ex. R-50.)

K. <u>January 2023 — Incident with [redacted]</u>

44.

Sometime in January 2023, an alleged incident occurred between [redacted] and [redacted], her teacher in the Biology co-taught class. The only evidence about the nature of this incident comes from [redacted] herself.[18] (Tr. 77-79, 91-93 [[redacted] Test.].) According to [redacted] on or around January 6,

[17] [redacted] testified that [redacted] was supposed to bring BIP documentation to the IEP, but he never arrived. (Tr. 243 [[redacted] Test.].) However, [redacted] did not specify what this BIP documentation was or how it differed from the documentation she received from [redacted] on November 10, 2022.

[18] [redacted] also presented a version of events in a written complaint, admitted as Exhibit P-8. While she testified that she wrote the complaint in January 2023—the same month as the incident—the document itself is dated March 14, 2023, after she had filed the Complaint in this matter. (Ex. P-8.) [redacted] could not explain why the document was dated March 14. (Tr. 116-118 [[redacted] Test.].) Given this discrepancy, the Court gives this written version of events little weight.

2023, [redacted] asked [redacted] to leave the classroom to use the bathroom, and [redacted] refused to let her go. (Tr. 78, 79, 92 [[redacted] Test.].) [redacted] texted [redacted] that [redacted] would not let her go to the bathroom, that she was "starting to hurt," and that she felt dizzy. (Tr. 91-93 [[redacted] Test.]; Exs. P-22, P-23.) [redacted] texted [redacted] that she would contact [redacted] (Tr. 78 [[redacted] Test.]; Ex. P-22.) At that point, [redacted] alleged that [redacted] intentionally bumped her. The school resource officer filed charges of simple battery. (Tr. 78 [[redacted] Test.].)

45.

According to [redacted] she met with [redacted] and [redacted] an assistant principal over special education, on January 11, 2023. (Tr. 68, 79 [[redacted] Test.].) Also around that time, [redacted] was presented by the school with a "7 Step Behavior Correction Plan" ("Behavior Correction Plan"),[19] which included the following:

> [redacted] has had interactions with teachers and staff where she has used profanity and language that has the effect of undermining the authority of the school employee or distracting staff and/or students from the learning environment. Physical contact has been made with staff that were of an insulting or provoking nature. With regards to academics, [redacted] has a willingness to learn yet struggles with mastering the content and would benefit from our tutoring program.

(Tr. 80 [[redacted] Test.]; Ex. P-13.[20]) A handwritten statement at the bottom stated as follows: "In an effort to holistically support [redacted] we are placing her on a Behavior Correction Plan per the principal's recommendation." (Ex. P-13.) The Behavior Correction Plan also listed four instances where [redacted] purportedly violated student conduct rules on September 21, 2022; October 2022; November 29, 2022; and January 6, 2023. (Ex. P-13.) The nature of these four violations was not described, though the latter date presumably relates to the alleged incident with [redacted] (Ex. P-

[19] According to the document, a Behavior Correction Plan "will identify specific behavior areas, outline interventions, and state what is expected of the student to correct the inappropriate behavior." (Ex. P-13.)

[20] At the hearing, the District raised a hearsay objection to the admittance of the Behavior Correction Plan, identified as Exhibit P-13. The Court overruled the objection, with the caveat that any hearsay will go to the weight given to those statements. (Tr. 157-158.)

13.) According to the plan, [redacted] was to receive one day of out-of-school suspension for the January 6 incident. (Tr. 79 [[redacted] Test.]; Ex. P-13.)

46.

[redacted] testified that she refused to sign the Behavior Correction Plan about the suspension because she had been requesting a BIP for months. (Tr. 79-80; Ex. P-13.) Eventually, [redacted] was referred to a school tribunal, and in January 2023 she was suspended from school for one year. (Tr. 58, 79, 81, 260-261 [[redacted] Test.].) [redacted] has appealed to the local board of education.[21] (Tr. 261 [[redacted] Test.]).

L. Additional Testimony

i. Petitioner [redacted]

47.

At the hearing, [redacted] asserted the District had "dropped the ball" and failed her daughter in numerous ways. (Tr. 65, 70, 72, 190.) [redacted] testified that [redacted] was an A student and had great conduct while in the private school, due to that school's supportive teachers. (Tr. 210, 267.) However, when [redacted] re-entered the District, "it was like a repeating pattern in what they did to her in the fifth grade." (Tr. 267.)

48.

She identified the "big issue" as being the teachers' refusal to allow bathroom breaks, which she maintained had been discussed in the 504 meetings. (Tr. 73, 183, 274.) She further stated that, while the school did provide an elevator pass, it failed to provide the other 504

[21] It is not fully clear to the Court exactly why the matter was referred to the tribunal. [redacted] testified that the principal told her it was because [redacted] did not sign the Behavior Correction Plan. (Tr. 81- 82 [[redacted] Test.].) However, nothing else in the evidence corroborates this hearsay statement. Additionally, [redacted] testified she was told that [redacted]s suspension set up a manifestation determination. (Tr. 81 [[redacted] Test.].) As clarification, this proceeding is not an appeal of any such manifestation determination, pursuant to 34 C.F.R. § 300.530(e) and § 300.532(a).

accommodations such as allowing [redacted] to prop up her leg, and that she learned this information from [redacted] (Tr. 229-230.) [redacted] did not testify at the hearing.

49.

Additionally, [redacted] testified that [redacted] was not receiving other accommodations in her classes. (Tr. 76, 156.) In particular, [redacted] cited the presence of a substitute co-teacher in [redacted]s science class, from August to December 2022, as the reason [redacted] did not receive her accommodations in that class. (Tr. 666, 88; Ex. P-4; see also Tr. 35 [Williams Test.].) [redacted] stated she had emailed teachers and spoken with assistant principals about these missing accommodations, to no avail. (Tr. 65-66, 77, 193.) She did not offer any corroborating evidence of these emails or other contact attempts.

50.

In her testimony, [redacted] gave few specific examples of when [redacted] failed to receive accommodations. The one exception is [redacted]s claim that [redacted] the Biology teacher, purportedly gave [redacted] a zero instead of giving her extra time to complete a project after being out sick. (Tr. 251-252, 266-267.) Yet apart from [redacted]s testimony, nothing else in the evidentiary record supports this claim.

51.

As for the reevaluation process in September 2022, [redacted] asserted the District failed to recognize "that something was going on with [redacted] based on the claims made in the 2019 due process complaint, as outlined in the attorney's memorandum. (Tr. 167; see also Ex. P-1.) However, [redacted] stated later in her testimony that [redacted] did not "have a mental problem." (Tr. 257.) [redacted] also testified that that [redacted]s case manager "kept giving [her] the run-around" in response to [redacted]s queries about a BIP. (Tr. 80.)

52.

