IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

08-972941

[redacted]., a minor, by his parents and next friends, [redacted]. and [redacted].; [redacted]. and [redacted].,

Plaintiffs,

v.

COBB COUNTY SCHOOL DISTRICT,

Defendant.

DOCKET NO.

OSAH-DOE-SE-0816943-33-Gatto

FINAL ORDER

COUNSEL: Chris E. Vance, for Plaintiff.

Neeru Gupta, for Defendant.

GATTO, Judge

I. INTRODUCTION

This matter is before the Court pursuant to a Complaint filed by Plaintiffs [redacted], a minor child, [redacted]. ([redacted].'s mother), and [redacted]. ([redacted].'s father), against Defendant Cobb County School District on or about January 3, 2008. Plaintiffs allege that Defendant failed to provide [redacted]. with a free appropriate public education (FAPE) in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* Specifically, Plaintiffs allege that Defendant improperly failed to identify [redacted] as a "child with a disability" within the meaning of IDEA and denied him FAPE under both IDEA and Section 504 of the Rehabilitation Act of 1973 (Section 504). Plaintiffs seek reimbursement for privately-obtained testing, costs associated with their unilateral placement of [redacted]. in a private school, and costs for unilaterally obtained private services, and transportation. Defendant argues that, while [redacted]. was entitled to and received the

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services of appropriate Section 504 plans, he was not a "child with a disability" within the meaning of IDEA. For the reasons stated below, Plaintiffs' requests for relief are **DENIED**.

II. FINDINGS OF FACTS[1]

[redacted]. is a [redacted]-year-old student and his date of birth is [redacted]. (Def. Ex. 1 at 0001.) [redacted]. attended public schools within Cobb County School District from his kindergarten year (the 1996-1997 school year) until December 21, 2006, in the middle of his sophomore year of high school. (Def. Ex. 16 at 0068-0082; Def. Ex. 15 at 0067.) On September 19, 2005, Defendant convened a Section 504 meeting for [redacted]. to review his Section 504 plan.[2] (Def. Ex. 10 at 0055-0059.)

Sheree Altmann, Instructional Lead Teacher at [redacted] High School at that time,[3] several of [redacted].'s teachers, as well as both of [redacted].'s parents attended this meeting. (Def. Ex. 10 at 0055.) [redacted].'s parents were "vocal" at this meeting. (Tr., p. 274.) They contributed, as did [redacted]'s teachers. (Tr., pp. 274-275; Def. Ex. 10 at 0057-0059.) [redacted].'s parents in particular had "definite ideas about what needs he had" and "made their wishes known." In fact, at least one participant in this meeting testified that the parents' requests were met and could not recall denying any of Plaintiffs' requests. (Tr., pp. 368-369.) Plaintiffs acknowledged that they participated in the development of the plan and further received a copy of their rights under Section 504. (Def. Ex. 10 at 0056.) Overall, [redacted]. was doing "very well." (Tr., p. 274.)

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[1] Although much of the evidence in this case as well as the parties proposed findings of fact related back as far as the 2002-2003 school year, the Court has concluded that the two-year statute of limitations should applies from the date the complaint was filed on or about January 3, 2008. Therefore, other than for historical reference, this Court has restricted its findings to events occurring on or after January 3, 2006 and the 2006-2007 school year's Section 504 plan.

[2] In April 4, 2003, a Section 504 Committee determined that based upon parent recommendation, teacher recommendation, and physician diagnosis, [redacted]. was eligible for a Section 504 plan. (Def. Ex. 4 at 0048.)

[3] Ms. Altmann was qualified, without objection, as an expert in the areas of Spanish, Education, Spanish Education, and Development of Section 504 Plans. (Tr., p. 267; Def. Ex. 18 at 0138-0140.)

After considering information from Plaintiffs' parents, his physician's diagnosis, as well as his teachers, the committee determined that [redacted]. would have access to a computer and printer or AlphaSmart for classroom use. (Def. Ex. 10 at 0056). However, [redacted]. preferred to use his own laptop, rather than use the laptop offered to him by Ms. Altmann. (Tr., p. 273.) Accordingly, the committee determined that he would be allowed to bring a laptop to school. (Def. Ex. 10 at 0058.) In addition, [redacted]. would receive a 50% reduction in his math homework, 100% extended time for classroom tests and quizzes (excluding standardized tests), and two days of extended time for long term assignments/projects. Additionally, [redacted].'s parents and teachers would use email and phone for communication. All accommodations would be implemented in the regular classroom.[4] (Def. Ex. 10 at 0056.) The Section 504 committee did not believe that [redacted]. required the use of a Palm Pilot to track assignments and so did not write any such accommodation. (Def. Ex. 10 at 0056.) In any event, all students at [redacted] High School are provided agendas with which to track assignments. (Tr., p. 293.) [redacted].'s teachers encouraged him to use that agenda. (Tr., p. 494.)

Chris Minich[5] taught [redacted]. World Geography for the second semester of his ninth grade year. (Tr., p. 342.) Mr. Minich described [redacted]. as a "very likeable young man," a "conscientious student," "well liked by other students" and "fit in with the other students – a normal teenager." (Tr., pp. 342-343.) In his class, rather than using a printer to turn in assignments, [redacted]. would simply transfer information from his personal laptop to Mr. Minich's computer using a flash drive. (Tr., p. 342.) Mr. Minich also noted that [redacted]. was a "solid student." (Tr., p. 344.) He

[4] This Section 504 plan was in effect on January 3, 2006.
[5] Mr. Minich was qualified, without objection, as an expert in Education and Social Studies Education. (Tr., p. 341; Def. Ex. 18 at 0123-0124.) Mr. Minich also has experience teaching disabled students through co-taught (team taught) classes. (Tr., p. 345.)

described [redacted].'s writing skills as "typical" and "perhaps above-average." (Tr., p. 345.) T.K. earned a "B" in Mr. Minich's class. (Def. Ex. 16 at 0082.)

Sandra Malluck[6] taught [redacted]. Honors Physical Science for his entire ninth grade year. (Tr., p. 367.) Ms. Malluck described [redacted]. as "a very dry wit, very personable," "bright," and "memorable." (Tr., p. 367.) [redacted]. did very well in Ms. Malluck's class, earning an A. (Tr., p. 371; Def. Ex. 16 at 0082.) In addition, [redacted]. did very well on the End of Course Test (EOCT) in Physical Science, as well. The EOCT is a state-devised test that covers an entire subject area in certain courses. Physical Science is one course with an EOCT. [redacted]. earned a 95 on this test. (T, pp. 371-374; Def. Ex. 17 at 0110.) Also, [redacted]. did well socially. Ms. Malluck described as having friends and having no difficulty working cooperatively in lab groups. (Tr., p. 374.)

Kim Gasaway[7] taught [redacted]. Honors Ninth Grade English for his entire ninth grade year. (Tr., p. 389.) Ms. Gasaway described [redacted]. as a "good student." (Tr., p. 389.) He displayed no unusual difficulties with any area (including writing) and did not require any extra time on any task. (Tr., pp. 392-393.) Indeed, Ms. Gasaway affirmed that [redacted]. did not exhibit any unusual difficulties with writing. (Tr., p. 400.) He earned a B during both semesters of the class. (Def. Ex. 16 at 0082.) In addition, he scored a 91 on the EOCT. (Def. Ex. 17 at 0112.) Additionally, [redacted]. did well socially in this class. Ms. Gasaway described him as "very social" and stated that he "got along with other students just fine." (Tr., p. 393.)

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[6] Ms. Malluck was qualified, without objection as an expert in Biology, Chemistry, Science, Education, Curriculum and Instruction, and Provision of Educational Services to Students with disabilities. (Tr., p. 366; Def. Ex. 18 at 0130-0131.) Ms. Malluck has taught disabled students almost every year of her fourteen years as an educator. (Tr., pp. 374-375.)

[7] Ms. Gasaway was qualified, without objection, as an expert in English, Education, English Education, and Provision of Educational Services to Students with Disabilities. (Tr., p. 389; Def. Ex. 18 at 0134.) Ms. Gasaway has taught disabled students in co-taught (team taught) classes. (Tr., p. 395.)

Linda Farmer[8] taught [redacted] French II for his entire ninth grade year. (Tr., p. 409.) Ms. Farmer described [redacted]. as "very bright...very mannerly, very respectful." (Tr., p. 409.) In Ms. Farmer's class, [redacted] would often simply show her his homework on his laptop, rather than printing it. (Tr., p. 411.) Specifically, Ms. Farmer picked up homework very quickly and did not want [redacted] to miss instructional time in order to print homework. Rather, she could simply see that he had completed his homework by looking on his computer screen. (Tr., p. 418.) In Ms. Farmer's opinion, [redacted] did "very well" in her class. Socially, she saw him "blossom" from a shy ninth grader to a "social ninth grader." She saw him interact with his peers "very well" and noted that his peers "seemed to like him." (Tr., pp. 411-412.)[9] Ms. Farmer also observed [redacted] interacting with other students in the hallways and the cafeteria and noted no difficulties. (T. 417.) [redacted]. earned an A during both semesters of Ms. Farmer's class. (Def. Ex. 16 at 0082.)