Regarding [redacted]s academic performance, [redacted] testified that, as the 2022 fall semester went on, [redacted] became frustrated with school "because she wasn't understanding her work." (Tr. 70.) She ended up failing math and science. (Tr. 76, 156, 189, 266.) [redacted] further contended the District failed to provide additional tutoring to [redacted] through its S.H.I.E.L.D. program. (Tr. 149-151, 153, 265; see also Ex. P-12.) [redacted] conceded that [redacted] recovered her failing grades via credit recovery, earning Bs. (Tr. 260.) However, she maintained that the need for credit recovery itself indicates the school "failed" her daughter, and that her daughter is doing much better while being homeschooled with one-on-one support, earning a 90 in math and an 80 in Biology. (Tr. 189-191, 266.)

53.

[redacted] asserted that [redacted]s co-taught math classroom, which she began attending after October 2022, did not meet her academic needs and caused her to fail math. (Tr. 76, 152, 269.) She stated she had asked for another small-setting math classroom for [redacted] but that [redacted] resource class was the only one at [redacted]. (Tr. 76, 190.)

54.

[redacted] noted that [redacted] had a long-term substitute co-teacher in her Biology class, [redacted], from August through December 2022. (Tr. 77, 269; see also Ex. P-4.) However, she did not testify about [redacted] certifications. Additionally, [redacted] asserted that [redacted], [redacted]s Visual Arts teacher, was not a special education teacher and was "out of compliance." (Tr. 258.) Yet [redacted] did not explain how she knew this, nor does any evidence in the record corroborate this statement.

55.

[redacted] strongly disagreed with [redacted]s one-year suspension, calling it "very disturbing." (Tr. 82.) She expressed that she believed it was unfair for [redacted] to be punished for the incident involving [redacted] while the District took no action against [redacted] conduct in the other incident. (Tr. 82, 83.)

ii. [redacted]

56.

[redacted]. [redacted]s stepfather, has an M.A. degree in special education and an M.A. degree in instructional education. (Tr. 15, 16, 52.) He is certified in Georgia to teach "P" through 12th grade in "social cognitive" as well as general curriculum; sixth through 12th grade in social studies; and sixth through 12th grade in political science. (Tr. 15-16.) [redacted] is not a school psychologist, though he maintained he was "qualified" to read a psychological report in his role as a special education teacher. (Tr. 47-48.)

57.

Mr. Williams testified that [redacted]s January 2017 BASC-3 results identified clinically significant problems with aggression, conduct, and learning. Hence, those results, plus other documentation showing [redacted]s conduct from 2018, should have "triggered" the District to complete a Functional Behavioral Assessment ("FBA") on [redacted] when she re-enrolled in 2022.[22] (Tr. 16, 18, 23-24, 30, 52.) [redacted] further stated that an FBA "would've allowed [the District] and the family to adequately see if there was a need for a BIP or any type of behavior plan to be put in place." (Tr. 16-17.)

[22] Mr. Williams also referred to the "Internalizing Problems" score from the BASC-3, stating that such behavior related to a child's aggression and impulsivity, and that impulsivity "sounds like someone that needs a behavior plan or at least needs an FBA . . . ." (Tr. 17.) However, [redacted] was reported to be "Within Normal Limits" with regards to "Internalizing Problems." (See Ex. P-2, unnumbered p. 2.)

58.

[redacted] also contended that, even though [redacted] already had been eligible for special education services under the SLD category, the District was not "absolved" from identifying another disability, such as an emotional or behavior disorder. (Tr. 19-22.) He asserted that learning problems such as [redacted]s "can be manifested in behavior," because the child can become frustrated. (Tr. 19.)

59.

Regarding the 504 meetings in 2022, [redacted] testified he was present at both meetings,[23] and that both he and [redacted] were told that [redacted] would be allowed to go to the bathroom. (Tr. 50-51.) [redacted] also stated that [redacted] had an unspecified substitute teacher for the "whole semester," and that this substitute did not have access to [redacted]s accommodations. (Tr. 20.)

iii. [redacted]

60.

[redacted] is [redacted]s grandmother. (Tr. 54.) She has been in [redacted]s life since her birth. (Tr. 54.) [redacted] testified that [redacted] experienced "a tremendous trauma" when she was suspended from school in January 2023, and that she no longer trusts people. (Tr. 57-59.)

iv. [redacted]

61.

[redacted] is a special education teacher at [redacted]. She is certified to teach in the state of Georgia and received GATE certifications in Mathematics I and II. (Tr. 290,

[23] [redacted] is not listed as an attendee on the documentation for the August 2022 504 meeting. (Ex. P-6, IAP, p. 4 and Minutes, unnumbered p. 1.)

296.) The 2022-2023 school year was her first year at [redacted], where she taught Algebra I and Algebra I Strategies.[24] (Tr. 281-282, 287.)

62.

[redacted] taught [redacted] in Algebra I and Algebra I Strategies from August through October 2022. (Tr. 282, 287.) She described [redacted] as being quiet, keeping to herself, and being "nice, kind, and pleasant when she first entered the classroom." (Tr. 282-283.) [redacted] stated she did not have any disciplinary problems with [redacted] prior to the October 2022 incident. (Tr. 283-284, 287.)

63.

Regarding [redacted]s performance in math, [redacted] testified the student "had a lot of struggles, including with basics like multiplication. (Tr. 283.) [redacted] "didn't really seem to take to the teaching" or participate in class. (Tr. 283.)

iv. Thomas Owen

64.

Thomas Owen is the District's director of special education support services. (Tr. 304; see also Ex. R-165.) Prior to filling this role in 2022, he served as the District's director of psychological services for approximately 13 years, during which he hired, developed, and supervised the District's school psychologists. (Tr. 321-322; see also Ex. R-165.) Mr. Owen has an associate degree in natural and physical science, and a bachelor's degree in psychology. (Tr. 303; see also Ex. R-167.) He obtained a master's degree in school psychology and an educational specialist degree in school psychology from the College of William and Mary. (Tr. 303; see also Ex. R-167.) Mr. Owen has worked as school psychologist for 33 years, with 26 of those years at

[24] Algebra I Strategies is an elective to support students in the main algebra course. (Tr. 296 [Anderson Test.]).

the District. (Tr. 303-304.) In that time, Mr. Owen has completed roughly 2,000 school-based psychological evaluations for students ages 2 to 20, and he has attended roughly 4,000 IDEA eligibility meetings and 1,000 IEP meetings. (Tr. 305-306.) He is a certified school psychologist in the state of Georgia, and he is a member of the Georgia Association of School Psychologists, the National Association of School Psychologists, and the Student Support Team Association of Georgia Educators.[25] (Tr. 304.)

65.

At the hearing, Mr. Owen testified that a school-based evaluation's purpose is to "try to provide a current level of functioning for a student to identify strengths and weaknesses . . . so to better inform instruction." (Tr. 305.) Evaluators are trained to review a student's full record in depth. (Tr. 324.) In [redacted]s case, the September 2022 evaluation conducted by Dr. Boston was a "reevaluation," in that [redacted] already had been found eligible for special education services before leaving the District but had withdrawn for about three years. Upon [redacted]s return in 2022, she still remained eligible. (Tr. 310.)

66.

Though Mr. Owen did not conduct the reevaluation, he testified he had reviewed Dr. Boston's report and did not see any "red flags" pertaining to [redacted]s eligibility finding. (Tr. 312.) Mr. Owen asserted that several sections of the September 2022 Reevaluation report reflected a consideration of [redacted]s social-emotional needs, including the "Social" and "Emotion and Behavior" domains, as well as teacher observations and parent input. (Tr. 313-314.) The student interview also acts as a "social-emotional screener." (Tr. 311.) Mr. Owen opined that, based on

[25] At the hearing, Mr. Owen was qualified as an expert in school psychology, in performing and interpreting evaluations in the school setting, in supervising school psychologists, and in identifying students with disabilities. (Tr. 306-307.)

his expertise, he did not believe [redacted] should have been further evaluated for emotional-behavioral disorder, or for any other disability. (Tr. 314-315.)

67.

On cross-examination, Mr. Owen was asked why [redacted] had not been administered a BASC-3. Mr. Owen responded that, while he did not conduct the reevaluation himself, he could presume one was not completed because there was no indication one was needed. He stated that a BASC-3 is only completed for a student with concerns about behavior or emotional status. (Tr. 317.)

v. Marlena Wragg

68.

Marlena Wragg serves as the director of compliance for the District who oversees all IDEA-related matters. (Tr. 327.) She also serves as the District's 504 coordinator. (Tr. 328.) Prior to her director role, she served as a special education teacher, a special education department chair, a special education assistant principal, and a coordinator for compliance. Ms. Wragg has a special education certificate from the University of Georgia, a master's degree in special education, and a specialist degree in educational leadership. (Tr. 327.) Over the course of her career, Ms. Wragg has attended more than 500 IEP meetings, approximately 150 eligibility meetings, and more than 100 meetings for 504 accommodations. (Tr. 329.) She has given presentations at the national level on such topics as Section 504.[26] (Tr. 330-331.)

69.

With regard to physician recommendations for an accommodation, Ms. Wragg testified that the IEP or 504 team will discuss it as a team and "review whether or not it needs to be put in place based on what they're seeing in the educational setting." (Tr. 339.) She confirmed that

[26] At the hearing, Ms. Wragg was qualified as an expert in writing and implementing IEPs and 504 plans for children with disabilities. (Tr. 330.)

bathroom use was not included in either the 504 plan or the IEP for [redacted] (Tr. 342.) She further stated that, following a review of the October 2022 incident with [redacted] she had "no concerns" about implementing [redacted]s existing 504 plan. (Tr. 339-340.)

70.

Mr. Wragg testified that, in reviewing [redacted]s disciplinary history while at [redacted] Gwinnett, nothing "stood out" as abnormal for a high schooler. (Tr. 341.) Moreover, nothing the 504 plan or the IEP "stood out to [her] that would warrant a definitive need for an FBA." (Tr. 343.)

III. CONCLUSIONS OF LAW

A. General Law

1.

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

2.

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

see also Ga. Comp. R. & Regs. 160-4-7-.12(3)(n) ("The party seeking relief shall bear the burden of persuasion with the evidence at the administrative hearing."). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

3.

Claims brought under the IDEA are subject to a two-year statute of limitations. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.507(a)(2). Here, because the Petitioners' Complaint was filed on March 8, 2023, only IDEA violations occurring within the two years prior to that date are at issue in this proceeding. Id.

4.

This Court's review is limited to the issues the Petitioners presented in their due process complaint. 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d); Ga. Comp. R. & Regs. 160-4-7-12(j). See also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 (E.D.N.Y. 2012); Co. of San Diego v. Ca. Special Educ. Hearing Office, 93 F.3d 1458, 1465 (9th Cir. 1996). The Petitioners may raise no other issues at the due process hearing unless the District agrees or acquiesces. See 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).

5.

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

> transportation, and such developmental, corrective, and other supportive services (including . . . psychological services . . .) as may be required to assist a child with

> a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

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

6.

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

7.

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

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

(III) caused a deprivation of educational benefits.

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

8.

Important procedural rights for the student and parents include the right to give informed consent and the right to participate in the decision-making process. See 20 U.S.C. § 1415(b), (f). Parents also have the right to be members of "any group that makes decisions on the educational placement of their child." Id. § 1414(e); 34 C.F.R. § 300.322. In Weiss, the Court held that where a family has "full and effective participation in the IEP process," the purpose of the procedural requirements is not thwarted. Weiss, 141 F.3d at 996.

9.

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

10.

Also under the second prong of the Rowley test, a school district is not required to provide an education that will "maximize" a disabled student's potential. Instead, the IDEA mandates only "an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction." Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1312 n.1 (11th Cir. 2003) (quotation and citations omitted); see also JSK v. Hendry Cnty. Sch. Bd., 941 F.2d 1563, 1573 (11th Cir. 1991); Doe v. Ala. State Dep't of Educ., 915 F.2d 651, 655 (11th Cir. 1990). However, as Endrew F. made clear, this standard is "more demanding than the 'merely more than *de minimis'* test." Endrew F., 137 S. Ct. at 1000.

11.

Furthermore, the IDEA does not require a school district to "guarantee a particular outcome." W.C., 407 F. Supp. 2d at 1359 (citing Rowley, 458 U.S. at 192). In determining whether a student has received adequate educational benefit, the Eleventh Circuit has noted the courts should pay "great deference" to the educators who developed the IEP. W.C., 407 F. Supp. 2d at 1359 (citing JSK, 941 F.2d at 1573.

B. Complaint's Claims for Relief

12.

From the Petitioners' Complaint, the Court has identified the following claims:[27]

i. [redacted]s co-teaching setting lacked a certified special education teacher who could

[27] Throughout the hearing, the Petitioners presented arguments and evidence pertaining to claims not otherwise presented in their Complaint. (See Case File, OSAH Form 1 and attachments, filed Mar. 8, 2023.) These claims alleged, *inter alia*, that the District failed to offer [redacted] additional tutoring; the District mishandled the October 2022 incident with [redacted] and improperly suspended [redacted] for one year; and the District failed to offer a different resource math class for [redacted] after she left [redacted] class, among others. As the District never agreed to the inclusion of these claims, the Petitioners are not eligible for relief on these claims in this proceeding. See 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).