Beverly Bingham[10] taught [redacted] Geometry for his entire ninth grade year. (Tr., pp. 555-556.) Geometry is usually a class for tenth graders, but [redacted] took it as a ninth grader. (Tr., pp. 557-558.) She described him as a "nice young man. Smart. Did well in class. Always attentive." (Tr., p. 556.) Socially, too, [redacted]. was doing well. At the beginning of the first semester, he was very quiet, as is typical for ninth graders, especially in a class made up of mostly upperclassman. (Tr., p. 561.) As the year went on, however, [redacted]. became more outgoing and verbal, socializing with his peers and working in groups with his peers. (Tr., pp. 561-562.) [redacted].'s organizational skills were also in line with those of a typical ninth grade student. (Tr., p. 578.)

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[8] Ms. Farmer was qualified, without objection, as an expert in French, English, Education, French Education, English Education, and Provision of Educational Services to Students with Disabilities. (Tr., p. 409; Def. Ex. 18 at 0113.)

[9] [redacted] did have one difficulty in Ms. Farmer's class. On one occasion, Ms. Farmer found [redacted]. cheating on a quiz. Ms. Farmer met with [redacted]. and his parents about this incident. (Def. Ex. 11 at 0060.) As a result of his cheating [redacted] received a grade of "zero" on that quiz. (Tr., p. 413.)

[10] Ms. Bingham was qualified, without exception, as an expert in Math, Education, Math Education, and Provision of Educational Services for Students with Disabilities. (Tr., p. 555; Def. Ex. 18 at 0146.)

Although Ms. Bingham noted the 50% reduction in math homework on his Section 504 plan, she nonetheless violated that plan by asking him to do more than 50% of the homework, noting that "if he didn't do enough of the homework then he's not going to get the concept and he's not going to be successful." (Tr., pp. 558-559.) "Otherwise, when the tests come around, he's not going to understand how to do the concepts." (Tr., p. 559, 563-564.) Ms. Bingham opined that, if [redacted]. were not successful in a math class, it would be because he was either in the wrong class or that he needed to do more work to be successful. (Tr., p. 580.) [redacted]. earned an A during both semesters of Geometry. (Def. Ex. 16 at 0082.)

During his ninth grade year, none of [redacted].'s teachers saw any evidence that he required any kind of service that he was not already receiving or any evidence of any needs not being met. (Tr., pp. 277, 329, 331, 345, 374, 395, 406, 407, 565.) In addition, neither [redacted]. nor his parents ever expressed anything to any teacher suggesting that they suspected he needed any kind of service that he was not already receiving. (Tr., p. 277, 290-291, 329, 331, 335, 346, 375, 395-396, 565, 608.) Similarly, neither [redacted]. nor his parents expressed any concerns regarding any behavioral, social, or communication difficulties or concerns. (Tr., pp. 320-321.) Of course, [redacted]., like any other ninth grade student, had some missing assignments from time to time. [redacted].'s issues with keeping with assignments were nothing unusual, however. (Tr., pp. 322-323, 370.) Rather, [redacted].'s difficulties with homework completion were, in the opinions of his teachers not unusual and were, rather, typical of ninth grade students. (Tr., pp. 340, 349, 361-362, 370, 394-395.)

Prior to the end of his ninth grade year, Defendant reconvened a Section 504 meeting to review [redacted].'s Section 504 plan for the upcoming 2006-2007 school year, [redacted]'s tenth grade year. (Def. Ex. 13 at 0062-0065.) [redacted], as well as both of his parents, attended this meeting, as

did several of his teachers. (Def. Ex. 13 at 0064.) At this meeting, the committee reviewed [redacted].'s current accommodations, and all were working well. [redacted]'s parents reported that the first accommodation listed – [redacted]'s access to a computer and printer or AlphaSmart for classroom use and completion of assignments – was "working well." After considering information from [redacted]'s parents, his physician's diagnosis, as well as his teachers, the committee developed accommodations. (Def. Ex. 13 at 0063.) The Section 504 committee elected to retain all previous accommodations, and neither [redacted].'s teachers nor Plaintiffs themselves brought up any others. (Def. Ex. 13 at 0065.) All accommodations were to be implemented in the regular classroom. (Def. Ex. 13 at 0062.) Plaintiffs signed the Section 504 plan, indicating that they participated in the development of the plan and had received their rights under Section 504. (Def. Ex. 13 at 0062.)

For the 2006-2007 school year [redacted]. went from taking two honors courses (in ninth grade) to taking four honors courses in tenth grade. (Def. Ex. 16 at 0082.) For tenth grade, [redacted] elected to dramatically increase the academic rigor of his course load. Specifically, [redacted]. took only one elective, one foreign language class (increased to the Honors level) and four academic classes (three at the Honors level) as follows: String Ensemble (elective), Honors French III (foreign language), World History (academic), Honors Biology (academic), Honors Tenth Grade American Literature (academic), and Honors Algebra II (academic). (Def. Ex. 16 at 0082.) [redacted] elected to take four Honors level courses, including Honors Algebra II, even though his diploma plan advised otherwise.[11] (Def. Ex. 1 at 0012; Def. Ex. 16 at 0082.)

Increasing an academic load from two Honors level classes to four Honors level classes increases the academic rigor and comes with "significantly different expectations." (Tr., p. 325.)

[11] Specifically, [redacted]. and [redacted]. signed a four-year diploma plan on February 16, 2006, near the end of his ninth grade year. In that plan, [redacted]. was to take only three Honors level courses (French III, American Literature, and Biology). Despite signing off on this plan, [redacted]. then elected to take four Honors level courses.

Indeed, this increased rigor and increased workload would obviously impact his, and any student's, ability to do well in all classes since Honors level courses are more rigorous, move at a much faster pace, and cover more material and concepts in greater depth, than regular classes. (Tr., pp. 388, 428.)

Susan Bush[12] taught [redacted] Honors Algebra II during the first semester of his tenth grade year. She described [redacted] as a "likeable kid, a nice kid," and "friendly with the kids in the class." (Tr., p. 424.) Ms. Bush reviewed [redacted]'s Section 504 plan and noted his 50% reduction in math homework. (Tr., p. 424.) This reduction concerned Ms. Bush because she believed, in her expert opinion, that doing only 50% of her assigned homework would be insufficient for [redacted] to master the concepts covered in class. (Tr., p. 425.) Ms. Bush assigned minimal homework; just enough that would allow mastery of the concept. (Tr., pp. 425-426.)

Noting the 50% homework reduction and her concerns that [redacted] would not be able to learn the material if he only did 50% of the assigned homework, Ms. Bush had a conference with [redacted]'s parents. They discussed Ms. Bush's concerns and agreed that [redacted] would need to do all homework in Ms. Bush's class. (Tr., pp. 426, 432, 440, 448, 454, 673.)[13] In any event, homework constituted only 15% of the total grade in Ms. Bush's class. She checked it for completion, rather than accuracy, and checked it "as the spirit moved" her, perhaps twice a week. (Tr., pp. 426-427.)

As the semester progressed, [redacted] has some difficulty in Ms. Bush's class, as he was not completing the homework necessary to master concepts at the level taught in an Honors Algebra

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[12] Ms. Bush was qualified, without objection, as an expert in Math, Education, and Math Education. (Tr., p. 423; Def. Ex. 18 at 0145.). Ms. Bush additionally has taught disabled students throughout her 34-year teaching career. (Tr., p. 429; Def. Ex. 18 at 0145.)

[13] [redacted] stated that, as a general rule, she and her husband "always required [redacted] to do the homework because we felt he needed the practice," regardless of the class for which the homework was assigned and regardless of whether the homework was already late and not available for credit. (Tr., p. 93.)

II class. Indeed, as predicted by Ms. Bush, [redacted]. did not perform very well on tests or quizzes (though he received a grade of 94 on the final exam and did well enough to pass the class). (Tr., pp. 433-435.)

Accordingly, Ms. Bush scheduled another conference, this one attended by [redacted].'s parents, as well as [redacted]. himself. [redacted].'s parents were upset with him and "really launched into him" about why he was not doing what he needed to be doing. (Tr., p. 427, 440, 448.) At no time did they ever express any dissatisfaction with what was occurring through [redacted] High School. (Tr., pp. 428, 446-447, 455.[14]) Ms. Bush also noted that she was available after school to provide [redacted]. with extra help and that he could see another teacher before school for extra help. (Tr., p. 448.) There is no evidence that [redacted]. ever took advantage of any such offers of assistance.[15] Despite these difficulties, [redacted]. still managed to earn a 76 (a C) in Ms. Bush's Honors Algebra II class. (Def. Ex. 16 at 0082.)

Joy Tynes[16] taught [redacted]. Honors French III for the first semester of [redacted].'s tenth grade year. (Tr., p. 457.) Honors French III is a pre-Advanced Placement track class. (Tr., p. 457.) Accordingly, it is a much more challenging class, requiring students to utilize French learned for two years previously and expanding that knowledge. The class is conducted almost entirely in French, and the pace is "quick" and "intense." (Tr., p. 458.) The class is based on national standards with the goal of being a high-level novice speaker of the language. (Tr., p. 462.)

Ms. Tynes, like all of his other teachers, recalled [redacted] fondly. She described him as a "nice young man" who was "very cooperative." (Tr., p. 458.) She noted that she came into the

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[14] [redacted]. alleged that she spoke with Ms. Bush on the phone towards the end of the semester and accused her of harming [redacted]. (Tr., pp. 673-674.) Ms. Bush disputed that assertion. (Tr., pp. 446-447.)

[15] [redacted] admitted that [redacted]. was generally offered extra help while at Lassiter, both before and after school, with his teachers. There is no evidence that [redacted] took advantage of this extra assistance offered to him, either before or after school. (Tr., p. 87)

[16] Ms. Tynes was qualified, without objection, as an expert in French, Education, and French Education. (Tr., p. 457; Def. Ex. 18 at 0114-0115.) Ms. Tynes has additionally had experience teaching disabled students "all throughout" her teaching career. (Tr., p. 467.)

class with a friend and seemed to have other friends in the class. (Tr., pp. 458-459.) She noted no difficulties with peer relations. (Tr., p. 471.) She recalled no unusual problems with [redacted], noting that he used his laptop for class work and that he never needed any extended time on tests or quizzes. (Tr., p. 459.) By the end of the semester, [redacted] had earned a 72 (a D) in his Honors French III class. (Def. Ex. 16 at 0082.) This grade was consistent with his test and quiz grades, as well. (Tr., p. 463.) Specifically, [redacted] did not do the daily work required to learn any foreign language at a high level and perform in a high-level foreign language class. (Tr., p. 463.)

Jennifer Mercure[17] taught [redacted] Honors Biology while he was in tenth grade at [redacted] High School. (Tr., pp. 484-485.) Ms. Mercure also remembered [redacted] fondly, stating that she remembered him "using his little white Apple computer a lot in class" which he "loved" and that she "really liked him." (Tr., p. 485.) Ms. Mercure described him as a "typical" tenth grade boy. (Tr., p. 488.) She further described him as involved with the Drama Club outside of school, "loved his computer" and "social with other students in the class." (Tr., p. 488.) She noted that he always worked well in lab groups with other students, talking and conversing with them in a "normal" fashion. (Tr., p. 495.)

Ms. Mercure received a copy of [redacted]'s Section 504 plan prior to the beginning of the school year. Noting that he was diagnosed with Asperger's Syndrome at that time, she requested and received information about the Syndrome. (Tr., pp. 488-489.) She also emailed [redacted]'s parents prior to the beginning of the school year to introduce herself. (Tr., p. 489.) Ms. Mercure's class was scheduled to meet in a room without a printer. Noting that [redacted]'s Section 504 plan required "access" to a printer, she ensured her class was moved to a room with a

[17] Ms. Mercure was qualified, without objection, as an expert in Biology, Education, Biology Education, Science Education, and Provision of Educational Services to Students with Disabilities. (Tr., p. 484; Def. Ex. 18 at 0125-0127.) She has been part of the Student Support Team (SST) process and has referred students to special education previously. (Tr., pp. 498-499.)

printer. (Tr., pp. 489-490.) On occasion, however, printing was an issue. Ms. Mercure would allow [redacted]. to print, but it was at times disruptive to the class or would result in [redacted]. missing instruction. (Tr., pp. 489-490.) Ms. Mercure emailed [redacted].'s parents about the issue. [redacted]. responded that printing should be no issue in her class, as [redacted]. had several printers at home and access to several printers at school. (Tr., p. 490.) [redacted]. admitted that, when communicating with Ms. Mercure, he assured her that [redacted]. could and should print any work he completed at home, as [redacted]. had access to several printers at home and there was no reason for him not to print it out during class.[18] (Tr., p. 225.)

Ms. Mercure also allowed [redacted]. to email her his assignments, but suggested that he print them as a backup, either before school or after school, in case the email did not go through. (Tr., p. 490.) Ms. Mercure put no time limit on [redacted]'s ability to email her homework assignments. (Tr., p. 528.) Both [redacted]. and [redacted]. admitted that Ms. Mercure allowed [redacted]. to email his assignments rather than turn in hard copies. (Tr., pp. 111, 227-228.) These communications occurred in August, approximately two weeks into the school year. (Tr., pp. 490-491.) There was never an occasion on which Ms. Mercure refused to allow [redacted]. to use a printer in her room, however, and she gave him several opportunities in class to print work, if necessary. (Tr., pp. 504, 506, 521, 528.) All Ms. Mercure requested of [redacted] is that he wait until there was a "break in the action" in class so as not to disrupt class or miss instruction. (Tr., p. 528.)

Ms. Mercure had additional correspondence with [redacted].'s parents regarding his homework. While his rate of homework completion was not unusual (Tr., p. 492), Ms. Mercure did initiate communication with his parents. (Tr., pp. 491-492.) In response, [redacted]. responded that they would need to change things at home, rather than at school. (Tr., p. 492.) Indeed, Ms. Mercure

[18] [redacted]. additionally had access to printers throughout [redacted] High school, including in the Media Center, Ms. Altmann's office, and Carol Doemel's office. (Tr., pp. 318, 662.)

sent them "frequent" reminders about upcoming projects and assignments, as well as reminders to turn in homework, in order to keep them informed of what was going on in her class. (Tr., pp. 494-495.) On occasion, she also allowed him to hand in late homework without imposing penalties. (Tr., pp. 495, 519.) Ms. Mercure also gave [redacted]., like she would for any other child, partial credit for any portion of homework completed. (Tr., p. 513.)

As the semester wore on, Ms. Mercure emailed [redacted].'s parents about his grade (a 69 or 70 at the time) and her concern that he do well on the final exam. (Tr., p. 508.) She suggested specific areas of study, noted which tests he did poorly on and what areas those covered, and suggested areas of focus. (Tr., pp. 525-526.) Despite Ms. Mercure's efforts and accommodations, [redacted]. earned a 72 (a D) in her class, albeit an Honors level class taken in conjunction with three other Honors level classes that semester. (Def. Ex. 16 at 0082.)

Kathleen Richter[19] taught [redacted]. Honors American Literature while he was in tenth grade at [redacted] High School. (Tr., pp. 529-530.) Like all his other teachers at [redacted] Ms. Richter described [redacted]. in positive terms. She described him as a "really good student," "very helpful," "very insightful," "engaged," and "intuitive." (Tr., pp. 530, 535.) She also described him as having no problems with his written expression, describing his writing skills as "where they should be for a tenth grade honors student." (Tr., p. 532.) In addition, she described him as doing well socially, interacting well with both her and his peers. (Tr., pp. 532-533.) [redacted]. earned a 90 (an A) in Ms. Richter's class. (Def. Ex. 16 at 0082.)[20] Ms. Richter, like [redacted].'s other teachers, agrees that he received "excellent" educational benefit while in her class. (Tr., p. 536.)

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[19] Ms. Richter was qualified, without objection, as an expert in English, Education, English Education, Social Studies Education, and Provision of Educational Services to Students with Disabilities. (Tr., p. 529; Def. Ex. 18 at 0122.) She has taught disabled students in each of her sixteen years of teaching with Defendant. (Tr., p. 533.)

[20] Like Ms. Tynes, Ms. Richter also filled out a confidential evaluation form for [redacted] Academy. On that form, she listed [redacted]. as "Gifted and Learning Disability." (Pl. Ex. 180.) Ms. Richter explained that used language that was already on the form itself but should have listed T.K. as having Section 504 accommodations. Ms. Richter verified that there is nothing that suggests [redacted]. has a learning disability. (Tr., pp. 534-535.)

Nan Hudson[21] taught [redacted]. World History while he was in tenth grade at [redacted] High School. (Tr., p. 581.) Ms. Hudson echoed other teachers' positive comments about [redacted]. and described him as "a very personable, likeable young man" who was "very bright and very into technology." She also noted that he brought his Apple laptop to class and "was real crazy about it." (Tr., pp. 581-582.) Additionally, Ms. Hudson noted that [redacted] was "well-liked" by the other students in class. (Tr., p. 584.) Ms. Hudson did note that [redacted]. had some difficulties turning in homework. However, she also noted that his rate of homework completion was "pretty typical" of students in general. (Tr., pp. 583, 593.) [redacted]. earned an 83 (a B) in Ms. Hudson's class. (Def. Ex. 16 at 0082.)