Furthermore, while the Petitioners noted on the complaint form that they were alleging a "placement" violation, the claims themselves do not describe a specific challenge to [redacted]s placement, apart from the general assertion that the District's failure to properly identify and evaluate [redacted] resulted in her suspension.

fully implement [redacted]s accommodations.

ii. [redacted] did not receive accommodations from all her teachers during her first semester at [redacted]. This specifically pertained to the Biology class, whose long-term substitute did not have access to [redacted]s IEP accommodations.

iii. [redacted] went without an IEP from August 3, 2022, to September 26, 2022.

iv. The District delayed implementing a BIP.

v. The District did not properly identify a secondary disability for [redacted] The September 2022 Reevaluation also was flawed and misdiagnosed [redacted] Namely, the evaluation did not consider all the records in [redacted]s file, including those from as early as 2018; did not use "best practices"; and did not perform a "full battery of tests."

vi. The District failed to conduct an FBA for [redacted] despite documentation from as far back as 2018 showing that one was needed due to behavioral incidents.

The Petitioners have asked this Court to order the following relief: (a) [redacted] who is currently suspended, should be allowed to return to [redacted] Gwinnett; (b) the District must conduct a more thorough evaluation using both new and old data; and (c) the District must "expunge" [redacted]s record.

C. Motion for Involuntary Dismissal

13.

The Court first shall address the District's motion for involuntary dismissal, to determine whether any or all of the Complaint's claims should be dismissed based on the Petitioners' failure to carry their burden after presenting their case-in-chief. Ga. Comp. R. & Regs. 616-1-2-.35. The Georgia Civil Practices Act ("CPA") also provides for involuntary dismissal. See O.C.G.A. § 9-11-41(b). Under the case law interpreting Section 41(b) of the CPA, a court presiding in a non-jury trial is not required to construe the evidence most favorably to the plaintiff. Alexander v. Watson, 271 Ga. App. 816, 817 (2005) (holding that a trial court is not required to construe the evidence in the plaintiff's favor because the trial court acts as factfinder); see also Ivey v. Ivey, 266

Ga. 143, 144 (1996) ("Since the [trial] court determines the facts as well as the law, it necessarily follows that the motion may be sustained even though plaintiff may have established a prima facie case.") (citation omitted).

14.

At the close of the Petitioners' case-in-chief, the District argued that the Petitioners presented "little to no direct evidence" in support of their allegations. Specifically, the District asserted that no evidence had been presented to show that the 504 plan included bathroom accommodations, or that either the 504 plan or the IEP were not properly implemented.[28] Upon review of the Petitioners' evidence, the Court concludes that four of the Petitioners' six claims fail outright for lack of sufficient evidence. These four claims are addressed below.

i. Claim: [redacted]s co-teaching setting lacked a certified special education teacher who could fully implement [redacted]s accommodations.

15.

Every school district must establish and maintain qualifications to ensure that the personnel needed to carry out the IDEA are "appropriately and adequate prepared and trained" and "have the content knowledge and skills to serve children with disabilities." 34 C.F.R. § 300.156(b). Specifically, an individual employed as a public school special education teacher must hold "full State certification as a special education teacher . . . or [have] passed the State special education teacher licensing examination, and hold[] a license to teach in the State as a special education teacher." Id. § 300.156(c)(i). Additionally, a school district must ensure that an IEP is accessible to every regular education and special education teacher for that student. Id. § 300.323(d)(1).

[28] (See Tr. 212-213.)

16.

Here, the full extent of the Petitioners' evidence related to this claim consists of the following: (i) testimony from [redacted] that [redacted], a substitute in [redacted]s co-taught Biology class, was "out of certification" and did not have access to [redacted]s accommodations; and (ii) [redacted] testimony that an unspecified substitute teacher did not have access to [redacted]s accommodations. Neither witness explained how they knew about the teacher or teachers' certification status or accommodation access, nor did the Petitioners present additional evidence corroborating these witnesses' assertions. Such conclusory, unsubstantiated claims fall far short of meeting the Petitioners' burden in this matter. See Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1217 (11th Cir. 2000) (stating that "conclusory allegations without specific supporting facts have no probative value"); N.B. v. Demopolis City Bd. of Educ., No. 12-00012-KD-C, 2012 U.S. Dist. LEXIS 173793, at *43 (Ala. S.D. Dec. 7, 2012) (noting that the IDEA plaintiff "offers little in the way of evidence to support his conclusory statements" that an IEP was deficient). This claim, therefore, should be dismissed.[29]

ii. Claim: [redacted] did not receive accommodations from all her teachers during her first semester at [redacted]. This specifically pertained to the Biology class, whose long-term substitute did not have access to [redacted]s IEP accommodations.

17.

At the hearing, the Petitioners' evidence touched upon two types of accommodations for [redacted] classroom and testing accommodations listed in her IEP, and accommodations for her lower-back and knee injury as outlined in her 504 plan. While the claim in the Complaint specifically refers to IEP accommodations, a significant portion of the Petitioners' case-in-chief focused on

[29] [redacted] also had testified that [redacted], [redacted]s Visual Arts teacher, was not a special education teacher and was "out of compliance." Nothing in the evidentiary record indicates that [redacted] was a substitute, nor does the evidence indicate that [redacted] received special education services for the Visual Arts class. Furthermore, as with the other testimony, [redacted]s statements here are conclusory in nature and unsubstantiated by any other evidence.

purported shortfalls with the accommodations for [redacted]s injuries. Thus, to be thorough, the Court shall examine this claim as it concerns both 504 and IEP accommodations.

a. 504 accommodations

18.

At the hearing, [redacted] testified that the District failed to provide [redacted] her 504 accommodations, such as allowing her to prop up her leg. But even assuming, *arguendo*, that the Petitioners were referencing 504 violations in their Complaint, this Court cannot address such violations here. This Court's jurisdiction in an IDEA due process hearing does not extend to causes of action that arise under other federal laws, including Section 504 of the Rehabilitation Act of 1973.[30] See Atlanta Indep. Sch. Sys. v. S.F., No. 1:09-CV-2166-RWS, 2010 U.S. Dist. LEXIS 141552, at *21-22 n.4 (N.D. Ga. Feb. 22, 2010) ("There is nothing in the Georgia Administrative Code section applicable to IDEA dispute resolution that suggests that the impartial due process hearing is an appropriate venue for raising non-IDEA claims.") (citation omitted).[31]

[30] Section 504, as codified in 29 U.S.C. § 701 et seq., states as follows, in relevant part: "No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 U.S.C. § 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a). "Program or activity" includes local education agencies. Id. § 794(b)(2)(B).

[31] A state regulation does allow for a *separate* request for a 504 hearing to be essentially consolidated with an IDEA proceeding before this Court. However, such consolidation is initiated solely at the request of a "local board of education." See Ga. Comp. R. & Regs. 160-1-3-.07. No such request has been received in this matter.