Carol Doemel[22] taught [redacted]. for the entire time he attended [redacted] High School (1-1/2 years), as he was in the school orchestra and took String Ensemble each semester. (Tr., p. 649; Def. Ex. 16 at 0082.) As a member of the school orchestra, [redacted]. not only had to attend class each day, he had rehearsals and performances both before school and after school, outside of school hours. (Tr., pp. 650-651.) Additionally, he was able to attend an out-of-town orchestra trip to Washington D.C. the second semester of his ninth grade year. (Tr., p. 654; Def. Ex. 12 at 0061.) [redacted]. received an "A" each semester he was enrolled in String Ensemble. (Def. Ex. 16 at 0082.) Ms. Doemel described him as a "very good musician...enjoyable, great kid." (Tr., p. 650.) She also described him as getting along with his peers "very well" and further described him as a "very social kid" with a "lot of friends." (Tr., p. 650.) She noted that he "seemed very friendly" and "kids liked him." (Tr., pp. 655-656.) These sentiments were echoed by Ann

[21] Ms. Hudson was qualified, without objection, as an expert in the areas of History, Education, and the Provision of Educational Services to Students with Disabilities. (Tr., p. 581; Def. Ex. 18 at 0141-0142).
[22] Ms. Doemel was qualified, without objection, as an expert in Music, Education, Music Education, and Provision of Educational Services to Students with Disabilities. (Tr., p. 649; Def. Ex. 18 at 0137.)

Rives[23], [redacted]'s guidance counselor at [redacted] High School. At Lassiter, counselors divide up the alphabet, and [redacted]. was assigned to Ms. Rives' caseload accordingly.[24] (Tr., p. 601.) Ms. Rives described [redacted]. as a "nice young man." (Tr., p. 601.)

In October 2006, Plaintiffs (including [redacted].) had a meeting with [redacted]'s teachers, all of whom were able to attend, except Ms. Bush. (Def. Ex. 14 at 0066.) At this time, Ms. Altmann explained that, if a parent expressed concerns about their child, it is appropriate to first call a parent-teacher conference to discuss the concern. If a Section 504 meeting proved to be necessary, she would then call a Section 504 meeting. (Tr., p. 313.) If a parent expressed a specific desire to revisit accommodations, however, a Section 504 meeting could be called. (Tr., p. 314.) There is no indication that Plaintiffs wanted to "revisit accommodations" in [redacted]'s Section 504 plan

Plaintiffs and [redacted].'s teachers discussed his progress in various classes and him keeping up with daily work and homework.[25] (Tr., p. 460.) Ms. Tynes stressed the importance of [redacted]. completing his homework and reviewing information, given that her course not only relied upon two previous years of foreign language instruction but built from that, as well. (Tr., p. 461.) Ms. Hudson also attended this meeting. She gave [redacted]. the opportunity to complete any homework that he had missed for credit. [redacted]. told [redacted]. that Ms. Hudson had made a "very gracious" offer to him. (Tr., p. 583.) Ms. Doemel, who also attended this meeting, recalled [redacted].'s parents being "disappointed" in him for not keeping up with his homework, as his teachers had done all that they could do. (Tr., p. 654.) At no time during this October 2006

[23] Ms. Rives was qualified, without objection, as an expert in Counseling, Education, Social Studies Education, and English Education. (Tr., p. 601; Def. Ex. 18 at 0119-0121.)
[24] While Ms. Rives was [redacted].'s guidance counselor, another guidance counselor facilitated Section 504 students during [redacted].'s tenth grade year. (Tr., p. 613.)

conference did Plaintiffs express any concern or dissatisfaction with anything that had occurred at [redacted] High School or that anyone at [redacted] High School had done. (Tr., p. 461.)[26]

[redacted]. did have some occasions in which he did not complete his homework. However, [redacted].'s rate of homework completion was typical of tenth grade students in general and was not unusual. (Tr., pp. 428, 459-460, 473-474.) However, during his tenth grade year, none of his teachers saw any evidence that [redacted]. required any kind of service that he was not already receiving or any evidence of any of [redacted].'s needs not being met. (Tr., pp. 428-429, 466, 497, 533, 584-586, 657.) In addition, neither [redacted]. nor his parents ever expressed anything to any teacher suggesting that *they* suspected he needed any kind of service that he was not already receiving. (Tr., pp. 429, 467, 497, 533-534, 585, 608, 657.) Similarly, there were no teacher complaints or concerns. (Tr., pp. 429, 467-468, 498, 534.) Indeed, his teachers believed [redacted].'s Section 504 plan to be adequate for him. (Tr., p. 430.)

At the time of the trial, [redacted]. described himself as "desperately seeking" help, "miserable," "overwhelmed," and concerned that he would not graduate high school while at [redacted] during his tenth grade year and in December 2006. (T, pp. 685, 701-702; Pl. Exs. 0072-0073.) However, he never expressed any such concerns to the Defendant. (Tr., pp. 414, 429, 466-467, 496-497, 534, 585, 593, 610, 657.) In fact, all of [redacted].'s teachers directly contradicted these assertions.

Furthermore, [redacted]. has consistently performed well as measured by both his grades and outside, independent, measures of achievement. He has always met or exceeded expectations on

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[25] D.K. alleged that, as of October 2006, and according to I-Parent Reports (Defendant's online grade system), [redacted]. was failing some classes. (Tr., pp. 84-85.) These grades, however, only reflect grades that have already been entered by teachers. Accordingly, if a grade had not been entered, it would not be reflected on the information available on i-Parent. Accordingly, these grades can change from day to day. (Tr., pp. 547-548.)

[26] Plaintiffs alleged, through a proffer from their counsel offered at the close of this trial, that at this October 2006 meeting, an unidentified individual employed at [redacted] High School stated that [redacted]. could not have an IEP. (Tr., p. 698.) Earlier in the trial, however, D.K. admitted that there was no discussion regarding T.K. receiving an IEP while at [redacted] High School. (Tr., pp. 91-92.)

standardized tests such as the Iowa Test of Basic Skills and Stanford-9 Achievement Test. (Def. Ex. 17 at 0083-0088, 0092.) He has always met or exceeded expectations on every subject area on the Georgia Criterion Referenced Competency Test. (Def. Ex. 17 at 0090-0091, 0093-0098.) He has similarly shown improvement and met expectations on State-mandated writing assessments. (Def. Ex. 17 at 0089, 0100.) He exceeded expectations on each and every State-devised End of Course Test. (Def. Ex. 17 at 0110-0112.) When he left the Defendant district, [redacted]. had a grade point average of 3.33.[27] (Def. Ex. 16 at 0082.)

On December 12, 2006, [redacted]. sent Ms. Rives a letter stating that she was considering sending [redacted]. to [redacted] Academy for the coming semester in order to address some of his executive functioning and OCD [obsessive-compulsive disorder] concerns.[28] (Pl. Ex. 44.) [redacted]. asked Ms. Rives to distribute enclosed confidential evaluation forms for completion by his teachers. (Pl. Ex. 44.) [redacted]. had officially withdrawn as of December 21, 2006, just nine calendar days and seven school days after [redacted]. sent this letter. (Def. Ex. 15 at 0067.) Ms. Rives was "surprised" when she learned that Plaintiffs were "considering" withdrawing [redacted]. (Tr., p. 609.) Indeed, Ms. Rives had been [redacted]'s guidance counselor for 1-1/2 years and had attended some Section 504 meetings for him during that time, as well. Never during that time did Plaintiffs (or anyone else) express concerns about [redacted]. having difficulties or problems. (Tr., pp. 609-610.) At the time, [redacted]. himself expressed disappointment at having to go to [redacted] Academy. Specifically, he expressed to Ms. Doemel that he was upset about leaving [redacted]

[27] This GPA included [redacted].'s quality points earned in Honors level classes taken during his tenth grade year. Even without these quality points, [redacted]'s GPA was a 3.22. (Def. Ex. 16 at 0082.)

[28] Importantly, [redacted]. has never been diagnosed with OCD, "executive functioning disorder," or any other disorder, save for ADHD and Asperger's Syndrome. Moreover, his diagnosis of Asperger's Syndrome was removed via a privately-obtained evaluation conducted in December 2006. (Pl. Ex. 20, Pl. Ex. 27 through Pl. Ex. 40, Pl. Ex. 75 through Pl. Ex. 86, and Pl. Ex. 87 through Pl. Ex. 100.)

because he especially enjoyed orchestra and [redacted] Academy offered no such activity. [redacted]. expressed that he was "really going to miss it." (Tr., pp. 656-657.)

At trial, Plaintiffs presented descriptions of [redacted]'s social and emotional functioning while at [redacted] High School that was wholly inconsistent with other evidence they have provided. Specifically, [redacted]. alleged that, by the time [redacted]. left [redacted] in December 2006, he was "very upset...very depressed," saying "I have no friends." (Tr., pp. 94-95.) [redacted]. alleged that, while [redacted]. was at [redacted], he did not have "social skills," and had no time to socialize. (Tr., p. 99.)