Furthermore, when a petitioner's claims under Section 504 seek relief that is also available under the IDEA, federal law requires that the petitioner first exhaust the IDEA's administrative procedures. See Durbrow v. Cobb Cty. Sch. Dist., 887 F.3d 1182, 1190 (11th Cir. 2018) ("Since the only remedy available under the IDEA is injunctive relief for the wrongful denial of a FAPE, any such claim must undergo an administrative hearing before proceeding to state or federal court, whether the claim arises under the IDEA, § 504, the [Americans with Disabilities Act], or any other federal law.") (citing Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 750 (2017); see also M.T.V. v. DeKalb Cty. Sch. Dist., 446 F.3d 1153, 1158 (11th Cir. 2006) ("[T]he philosophy of the IDEA is that plaintiffs are required to utilize the elaborate administrative scheme established by the IDEA before resorting to the courts to challenge the actions of the local school authorities.") (citation omitted). That said, the exhaustion requirement does *not* expand this Court's jurisdiction or confer authority on this Court to resolve all legal claims between parties, regardless of the origin of such claims.

b. IEP accommodations

19.

Whether the District failed to provide [redacted] with her IEP accommodations constitutes an "implementation" claim. As the Court of Appeals for the Eleventh Circuit recognized in 2019, this particular "species of IDEA claim" arises when schools "fail to meet their obligation to provide a free appropriate public education by failing to implement the IEP *in practice.*" L.J. v. Sch. Bd., 927 F.3d 1203, 1211 (11th Cir. 2019). An implementation claim requires an inquiry into whether the school has materially failed to implement a child's IEP—i.e., failed to implement "substantial or significant provisions" of the IEP. Id. Among other considerations, a court should look to "the proportion of services mandated [by the IEP] to those actually provided, viewed in context of the goal and import of the specific service that was withheld." Id. at 1214 (citations omitted). This requires an examination of both quantitative and qualitative failures, "to determine *how much* was withheld and *how important* the withheld services were in view of the IEP as a whole." Id. "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail," though "the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." Id. (citations and quotations omitted).

20.

As with the previously discussed claim, the Petitioners' evidence related to [redacted]s lack of accommodations rests solely on vague, unsubstantiated testimony from [redacted] and [redacted]. Although both witnesses asserted that [redacted] was not receiving her accommodations in all classes for the full semester—and [redacted] testified to texting the case manager about this issue—these witnesses offered few specifics, including how they came to learn about this purported deficiency.

[redacted] also was not called as a witness, and thus did not provide direct testimony about not receiving these accommodations. At most, [redacted]s and [redacted] testimony about a universal failure by the District to implement the IEP's accommodations is conclusory in nature, and thus is insufficient to meet the Petitioners' burden of proof. See Leigh, 212 F.3d at 1217.

21.

Furthermore, as noted supra, the Petitioners' case-in-chief focused extensively on the District not allowing [redacted] to have bathroom breaks. Yet the Petitioners failed to present any probative evidence showing that bathroom breaks were ever included as an accommodation in [redacted]s IEP. [redacted] even conceded at the hearing that the sole IEP document proffered by the Petitioners—the October 2022 IEP—did *not* include a bathroom accommodation.

22.

The only other specific example the Petitioners provided of a missing accommodation came in [redacted]s testimony about the Biology teacher not giving [redacted] additional time to complete a project, thus causing [redacted] to fail the class. However, this represents yet another assertion that is not corroborated by direct evidence. Furthermore, even assuming, *arguendo*, that this otherwise uncorroborated claim has merit and constituted a failure by the District to provide the October 2022 IEP accommodation of giving "extra time if student effort is shown,"[32] it only constitutes a single instance of such a failure. Thus, it does not represent a material failure by the District to implement the IEP. See L.J., 927 F.3d at 1214-15 (holding that the materiality standard for

[32] Alternatively, [redacted] could have been referencing the 504 plan's accommodation of allowing [redacted] to request additional days for assignments following absences. Given that [redacted] testified [redacted] made the additional-time request after being out sick, the 504 plan's accommodation appears more applicable. Yet as discussed supra, any violation of Section 504 falls outside this Court's jurisdiction. Furthermore, no additional evidence corroborates [redacted]s testimony that the alleged violation occurred or that it caused [redacted] to fail the class.

implementation claims addresses whether the school has failed to implement the IEP "as a whole" and that "[c]umulative analysis is therefore built into the materiality standard itself").

23.

Accordingly, given the dearth of probative evidence from the Petitioners pertaining to accommodation violations, and in light of this Court's lack of jurisdiction over 504 violations, this claim should be dismissed.

iii. <u>Claim</u>: [redacted] went without an IEP from August 3, 2022, to September 26, 2022.

24.

At the beginning of each school year, a school district must have an IEP in effect for each child with a disability within its jurisdiction. 20 U.S.C. § 1414(d)(2); 34 C.F.R. § 300.323(a). The Petitioners argue here that the District did not have an IEP in place for [redacted] when the 2022-2023 school year started in August 2022; instead, [redacted] had to wait for the completion of the September 2022 IEP.

25.

The evidence proffered by the Petitioners does not support such a claim. Instead, both [redacted]s testimony and the Modification Agreement establish that [redacted] had a previous IEP from March 2019 when she attended Winn Holt. It is this 2019 IEP that was updated in the Modification Agreement dated July 29, 2022, which was "attached and made part of the student's IEP." That agreement laid out the resource and co-taught classes [redacted] would attend when she started ninth grade at Central Gwinnett. [redacted] signed this document, indicating she agreed to this modification, and she testified at the hearing that [redacted] did attend the agreement's listed courses. Hence, an IEP did exist at the start of classes in August 2022, albeit in an abbreviated amended format.

26.

Granted, it does not appear that any mandatory annual IEP reviews took place between March 2019 and July 2022. See 34 C.F.R. § 300.324(b)(1)(i) (calling for periodic reviews of an IEP, "but not less than annually"). Furthermore, based on the dates of the IEP, more than three years elapsed between [redacted]s eligibility evaluations. See id. § 300.303.(b)(2) (requiring eligibility evaluations at least once every three years). Nevertheless, such missed deadlines do not mean that the existing IEP and eligibility determination are no longer valid. See Doug C. v. Haw. Dep't of Educ., 720 F.3d 1038, 1046 (9th Cir. 2017) (finding no legal authority for a school district to cease special education services to a student because his annual IEP review was overdue). Furthermore, the Petitioners' claim in their Complaint solely addressed the *absence* of an IEP at the start of the 2022-2023 school year, rather than the untimeliness of the existing IEP's review. See 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d); Ga. Comp. R. & Regs. 160-4-7-12(j) (limiting this Court's review to issues presented in Complaint). Lastly, even assuming, *arguendo*, that the Court could consider the above untimeliness claim—and that the claim had merit[33]—no relief would be warranted for such procedural violations for two reasons. First, "the remedy for a procedural failing is generally to require that the procedure be followed." J.N., 12 F.4th at 1366. However, the Petitioners' evidence shows the District completed the eligibility reevaluation in September 2022, which led to a revised IEP that fall. Hence, any procedural gaps have since been resolved. Second, the Petitioners did not present any evidence showing how these alleged procedural inadequacies rose to the level of a substantive denial of FAPE. See 20 U.S.C. § 1415(f)(3)(E)(ii). Nothing in the record suggests [redacted] was deprived of educational benefits in August and September

[33] The District would not have had an obligation to hold annual IEP review meetings if [redacted] had attended a private school outside of its geographic area. See D.C. v. Klein Indep. Sch. Dist., 711 F. Supp. 2d 739, 750 (S.D. Tex. 2010). However, the record is silent as to the location of [redacted] Preparatory Academy.