Evidence that was generated at the time, however, directly contradicts Plaintiffs' current assertions. In a private evaluation unilaterally obtained by Plaintiffs and completed by Dr. Howard Drutman, begun in December 2006 (contemporaneous with the time in question), Plaintiffs painted a very different picture.[29] (Pl. Ex. 87-100.) [redacted]. admitted that Plaintiffs selected and were honest with all private evaluators of [redacted]., including Dr. Drutman. (Tr., pp. 111, 670-671.) [redacted]. confirmed that Plaintiffs had specifically selected Dr. Drutman to conduct an evaluation, based upon another privately obtained evaluation of their other son. (Tr., p. 203.) [redacted]. affirmed her believe that Dr. Drutman's evaluation is "thorough and accurate." (Tr., pp. 670-671.) During this evaluation, Plaintiffs' parents reported that [redacted]. "has friends," "does well socially and other kids know him and like him." They further reported that [redacted] "is not moody and that he gets over any hurt feelings that quickly." (Pl. Ex. 87.) [redacted]. himself echoed these sentiments. He reported that "he is a friendly person and has friends." (Pl. Ex. 88.) Indeed, Plaintiffs reported no social or emotional difficulties whatsoever. These sentiments are consistent with the testimony of [redacted].'s teachers at Lassiter High School, who uniformly reported him to be well-liked and social with his peers.

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[29] [redacted] never disclosed Dr. Drutman's evaluation to Defendant . (Tr., pp. 670-671.)

The available evidence also uncovered other inconsistencies in Plaintiffs' assertions. For instance, in their Complaint, Plaintiffs alleged that "the [District] did not even provide [[redacted].] with the SST [Student Support Team] Process." (Complaint, p. 4.) During the trial, however, [redacted]. admitted that [redacted]. had in fact received SST services while he was enrolled in Defendant during his second grade year. (Tr., p. 94; Def. Ex. 2 at 0040-0046.)

[redacted]. also alleged that he had to take Wellbutrin because of depression specifically caused by [redacted] High School. (Tr., p. 704.) As an initial matter, [redacted]. provided conflicting testimony that he took this medication for his ADHD. (Tr., pp. 703-704.) Accordingly, Plaintiffs' testimony that [redacted] caused depression sufficient for him to begin this medication is inconsistent with available evidence.[30]

[redacted]. officially withdrew from the Defendant district on December 21, 2006, at the end of his first semester of his tenth grade year. [redacted]. withdrew just nine calendar days and seven school days after [redacted]. sent her letter stating she was "considering" sending [redacted]. to [redacted] Academy. (Def. Ex. 15 at 0067.) There is no indication that Plaintiffs had any contact with Defendant regarding [redacted]. since December 21, 2006 until they filed the instant complaint on or about January 3, 2008. [redacted]. enrolled in [redacted] for the second semester of his tenth grade year and continues to attend that school. [redacted] Academy is a school solely for students with disabilities. (Tr., pp. 179, 687.)

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[30] Plaintiffs also alleged in sworn affidavits submitted to the Court that [redacted]. earned three grades of "70" when he left [redacted] High School. (Pl. Ex. 6, Pl. Ex. 64.) [redacted]. acknowledged, however, that these statements were incorrect and that she (like T.K. and S.K.) based her sworn statement on a transcript from [redacted] Academy, which was inaccurate. (Tr., p. 77.) Similarly, Plaintiffs offered inconsistent testimony regarding Lassiter's homework policy, testimony that was contradicted both by [redacted].'s teachers, as well as Plaintiffs themselves. For instance, [redacted] testified that [redacted]'s policy required all homework to be turned on its due date, or else students would receive a zero. (Tr., pp. 92-93.) She then admitted, however, that Nan Hudson, [redacted]'s tenth grade World History teacher, allowed [redacted] to turn in late assignments for credit. (Tr., pp. 111-112.)

In their complaint, Plaintiffs request reimbursement for privately-obtained services, including the costs associated with their unilateral placement of [redacted]. at [redacted] Academy, as well as continued placement at [redacted] Academy.[31]

III. CONCLUSIONS OF LAW

As the party bringing this complaint and seeking relief, Plaintiffs bear the burden of proof as to all issues for resolution. *Schaffer v. Weast*, 126 S. Ct. 528 (2005); *School Committee of the Town of Burlington v. Dep't of Educ. of the Commonwealth of Mass.*, 471 U.S. 359, 105 S. Ct. 1996 (1985); GDOE Rule 160-4-7-.18(1)(g)(8). Accordingly, Plaintiffs bear the burden of proving both that Defendant's provision of educational services failed to comply with the law and that the services he requests are appropriate and necessary.

In December 2004 Congress amended the IDEA, adding a two-year limitations period for parents to file a due process complaint. The IDEA as amended, provides as follows:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.[32]

The 2004 amendment went into effect on July 1, 2005.

Therefore, if the parents knew or had reason to know, more than two years ago, of the alleged actions about which they now sue, the IDEA's limitations period bars those claims regardless of the validity or compelling nature of those claims. The United States Supreme Court has explained:

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[31] Plaintiffs also demand entitlement to funds under Georgia's Special Needs Scholarship. This Scholarship is purely a matter of State law, with eligibility limited to those children who have been enrolled in a public school in Georgia for the entire previous academic year, have been residents of Georgia for the entire previous calendar year, and who have had an IEP in place. This Court has no authority to deem Plaintiffs entitled to this Scholarship, as the statute itself deems them ineligible, and further because Plaintiffs' demand is beyond the relief available under IDEA.

[32] 20 U.S.C. § 1415(f)(3)(C); *see also* 34 C.F.R. §§ 300.507(a)(2) & 300.511(e). There is no dispute here that the federally-defined two-year limitations period is the governing period in Georgia.

> Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them."[33]

A limitations period serves to "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death, or disappearance of documents, or otherwise."[34]

In the context of the IDEA, the statute of limitations has the added benefit of promoting the prompt resolution of disputes, in furtherance of "the general policy under the IDEA . . . to resolve educational disputes as quickly as possible."[35] The requirement that IDEA claims be brought in a timely manner both protects the school district from prejudice and assures that children with disabilities are given appropriate educational programs without long delays.[36]

The Court of Appeals for the Eleventh Circuit, as well as other Courts of Appeals, have acknowledged adherence to the principle that IDEA claims should be brought in a timely manner.[37] In a case predating the inclusion of a specific limitations period in the statute, the Circuit Court in *Cory D.* determined that a short limitations period was necessary for judicial review under the IDEA because a longer limitations period would lead to "appropriate remedies [being] delayed by potentially protracted litigations. In the meantime, an already disadvantaged

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[33] *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), and *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)).

[34] *Kubrick*, 444 U.S. at 117.

[35] *Powers v. Indiana Dept of Educ.*, 61 F.3d 552, 556 n.3 (7th Cir. 1995); *see also Nieuwenhuis v. Delavan-Darien Sch. Dist. Bd. of Educ.*, 996 F. Supp. 855, 867 (E.D. Wis. 1998) ("IDEA requires 'prompt rather than protracted resolution of disputes concerning the disabled student's education') (quoting *Dell v. Township High Sch. Dist. 113*, 32 F.3d 1053, 1060 (7th Cir. 1994)).

[36] *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 158 (3d Cir. 1994).

[37] *See Cory D. v. Burke County Sch. Dist.*, 285 F.3d 1294, 1299 (11th Cir. 2002) ("most effective means of ensuring disabled children receive an education tailored to meet their specific needs is to provide prompt resolution of disputes over a child's IEP"); *J.S.K. v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1570 n.1 (11th Cir. 1991) (court was "influenced particularly by the Ninth Circuit's recognition that a 30-day statute of limitation 'assure[s] prompt resolution of disputes over [IEPs] for handicapped children'") (citing *Department of Educ. of Hawaii v. Carl D.*, 695 F.2d 1154, 1157 (9th Cir. 1983)).

child's education will stagnate, awaiting placement decisions that may become obsolete even before implementation."[38] Such cases demonstrate the importance of bringing claims regarding placement in a timely manner.

The IDEA allows two exceptions to the running of the limitations period during which a parent must file a due process complaint. The bar to suit does not apply where the parent was prevented from filing a complaint due to either of the following factors:

> (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
>
> (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.[39]

Plaintiffs' complaint is dated January 3, 2008. Accordingly, unless one of the enumerated exceptions applies, Plaintiffs are prohibited from pursuing claims they "knew or should have known about" prior to January 3, 2008.[40] The evidence demonstrates that neither of these exceptions applies and that Plaintiffs knew or should have known of the alleged action that forms the basis of many of their claims long before January 3, 2008. Plaintiffs have not alleged and the evidence does not demonstrate that their failure to file a due process complaint sooner was the result of "specific misrepresentations" that Defendant had solved some problem. As a

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[38] *Cory D.*, 285 F.3d at 1299; *see also C.M. ex rel. J.M. v. Board of Educ. of Henderson County*, 241 F.3d 374, 380 (4th Cir. 2001) ("The Act's intent would obviously be thwarted if placement decisions were not carried out until after a child could benefit from those placements.").