2022 or otherwise could not make progress toward her education goals while attending the Modification Amendment's listed courses.[34] See id. § 1415(f)(3)(E)(ii)(I), (III); Endrew F., 137 S. Ct. at 999; see also A.M. v. Monrovia Unified Sch. Dist., 627 F.3d 773, 789 (9th Cir. 2010).

iv. Claim: The District delayed implementing a BIP.

27.

The Petitioners alleged in their Complaint that [redacted] asked [redacted]s case manager "numerous times" to start the "BIP process." Specifically, the Complaint stated that [redacted] asked for paperwork to start the BIP process on September 27, 2022, but she did not receive it until November 10, 2022.

28.

At the hearing, the Petitioners failed to meet their burden in proving this claim. First, there was insufficient probative evidence showing that [redacted] requested a BIP in either September or October 2022. At most, [redacted] provided uncorroborated testimony that she asked [redacted]s caseworker, [redacted] about a BIP sometime in September 2022. [redacted] also testified to several hearsay statements, to which this Court gives little weight. Furthermore, the only IEP the Petitioners proffered at the hearing, from October 2022, stated that a BIP was not required, and the meeting minutes did not mention any parent request for a BIP.

29.

Moreover, while the Petitioners' evidence does show that [redacted] texted multiple requests for BIP information to [redacted] between November 3 and 10, 2022, [redacted] conceded that Ms.

[34] The decision to amend the 2019 IEP in July 2022 without a meeting also may have strayed from IDEA procedures. While a parent and school district can agree to forego an IEP meeting, this can occur when changes are being made "after the annual IEP Team meeting." 34 C.F.R. § 300.324(a)(4). Yet no such annual meeting occurred in 2022 prior to July. That said, any procedural error here has since been cured with subsequent IDEA meetings throughout the remainder of 2022. See J.N., 12 F.4th at 1366. Also, [redacted] testified to signing the Modification Agreement and agreeing to the courses listed in it; hence, nothing indicates [redacted] was denied FAPE by curtailing her mother's opportunity to participate in this educational decision. See 20 U.S.C. § 1415(f)(3)(E)(ii)(II).

[redacted] sent the unspecified BIP information on November 10. Hence, the Petitioners' evidence demonstrates a delay of only one week, which is *de minimus* and does not reflect dilatory conduct on the part of the District.

30.

Based on the foregoing, involuntary dismissal is **GRANTED** for Claims i, ii, iii, and iv. For the remainder of the Complaint, Claims v and vi, the motion is **DENIED**, and Court shall consider the full evidentiary record in assessing their merits, infra.

D. Remaining Claims

v. Claim: The District did not properly identify a secondary disability for [redacted] The September 2022 Reevaluation also was flawed and misdiagnosed [redacted] Namely, the evaluation did not consider all the records in [redacted]s file, including those from as early as 2018; did not use "best practices"; and did not utilize a "full battery of tests."

31.

This claim addresses alleged IDEA violations pertaining to both identification of a disability and the student's evaluation. Before addressing the claim's merits, an overview of the relevant law is warranted.

32.

To be eligible for special education services under the IDEA, a student must be a "child with a disability," defined by statute as follows:

> Child with a disability.
>
> (A) In general. The term "child with a disability" means a child—
>
> (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title [20 USCS §§ 1400 et seq.] as "emotional disturbance"), orthopedic impairments,

> autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
>
> (ii) who, by reason thereof, needs special education and related services.
>
> . . . .

20 U.S.C. § 1401(3).

33.

Under the IDEA, states are required to establish policies to ensure that children with disabilities are identified, located, and evaluated. 34 C.F.R. § 300.11 l(a)(l)(i). These provisions are known as the "Child Find" provisions of the IDEA. See M.G. v. Williamson Cty. Sch., 720 F. App'x 280, 284-85 (6th Cir. 2018). This Child Find duty requires an evaluation of any child who is "suspected of being a child with a disability." 34 C.F.R. § 300.111(c)(1).

> The first responsibility of an educational authority is to locate and identify children who might be disabled in some way. Once such students are identified, the authority must have a particular kind of procedures for the evaluation of such students to determine the nature of their disability, if any, and to decide whether they are eligible for special education services.

Clay T. v. Walton Cty. Sch. Dist., 952 F. Supp. 817, 822 (M.D. Ga. 1997). When the state overlooks "clear signs of disability" or negligently fails to order testing, it violates its duty under the IDEA. Durbrow v. Cobb Cty. Sch. Dist., 887 F.3d 1182, 1196 (11th Cir. 2018) (citation and quotation omitted); see also 34 C.F.R. § 300.111(c)(1); Phyllene W. v. Huntsville City Bd. of Educ., 630 F. App'x 917, 925 (11th Cir. 2015) (recognizing school districts' continuing obligation to identify and evaluate all students who are reasonably suspected of having a disability).

34.

If a child is suspected of having a disability but has not yet been found eligible for special education services, the IDEA requires school districts to conduct a "full and individual initial

evaluation." 20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.301(a). This initial evaluation consists of procedures to determine whether IDEA services are warranted, as well as the student's educational needs. 34 C.F.R. § 300.301(c)(2). Once a child is found eligible for special education services, the IDEA calls for periodic reevaluations when either the school district determines the student's services warrant reevaluation, or the student's parents or teacher request a reevaluation. 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303(a). Reevaluations must occur at least every three years. 20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b).

35.

In conducting the initial evaluation and reevaluations, the school district must do the following:

> (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 [34 C.F.R.] § 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.

34 C.F.R. § 300.304(b). The evaluation also must consist of a review of the child's existing evaluation data, to determine what additional data is needed. Id. § 300.305(a)(2). An evaluation shall assess the child "in all areas related to the suspected disability." Id. § 300.304(c)(4).

36.