[39] 20 U.S.C. § 1415(f)(3)(D).

[40] *See* 20 U.S.C. § 1415(f)(3)(D). The fact that the IDEA explicitly provides two exceptions to the two-year limitations period precludes application of common law doctrines, such as equitable tolling of the statute of limitations or the notion of a "continuing violation." As the drafters of the federal regulations explained, "[i]t is not necessary to clarify that common-law directives regarding statutes of limitations should not override the Act or State regulatory timelines, as the commenters recommended, because the Act and these regulations prescribe specific limitation periods which supersede common law directives in this regard." 71 Fed. Reg. § 46540-01 at 46697 (Aug. 14, 2006); *see also J.L. v. Ambridge Area Sch. Dist.*, 2008 WL 509230, *9-10 (W.D. Pa. Feb. 22, 2008) ("the Regulations firmly establish that the two exceptions specifically set forth in the statute are the exclusive exceptions to the statute of limitations").

result, Plaintiffs cannot rely on the "specific misrepresentations" exception to the two-year statute of limitations.

Plaintiffs contend, however, that IDEA's two-year statute of limitations should not apply, as they contend that [redacted]. attempted to refer [redacted]. for special education services under IDEA, entitling them to a copy of their procedural safeguards. IDEA requires school districts to provide parents a copy of their procedural safeguards

> (1) Upon initial referral or parent request for evaluation;
> (2) Upon receipt of the first State complaint under §§ 300.151 through 300.153 and upon receipt of the first due process complaint under § 300.507 in a school year;
> (3) In accordance with the discipline procedures in § 300.530(h); and
> (4) Upon request by a parent.

34 C.F.R. § 300.504(a). Plaintiffs contend that they were entitled to a copy of their procedural safeguards because they attempted to refer [redacted] for special education but were rebuffed. Specifically, [redacted]. contends that she asked Ms. Chanin and Ms. Tyler for an IEP for [redacted] but was told by both individuals that [redacted] could not receive an IEP or a Section 504 plan "unless he was failing."

[redacted]'s assertions rely entirely on inadmissible hearsay, first brought up not in Plaintiffs' Complaint but in self-serving and conclusory affidavits that are not proper for consideration. This Court cannot rely on Plaintiffs' affidavits to establish any fact since in Georgia, even in the absence of objection, hearsay is without probative value to establish any fact. *Finch v. Caldwell*, 155 Ga. App. 813, 815-816 (1980). Plaintiffs' argument that, because Ms. Chanin and Ms. Tyler are District employees that their statements are admissions against interest rather than hearsay, cannot be supported. In fact, and as is only logical, a corporation cannot be bound by every statement by each one of its employees. For instance, in *Sarantis v. Kroger Co.*, 201 Ga. App. 552 (1991), the Georgia Court of Appeals determined that the statements of a grocery store

employee that the store would pay for an injured plaintiff's injuries were inadmissible hearsay. *Sarantis*, 201 Ga. App. at 552-553. Similarly, in *Brooks v. Kroger Co.*, 194 Ga. App. 215 (1990) an injured plaintiff attempted to submit statements made by a grocery store manager (an individual with supervisory authority) that he would pay her medical bills due to an injury incurred at the store. The plaintiff argued that the store manager's statements were admissions against interest. The Georgia Court of Appeals disagreed, noting that, because the store manager himself was not a party to the litigation, his statements were not admissible. *Brooks*, 194 Ga. App. at 216. As in *Sarantis* and *Brooks*, here Plaintiffs improperly rely solely on inadmissible hearsay to establish their assertions.

Moreover, Ms. Chanin and Ms. Tyler both strongly disputed any such assertion. Rather, Ms. Chanin and Ms. Tyler both testified at trial that Plaintiffs had never approached them regarding special education services of any sort for [redacted]. Both Ms. Chanin and Ms. Tyler worked with [redacted]., herself a District employee. Ms. Chanin considered [redacted]. a "friend" and would have helped her obtain services if [redacted]. had ever mentioned the possibility of [redacted]. needing them. Both individuals showed familiarity and knowledge of IDEA and its referral procedures. Moreover, as Ms. Tyler correctly noted, Defendant did provide [redacted]. with a Section 504 plan, even though he has never failed a class. *See C.G. v. Five Towns Community Sch. Dist.*, 2007 U.S. Dist. LEXIS 10310, *23 (D. Maine 2007) (parents' allegation that special education director would limit receipt of IDEA services, especially to "sophisticated, educated professionals" like parents, was not credible), *adopted in full* U.S. Dist. LEXIS 26237, *aff'd* 513 F.3d 279 (1st Cir. 2008). The Court finds the testimony of both Ms. Chanin and Ms. Tyler very credible and therefore concludes that Plaintiffs have submitted insufficient evidence that they should have received a copy of their procedural safeguards under IDEA or that IDEA's two-year statute of

limitations should be tolled. Accordingly, the Court concludes that all IDEA-related claims prior to January 6, 2006 are time-barred, and Plaintiffs are not entitled to any relief on any such claims.[41] And this Court has already determined that the two-year statute of limitations applicable to Section 504 claims applies in this matter.[42] Accordingly, this Court ruled that any claim regarding a violation of Section 504 accruing prior to January 3, 2006 is time-barred, and Plaintiffs are not entitled to any relief on any such claim.[43]

Furthermore, the Court concludes that Plaintiffs have not established that [redacted]. is a "child with a disability" within the meaning of IDEA. To the contrary, there is every indication that he is *not* a "child with a disability." As explained above, [redacted]. received educational benefit while receiving services from Defendant. [redacted] received passing grades (including some excellent grades), even when taking a very rigorous academic course load, throughout his enrollment in the Defendant district and left [redacted] High School with a G.P.A. of 3.33. He performed well on all independent measures of achievement, including standardized tests administered by Defendant, as well as evaluative measures administered by Plaintiffs' own privately-obtained evaluators such as Dr. Duis and Dr. Drutman. No individual (including Dr. Duis, Dr. Brown, Dr. Drutman, or [redacted].'s private physician, Dr. McMillan) recommended that he receive an IEP.

Since *Rowley*, the Eleventh Circuit Court of Appeals has had several opportunities to further the meaning of "educational benefit." In *J.S.K. v. Hendry County Sch. Bd.*, 941 F.2d. 1563 (11th Cir. 1991), the court rejected a plaintiff's argument that he had not received educational benefit:

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[41] Moreover, any such procedural violation is no more than *de minimus*, as the evidence shows that [redacted] would not have met the criteria for IDEA eligibility in any event. *Katherine S. v. Umbach*, 2002 U.S. Dist. LEXIS 2523, *48049 (M.D. Ala. 2002) (citing *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 665 (11th Cir. 1990)).

[42] *See* Memorandum Opinion and Order of April 14, 2008.

[43] Similarly, this Court has already determined that Defendant has no "child find" obligations under IDEA when [redacted]. unilaterally enrolled in [redacted] Academy, a school outside the Defendant district. Accordingly, this Court ruled that Plaintiffs' claims alleging that Defendant had failed its "child find" obligation were dismissed. *Id.*

> We disagree to the extent that "meaningful" means anything more than "some" or "adequate" educational benefit. In *Drew P. [Drew P. v. Clarke County Sch. Dist.*, 877 F.2d 927 (11th Cir. 1989)] we held that "The state must provide a child with only the 'basic floor of opportunity.' Our decision in *Drew P.* was not based on whether Drew P. was receiving "meaningful" educational benefits, but was based on whether he was receiving *any* educational benefits.

J.S.K., 941 F.2d at 1572 (italics in original). The court further explained the benchmark for measuring educational benefit was the "basic floor of opportunity" discussed in *Rowley*. Finally, the court held that "[i]f the educational benefits are adequate based on surrounding and supporting facts, [IDEA] requirements have been satisfied." *Id.*

A child's ability to pass from grade to grade is an important factor in determining whether the child is entitled to special education services under IDEA in the first instance. Specifically, if a child is able to pass from grade to grade, that child has likely received educational benefit, and therefore FAPE, in compliance with any and all applicable statutes. Moreover, in order to be eligible for services under IDEA, it is not enough that a child simply have some diagnosis that adversely affects his educational performance. Rather, a child must not only meet the criteria for a specific category or categories of eligibility (such as OHI), but he must also "by reason thereof, need[] special education and related services." 20 U.S.C. § 1401(3)(A).

In *Clay T. v. Walton County Sch. Dist.*, 952 F. Supp. 817 (M.D. Ga. 1997), a district court determined that a child diagnosed with attention deficit disorder (ADD) and a learning disability was not eligible under IDEA. Clay T. was (much like [redacted]) a bright child whose grades suffered due to inconsistency and problems completing homework. After failing every subject except P.E. and Art, his parents secured private tutoring and then unilaterally placed him in a private school. Although he still displayed signs of inconsistency doing his homework at the private school, his grades improved and were generally satisfactory. Clay T.'s parents then sought

reimbursement for the costs associated with private school, as well as continued placement in the private school until he finished his twelfth grade year.

The district court determined that the school district in question had committed no error. Specifically, the court noted that the school district relied on private information provided by the parents in determining its educational programming for the child. The court went on to note further that Clay T.'s "poor marks resulted not from an inability to comprehend or understand classroom material, but rather from his failure or refusal to turn in his assignments." *Id.* at 823. Given this, the court determined that there was insufficient evidence that Clay T. was eligible under IDEA.

In fact, the overwhelming weight of authority from a variety of courts around the country (including the Eleventh Circuit Court of Appeals and courts within its jurisdiction) shows that students who receive educational benefit in a regular education setting, with or without accommodations (whether or not they have a diagnosed disability, whether or not they fulfill eligibility criteria for one or more categories of eligibility, and whether or not they maximize their academic and/or educational potential) are not eligible for services under IDEA. This is so even when these students sometimes fail classes. Rather, so long as they are able to receive educational benefit in the regular education environment and without IDEA services, they are not eligible for those IDEA services. *See, e.g., C.J. v. Indian River County Sch. Bd.*, 41 IDELR 120 (11th Cir. 2004) (student with bipolar disorder and oppositional defiant disorder ineligible for IDEA services, given her strong academic record and successful progression from grade to grade); *Norton v. Orinda Union Sch. Dist.*, 168 F.3d 500 (9th Cir. 1999), *cert. denied*, 528 U.S. 825 (1999) (student who met eligibility criteria for "learning disabled" was ineligible for special education and related services because of her success in the regular classroom with

accommodations); *St. Joseph-Ogden Community High School Dist. No. 305 v. Janet W.*, 2008 U.S. Dist. LEXIS 3574 (C.D. Ill. 2008) (child with history of depression and suicide attempts not eligible for services under IDEA, as he passed his classes, albeit with grades that were not reflective of his full potential, and thus had received "educational benefit" without the need for IDEA services); *M.P. v. North East. Ind. Sch. Dist.*, 2007 U.S. Dist. LEXIS 87230, * (W.D. Tex. 2007) (despite the fact that he had failed his sixth and seventh grade years and failed a statewide assessment, child with ADHD was not eligible for IDEA because he did not require special education services to receive educational benefit); *R.B. v. Napa Valley Unified Sch. Dist.*, 43 IDELR 188 (N.D. Cal. 2005), *aff'd* 496 F.3d 932 (9th Cir. 2007) (despite poor grades and problematic behavior, child with ADHD, post-traumatic stress disorder, intermittent explosive disorder, and depression was not an eligible student under IDEA, as student was able to receive educational benefit with a Section 504 plan); *Sylvia M. v. Bd. of Educ. of Dripping Springs Ind. Sch. Dist.*, 48 F. Supp. 2d 681 (W.D. Tex. 1999), *aff'd* 214 F.3d 1351 (5th Cir. 2000), *cert denied*, 531 U.S. 879 (2000) (child with emotional and behavior problems who performed at or above grade level in every subject in her original school was ineligible for special education because she was receiving educational benefit from her public education program); *Hoffman v. East Troy Community Sch. Dist.*, 38 F. Supp. 2d 750 (E.D. Wis. 1999) (child with high intelligence and behavior problems who passed all but one class was not entitled to IDEA eligibility or reimbursement for private school costs, as he received "educational benefit" from his classes as required by IDEA, even though his performance was "certainly not reflective of his full potential"); *Doe v. Bd. of Ed. of the State of Connecticut*, 753 F. Supp. 65 (D.C. Conn. 1990) (child with behavior disorder was not eligible under IDEA, because his academic performance was satisfactory); *Riverside Unified Sch. Dist.*, 49 IDELR 83 (California SEA 2007) (student

with autism not eligible under IDEA because he could receive educational benefit in the regular education environment); *McMullen County Ind. Sch. Dist.*, 49 IDELR 118 (Texas SEA 2007) (despite several low, and one failing, grade, child with ADD and emotional issues was not eligible under IDEA because he did not require special education to receive educational benefit and because of existence of Section 504 plan for child).

Here, there is no real dispute that [redacted]. has a diagnosis of ADHD, a qualifying disability under the eligibility category of OHI. DOE Rule 160-4-7-.05, Appendix G. However, the existence of such a qualifying disability is insufficient to establish eligibility under IDEA. Rather, in order to be eligible for IDEA services, [redacted]. must "need[] special education and related services" in order to receive educational benefit. 20 U.S.C. § 1401(3)(A), DOE Rule 160-4-7-.05 (a child is a child with a disability within the meaning of IDEA if he "meets the eligibility criteria" in one or more eligibility category "*and* needs special education and related services") (emphasis added). [redacted]. clearly did not require special education and related services, as he received educational benefit during his enrollment in the Defendant district, as evidenced by virtually all the available evidence.

Academically, [redacted]. did well by every available measure. He passed each and every one of his classes, despite the additional rigor and work required when taking four Honors level courses, one advanced foreign language course, and only one elective. Indeed, he left [redacted] High School with a G.P.A. of 3.33 (3.22, when discounting quality points earned for taking Honors level courses during his tenth grade year). All standardized and statewide testing likewise shows excellent academic achievement and performance. Even the results of [redacted].'s own private evaluations support [redacted].'s academic progress.

[redacted]. was also deeply involved in and took advantage of extracurricular activities while at [redacted] High School. He was a member of the school's orchestra and participated in rehearsals and performances occurring outside of school hours. He even attended an out-of-town trip with his orchestra. In addition, he served as the Technical Director of [redacted]'s Drama Club. In fact, he was so involved with this extracurricular activity that he continued to serve as the Technical Director for at least several months *after* he left [redacted] High School.

Finally, he was doing well socially by virtually all accounts. Each and every one of his teachers noted that he was social, had friends, was well-liked by students and adults alike, and got along well with others. The only evidence to the contrary was offered by Plaintiffs testimony where they alleged that by December 2006, [redacted]. was "depressed," "miserable," and "a loner among his peers." Not only does the testimony of each and every one of [redacted]'s teachers contradict these assertions, Plaintiffs' own contemporaneous representations of [redacted].'s social functioning in December 2006 contradict these assertions. Specifically, Plaintiffs elected to have [redacted]. evaluated by Dr. Drutman, a private evaluator of their choosing, in December 2006. In that evaluation, Plaintiffs described [redacted]. in almost uniformly positive terms. Specifically, Plaintiffs' parents reported that, as of December 2006, [redacted] "has friends," "does well socially and other kids know him and like him." They further reported that [redacted] "is not moody and that he gets over any hurt feelings that quickly." [redacted]. himself echoed these sentiments. He reported that "he is a friendly person and has friends." Plaintiffs reported no social or emotional difficulties whatsoever. Moreover, [redacted] has never been diagnosed with any emotional disorder of any sort.

In addition, each and every one of [redacted].'s teachers who had any knowledge of him while at [redacted] High School agreed that [redacted]. received a FAPE while enrolled in the Defendant district. It is well established that courts must give great deference to educators in education-

related disputes. As the United States Supreme Court has unequivocally stated, courts "are not free to substitute [their] own notions of sound educational policy for those of the school authorities [courts] review." *See Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 887 (9th Cir. 2001) (quoting *Rowley,* 458 U.S. at 206). Indeed, because courts do "not have the expertise in the field of education presumably possessed by professional educators, and do[] not have the opportunity to observe a student's classroom behavior over a period of months as his teachers do, the Court[s] must grant much deference" to a child's teachers and school officials. *Clay Tr.*, 952 F. Supp. at 823.

Each and every one of [redacted].'s teachers agreed that, in their expert opinions, there was no evidence while [redacted] was enrolled in the Defendant district that he required any kind of service that he was not already receiving or any evidence of any needs not being met. Every one of his educators described [redacted]. in uniformly positive terms and described [redacted] as a typical, normal child in every respect and was successful while a student at [redacted].

Indeed, [redacted]. was performing so well socially that he was no longer diagnosed with Asperger's Syndrome as of December 2006, as reported by Dr. Drutman, Plaintiffs' private evaluator. Given these facts, this Court concludes that [redacted]. received educational benefit while enrolled in Defendant, is not a child with a disability within the meaning of IDEA, and that Defendant has fulfilled any and all of its requirements under IDEA regarding Plaintiffs.