In the instant matter, there is no dispute that the District had [redacted] reevaluated in September 2022, and that the reevaluation affirmed her eligibility based on SLD. Instead, the Petitioners contend the District did not do enough to determine whether [redacted] has an additional or secondary disability. Their Complaint did not state explicitly which eligibility category they believed [redacted] could qualify for, though the thrust of their evidence suggests the category of Emotional Behavioral Disorder ("EBD"). See Ga. Comp. R. & Regs. 160-4-7-.05 App'x (d). EBD is defined by the Georgia Department of Education as follows, in relevant part:

> An emotional and behavioral disorder is an emotional disability characterized by the following:
>
> (i) An inability to build or maintain satisfactory interpersonal relationships with peers and/or teachers. . . .
>
> (ii) An inability to learn which cannot be adequately explained by intellectual, sensory or health factors.
>
> (iii) A consistent or chronic inappropriate type of behavior or feelings under normal conditions.
>
> (iv) A displayed pervasive mood of unhappiness or depression.
>
> (v) A displayed tendency to develop physical symptoms, pains or unreasonable fears associated with personal or school problems. [34 C.F.R. § 300.8(c)(4)(i) (A-E)]
>
> A child with EBD is a child who exhibits one or more of the above emotionally based characteristics of sufficient duration, frequency and intensity that interferes significantly with educational performance to the degree that provision of special educational service is necessary. EBD is an emotional disorder characterized by excesses, deficits or disturbances of behavior. The child's difficulty is emotionally based and cannot be adequately explained by intellectual, cultural, sensory general health factors, or other additional exclusionary factors.

Id. 160-4-7-.05, App'x (d). See also 34 C.F.R. 300.8(c)(4) (giving similar description for "emotional disturbance" in IDEA context); Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 775-76 (8th Cir. 2001) ("Read naturally and as a whole, the law and the regulations [regarding

emotional disturbance] identify a class of children who are disabled only in the sense that their abnormal emotional conditions prevent them from choosing normal responses to normal situations.").

37.

Upon review of the evidentiary record, the Court concludes the District did not fail to identify [redacted] as a student with suspected EBD at the time she re-enrolled in 2022. In his testimony for the Petitioners, [redacted] opined that such a suspicion was warranted based on [redacted]s 2017 BASC-3 scores, as they showed [redacted] had issues with aggression and inappropriate behavior. Yet Mr. Williams is not a psychologist, nor did he explain why he believed these five-year-old BASC-3 scores were relevant to [redacted]s current behavioral state. The Petitioners also point to their 2019 IDEA Complaint as proof that [redacted]s purported behavioral difficulties had been brought to the District's attention in the past. Yet the complaint itself—drafted by a third party who did not testify—consists merely of allegations that such behavioral issues existed during that time. The Petitioners did not present any school records documenting [redacted]s conduct prior to 2022, nor did they offer any eyewitness accounts of the student's behavior in elementary and middle school.[35] Instead, what the evidentiary record *does* include is [redacted]s private school records from 2020 through 2022, showing consistent satisfactory ratings in the social/emotional domains; and the 2022 Eligibility Report, which [redacted] signed on September 20, that stated [redacted] did not have any "significant" discipline issues. Hence, the Petitioners fell short of proving to this Court that the District received "clear signs" that [redacted] may have an emotional or behavioral issue "of sufficient

[35] [redacted] 2022 report does briefly address the 2017 evaluation's findings that [redacted] engaged in confrontations with female peers and challenged staff members' authority. However, the full 2017 evaluation report was not introduced into evidence. Moreover, Dr. Boston wrote in her report that she found "no significant concerns" with [redacted]s behavior from that time period.

duration, frequency and intensity" that would warrant further evaluation for EBD. See Ga. Comp. R. & Regs. 160-4-7-.05, App'x (d)(iii); Durbrow, 887 F.3d at 1196.

38.

Lastly, insofar as the Petitioners contend the District failed to identify [redacted] as a child with an EBD after the September 2022 Reevaluation, this claim fails on the merits. [redacted], testifying as an expert in school psychology, stated that he had reviewed [redacted] report—which included sections related to [redacted]s social-emotional needs—and he did not believe further evaluation for EBD or any other disability was warranted. Moreover, the evidentiary record offers little to no probative evidence addressing the type and frequency of any inappropriate conduct from September 2022 through January 2023. At most, there is vague testimony from [redacted] about [redacted] getting upset and "caus[ing] a scene" during the October 2022 incident. There also is a copy of the Behavior Correction Plan from January 2023, which states [redacted] had used profanity when interacting with school staff and has had physical contact with staff "of an insulting or provoking nature." The plan also referenced four incidents of [redacted] violating the school code of conduct between September 2022 and January 2023, though the nature of the violations is not described. While this evidence suggests repeated inappropriate conduct, these incidents are not consistent with the following: (a) [redacted]s behavior in middle school during the prior two years; (b) the September and October 2022 IEP reports, where no serious behavioral issues or concerns were listed; and (c) [redacted] testimony that [redacted] exhibited no behavioral issues in class for at least two months, until the October 2022 incident. Based on the totality of the evidence, [redacted]s inappropriate conduct appears more intermittent, as opposed to the "consistent and persistent" inappropriate conduct of a child with EBD. See C.J. v. Indian River Cnty. Sch. Bd., 2003 U.S. Dist. LEXIS 29107, No. 02-14047-CIV-MOORE, at *14-15 (upholding ALJ's finding that

student's brief periods of maladaptive behavior failed to establish "emotional disturbance" handicap), aff'd without opinion, 107 F. App'x 893 (11th Cir. 2004). Moreover, nothing in the evidence shows that [redacted]s instances of inappropriate conduct have interfered with her actual educational performance. See Ga. Comp. R. & Regs. 160-4-7-.05, App'x (d); N.C. v. Bedford Cent. Sch. Dist., 300 F. App'x 11, 13 (2d Cir. 2008) (finding no evidence that student's declining GPA was attributable to emotional disturbance).[36]

39.

For the foregoing reasons, the Petitioners' claims involving alleged IDEA violations pertaining to identification and evaluation fail on the merits, and no reward of relief is warranted.

vi. Claim: The District failed to conduct an FBA for [redacted] despite documentation from as far back as 2018 showing that one was needed due to behavioral incidents.

40.

A Functional Behavioral Analysis, or FBA, is considered an evaluation under the IDEA because it is intended to assess a child's needs for special education and related services, including behavioral interventions. Cobb Cnty. Sch. Dist. v. D.B., No. 1:14-CV-02794-RWS, 2015 U.S. Dist. LEXIS 129855, at *18 (N.D. Ga. Sept. 28, 2015). Under the Georgia Department of Education's regulations, an FBA "includes examination of the contextual variables (antecedents and consequences) of the behavior, environmental components, and other information related to the behavior" and customarily precedes the development of a BIP. Ga. Comp. R. & Regs. 160-4-7-.21(20). A BIP is defined as follows:

> A plan for a child with disabilities, included in the IEP when appropriate, which uses positive behavior interventions, supports and other strategies to address

[36] Also, the fact that the District put in place a "Behaviorally Related" accommodation in November 2022 and attempted to put in place a Behavioral Correction Plan to address conduct concerns weighs against a finding of a Child Find violation. See Durbrow, 887 F.3d at 1196 ("When a school district uses measures besides special education to assist struggling students, it is even less likely in breach of its child-find duty.") (quotation and citation omitted).