The Court also concludes that Defendant has not committed any procedural violations of IDEA. Even if it had, however, such violations would not be actionable, because Plaintiffs suffered no substantive harm. *See, e.g.,* 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); *Doe v. Alabama*, 915 F.2d 651, 663 (11th Cir. 1990); *Sch. Bd. of Collier County v. K.C.*, 285 F.3d 977 (11th Cir. 2002); *Weiss v. Sch. Bd. of Hillsborough County*, 141 F.3d 990, 996 (11th

Cir. 1998); *Melissa S. v. Sch. Dist. of Pittsburgh*, 2006 U.S. App. LEXIS 14118 (3rd Cir. 2006); *Houston Independent Sch. Dist. v. Bobby R.*, 200 F3d 341 (5th Cir. 2000), *cert. denied*, 531 U.S. 817 (2000); *K.C. v. Fulton County Sch. Dist.*, LEXIS 47652 (N.D. Ga. 2006); *Bd. of Educ. v. Michael R.*, 2005 U.S. Dist. LEXIS 17450 (N.D. Ill. 2005); *Slama v. Ind. Sch. Dist.* No. 2580, 259 F.Supp.2d 880 (D. Minn. 2003). Moreover, any alleged procedural violations are not actionable as [redacted]. is not an eligible student under IDEA. Specifically, "a procedural violation cannot qualify an otherwise ineligible student for IDEA relief." *R.B. v. Napa Valley Sch. Dist.*, 496 F.3d 932, 942 (9th Cir. 2007). Accordingly, any procedural violation is harmless if a child is not otherwise eligible for IDEA's benefits. Because [redacted] is not a "child with a disability" within the meaning of IDEA, Plaintiffs are not entitled to any relief under IDEA.

Similarly, the Court finds no violation of Section 504. As already noted, Section 504's two-year statute of limitations bars recovery for any claim in this matter prior to January 3, 2006. "In order to establish a violation under Section 504, a disabled individual must establish that he was subjected to prohibited discrimination, which means he was denied the opportunity to participate in or benefit from the aid, benefit, or service because of a disability." *N.L. v. Knox County Schools*, 315 F.3d 688, 695 (6th Cir. 2003); 34 C.F.R. § 104.4(b). To prove discrimination in the education context, courts have held that something more than a simple failure to provide a free appropriate public education must be shown. *See Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982); see *also Lunceford v. D.C. Bd. of Educ.*, 241 U.S. App. D.C. 1, 745 F.2d 1577, 1580 (D.C. Cir. 1984)." *N.L. v. Knox County Schs,* 315 F.3d 688, 695 (6th Cir. 2003); *see also K.C. et al v. Fulton County Sch. Dist.*, U.S. Dist. LEXIS 47652, *53 (N.D. Ga. 2006.)

In any event, the substantive requirements under Section 504 are no more extensive than those of IDEA. Accordingly, if a child has received educational benefit, and therefore a FAPE under IDEA, he has necessarily received a FAPE under Section 504. *See Brendan K. v. Easton Area Sch. Dist.*, 2007 U.S. Dist. LEXIS 27846, * 35 (E.D. Pa. 2007). Moreover, it is well recognized that Section 504 covers more students than IDEA, but "students covered only by Section 504 are not entitled to the rights and protections enumerated by IDEA and its implementing regulations." *Id.* at 36.

As already noted above, because [redacted]. undoubtedly received educational benefit while enrolled in the Defendant, he has received a free appropriate public education. Accordingly, there is no evidence to suggest that Plaintiffs are entitled to recovery of any sort under Section 504. As already determined, [redacted]. received educational benefit, such that the requirements of any applicable statute have been satisfied.

At trial, however, Plaintiffs alleged that they were required to purchase certain technology for [redacted]. as part of his Section 504 plan and are entitled to reimbursement. The evidence, however, does not support this assertion. The only pieces of technology Plaintiffs allegedly purchased were [redacted].'s Palm Pilot and a laptop computer. As an initial matter, [redacted].'s Section 504 plans as of January 3, 2006 (the date on which the statute of limitations began) did not even require the use of a Palm Pilot. Plaintiffs participated in the development of those plans, signed them, and received a copy of their parental rights under Section 504. There is no evidence that they ever sought to challenge the content of any of these Section 504 plans. Accordingly, because these Section 504 plans did not require him to use a Palm Pilot, Plaintiffs cannot recover costs for purchasing one. In any event, there is evidence that Plaintiffs had purchased a Palm Pilot for [redacted] *before* he ever received a Section 504 plan. Accordingly,

Plaintiffs cannot credibly claim that they were required to purchase technology pursuant to any Section 504 plan.

Likewise, there is insufficient evidence that [redacted]. was required to purchase a laptop pursuant to a Section 504 plan. As an initial matter, there is no evidence as to the time Plaintiffs purchased this laptop or the amount paid for it.[44] Moreover, Defendant made a laptop available to [redacted]. when he determined that he no longer wished to use an AlphaSmart, technology that had been provided to him through middle school by Defendant. Defendant reflected his wishes on his Section 504 plan and indicated that he could use either an AlphaSmart or bring a laptop for classroom use. [redacted] was offered but refused a District laptop, preferring to use his own Apple laptop. Given this, there is insufficient evidence to prove that Plaintiffs incurred any costs for technology as a result of any impermissible action by Defendant.

Plaintiffs also emphasized that, on [redacted].'s most recent Section 504 plans, there was no indication of how [redacted].'s disability affected a major life activity. Additionally, Plaintiffs emphasized that Defendant had not conducted an evaluation of [redacted]. and instead relied on information provided by Plaintiffs through a privately obtained evaluation conducted in February 2003 and a medical examination report submitted in March 2003.[45] Section 504 and its implementing regulations (34 C.F.R. § 104.31 through 34 C.F.R. § 104.37) make clear, however, that Defendant's actions were appropriate.

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[44] It is undisputed, however, that [redacted]. had purchased this laptop well before January 6, 2006, as he was using the laptop throughout his ninth grade year, beginning as early as September 2005. Accordingly, any request for reimbursement is outside the applicable statute of limitations in any event. Likewise, any expenses incurred with obtaining private services from Miriam Hanson, during the 2003-2004 school year, are likewise outside the applicable statute of limitations and are therefore not recoverable.

[45] Any costs incurred by Plaintiffs associated with this evaluation and medical report are not recoverable, as they were incurred well outside the applicable two-year statute of limitations. Additionally, and importantly, neither the privately-obtained evaluation nor medical examination report recommend an IEP for [redacted]. Rather, they both explicitly recommend that he receive a Section 504 plan implemented in the regular classroom. Defendant complied with these recommendations. Further, to the extent that Plaintiffs request reimbursement for the costs associated with obtaining Dr. Drutman's evaluation, these costs are also not recoverable. Specifically, Plaintiffs made clear that this evaluation was not required of them by Defendant, was not obtained for Defendant, and was never even disclosed to Defendant.

For instance, Defendant was well within its rights to rely on [redacted].'s 2003 evaluation (the most recent one available) at all applicable times. Importantly, each and every Section 504 plan indicates that Defendant relied on a variety of sources, including parental recommendations, teacher recommendations, and a physician's diagnosis, as well. The Court also agrees with the Office of Civil Rights, the federal agency charged with the responsibility of ensuring that public school districts comply with Section 504, that "Other than requiring a [school district] to consider information from a variety of sources, Section 504 does not specify the kind of information the [school district] ought to consider in making evaluation and placement decisions." *Charlotte-Mecklenburg (NC) Schools*, 49 IDELR 80, 2-3 (OCR 2007). Accordingly, Defendant was under no obligation to update evaluative information. Rather, it can appropriately rely on *any* information (even very old information), so long as it comes from a variety of sources. In the instant matter, Defendant has explicitly complied with Section 504's requirements. It undoubtedly considered information from a variety of sources, including Plaintiffs themselves, as well as all information they had obtained privately and shared with Defendant . Therefore, Defendant has complied with Section 504's requirements.

Similarly, there is no requirement that a child's Section 504 plan contain an explicit statement about how a disability affects a major life activity. Indeed, all Section 504 requires is that

> in making placement decisions, a [school district] shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with 104.34 [requiring that every child be placed in the regular

education environment, unless the child cannot receive educational benefit in such an environment.

34 C.F.R. § 104.35. There can be no dispute that Defendant considered information from a variety of sources, documented that consideration, made a placement decision with a group of persons (that included Plaintiffs, as well as professional educators), and placed [redacted] in the least restrictive environment, the regular education classroom. Accordingly, Defendant complied with Section 504's procedures.[46]

As [redacted]. is not a child with a disability within the meaning of IDEA and because he received the educational benefit required, it necessarily follows that [redacted]. is not entitled to any of either IDEA's or Section 504's protections, including reimbursement for any costs associated with his unilateral enrollment in a private school. Specifically, because [redacted]. received educational benefit while enrolled at [redacted] High School, he is not entitled to reimbursement for any costs associated with attending [redacted]s Academy. Accordingly,

IV. DECISION

IT IS HEREBY ORDERED THAT Plaintiffs' requests for relief are **DENIED**.

SO ORDERED THIS 25th day of June, 2008.

John B. Gatto

JOHN B. GATTO, Judge

[46] Given that Section 504's substantive requirements do not exceed those of IDEA, it follows then that its procedural requirements likewise do not exceed those of IDEA. Accordingly, any procedural violation, to be actionable, must have resulted in substantive harm to [redacted]. Because Plaintiffs suffered no substantive harm, the Court concludes that any alleged procedural violations are not actionable.