> challenging behaviors and enables the child to learn socially appropriate and responsible behavior in school and/or educational settings.

Ga. Comp. R. & Regs. 160-4-7-.21(7). See also 20 U.S.C. § 1414(d)(3)(B)(i) (requiring IEP team to "consider the use of positive behavioral interventions and supports, and other strategies" to address behavior issues).

41.

"An FBA will be required in many cases because '[t]he FBA is essential to addressing a child's behavioral difficulties and, as such, it plays an integral role in the development of an IEP.'" Jackson v. Dist. of Columbia, No. 19-197 TJK/DAR2020, U.S. Dist. LEXIS 108457, at *47-48 (D.C.C. Jun. 2, 2020) (quoting Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008)). "A school's failure to conduct an FBA 'may prevent the [IEP team] from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all.'" Rosaria M. v. Madison City Bd. of Educ., 325 F.R.D. 429, 438 (N.D. Ala. 2018) (quoting R.E. v. New York City Dep't of Educ., 694 F.3d 167, 190 (2d Cir. 2012)).

> This concern has [led] some courts to conclude that the failure to conduct an FBA amounts to a procedural violation of the IDEA. See, e.g., R.E. v. New York City Dep't of Educ., 694 F.3d 167, 190 (2d Cir. 2012). But even if the failure to conduct an[] FBA is a procedural violation, a "[v]iolation of any of the procedures of the IDEA is not a per se violation of the [IDEA]." K.A. ex rel. F.A. v. Fulton Cty. Sch. Dist., 741 F.3d 1195, 1205 (11th Cir. 2013). Even when a school board does not conduct an FBA, the board nonetheless may provide the student with a FAPE during the period governed by the IEP if the program that the IEP team designs adequately addresses the student's needs and prepares the student for further education. See [M.W. ex rel. S.W. v. New York City Dep't of Educ., 725 F.3d 131, 141 (2d Cir. 2013); R.E., 694 F.3d at 193.

Rosaria, 325 F.R.D. at 438-39. See also Jackson, U.S. Dist. LEXIS 108457, at *23 (holding that a failure to complete an FBA may result in a substantive denial of FAPE because, to ensure a child receives FAPE, "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" must be used) (quotations and citations omitted).

42.

As an initial matter, the Petitioners presented very little evidence about whether an FBA has—or has not—been administered to [redacted]. The only relevant evidence came from [redacted], who testified that [redacted]s records from 2018 should have been enough to trigger an FBA. The implication from this otherwise conclusory statement is that an FBA has *not* been conducted. Yet [redacted] testified that she had received information to start the "BIP process" on November 10, 2022. Since a BIP is the end result of an FBA, her testimony suggests that the District had engaged with [redacted] to start an FBA.

43.

But even if this Court accepts that an FBA has not taken place, the Petitioners failed to demonstrate an IDEA violation. First, as discussed with Claim v, supra, there is no probative evidence that [redacted] exhibited "challenging behaviors" at the time she re-enrolled in the District in July 2022 and for the first few months at school, prior to the October 2022 incident. Thus, it was not unreasonable for the District to forego an FBA and BIP at the reevaluation stage and during [redacted]s first few months at [redacted]. See 34 C.F.R. § 300.304(c)(4) (requiring evaluation to assess child in areas of ***suspected*** disability).

44.

Also as discussed in Claim v, supra, the Court has been provided little to no probative evidence as to the exact nature, intensity, and frequency of any maladaptive behaviors from the October 2022 incident onward. The Court also pays deference to the opinion of Ms. Wragg, in her capacity as an expert on 504 plans and IEPs, that nothing in [redacted]s IEP or 504 plan warranted an FBA. See W.C., 407 F. Supp. 2d at 1359. Instead, the evidence shows the District did address behavioral concerns, albeit succinctly, when it added the "Behaviorally Related" accommodation

to the November 2022 IEP. See M.H. v. New York City Dep't of Educ., 712 F.Supp.2d 125, 158-59 (S.D.N.Y. 2010) (holding that a failure to conduct an FBA did not constitute an IDEA procedural violation where the IEP set forth a strategy for addressing student's problematic behavior). Finally, nothing in the evidentiary record speaks to whether any behavioral issues interfered with [redacted]s ability to progress in her educational goals. See Jackson, 2020 U.S. Dist. LEXIS, at *49-50 (IEP team reasonably concluded FBA was unnecessary to address behaviors such as putting objects in mouth and nose, kicking classmates, or stealing items, because behaviors did not have "a clear effect" on student's educational process). Accordingly, for the foregoing reasons, the Petitioners are not entitled to any relief for either a procedural IDEA violation or a substantive denial of FAPE.[37]

* * *

45.

In closing, the Court's determinations herein are not intended to minimize any challenges facing [redacted] and her mother as they navigate the special education process. It is clear to the undersigned that [redacted]s suspension is of tremendous concern to her family, and that the Petitioners feel they have been treated unfairly in that process. Nevertheless, the purpose of this hearing is to address the alleged violations of the IDEA. The Petitioners bore the burden of proof in this matter, and the admitted testimony and exhibits fell short of satisfying this burden.

[37] The IDEA does address the use of FBAs in instances where a child is removed from their placement following school-code violations. See 20 U.S.C. § 1415(k)(1)(D)(ii). However, the FBA is to be used "as appropriate." Id. As discussed supra, there is insufficient evidence on the nature of the purported misconduct, including whether it interfered with [redacted]s educational goals. Thus, the Cannot has no way to determine whether an FBA would be reasonable in this instance.

IV. DECISION

Based on the foregoing, the Petitioners' requests for relief under the IDEA is **DENIED**.

SO ORDERED, this 24th day of July, 2023.

Lisa Boggs

Lisa Boggs
Administrative Law Judge

NOTICE OF FINAL DECISION

Attached is the Final Decision of the administrative law judge. 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(4). 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 Devin Hamilton - 404-657-3337; Email: devinh@osah.ga.gov; Fax: 404-657-3337; 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303.

Bringing a Civil Action

A party aggrieved by the Final Decision has the right to bring a civil action in the appropriate court within 90 days from the date of the Final Decision. 34 C.F.R. § 300.516; Ga. Comp. R. & Regs. 160-4-7-.12(3)(u). A copy of the civil action must also be filed with the Georgia Department of Education, Special Education Services and Supports, at 1870 Twin Towers East, 205 Jesse Hill Jr. Drive, Atlanta, Georgia 30334, and the OSAH Clerk at 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303. Ga. Comp. R. & Regs. 616-1-2-.39.