BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Docket No.:**
	:	**OSAH-DOE-SE-1118474-75-Walker**
HENRY COUNTY PUBLIC SCHOOLS,	:	
	:	
Defendant.	:	

FINAL DECISION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On January 18, 2011, Plaintiff [redacted], by and through [redacted] parents, [redacted] and [redacted], filed a Due Process Hearing Request ("Complaint") contending that Defendant, Henry County Public Schools, denied [redacted] a free appropriate public education under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.* Plaintiff alleges that 1) Defendant failed to provide occupational therapy or monitor [redacted] sensory diet for over a period of eight weeks; 2) Defendant failed to provide teachers with adequate training, which resulted in inhumane physical and emotional abuse towards Plaintiff; 3) Defendant violated Plaintiff's IEP by taking [redacted] to an administrator to be disciplined; and 4) Defendant violated the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, by failing to provide [redacted]'s parents with certain educational records. In his Complaint, Plaintiff seeks "psychological supported services and occupational therapy to help rectify this situation."[1] Defendant filed a counterclaim to Plaintiff's Complaint on January 28, 2011.[2]

---

[1] Plaintiff's Complaint references attached documents; however, no documents were affixed to the Complaint or forwarded by Plaintiff. At the hearing, Plaintiff asked for the remedy of occupational therapy for one hour per week for one year and psychological support with a psychologist for one hour per week for one year.

[2] Defendant did not pursue this counterclaim at the hearing or in post-hearing briefing and the undersigned deems it abandoned.

A hearing took place on March 14, 2011, and the record closed on March 28, 2011. The matter is now pending before the undersigned administrative law judge of the Office of State Administrative Hearings. After careful consideration of the arguments and submissions of the parties, and for the reasons set forth below, Plaintiff's claims are **DENIED**.

II. FINDINGS OF FACT

1.

During the 2008-2009 academic year, Plaintiff [redacted] was a first grade student at Flippen Elementary School in the Henry County Public Schools. [redacted]. was eligible for special education under the category of Autism. (Exhibit J-1). Plaintiff's individualized education program ("IEP") provided that he receive occupational therapy services for fifteen minutes per week. (Exhibit J-9).

2.

[redacted]'s first grade teachers were Ms. Robin Watts and Ms. Amanda Banks. [redacted] paraprofessional was Ms. Elaine Patterson. (Testimony of [redacted], Testimony of Amanda Banks).

3.

According to his mother, Ms. [redacted], Plaintiff started off the 2008-2009 academic year well. As the year progressed, Ms. [redacted] noticed that [redacted] was reluctant to go to class without her. [redacted]'s teachers also remarked to Ms. [redacted] that [redacted] was having some behavioral difficulties in class. However, in the daily planner sent home by his teachers, [redacted] generally received positive marks for [redacted] conduct and progress. (Testimony of [redacted], Exhibit J-3).

4.

Plaintiff's IEP stated that [redacted] would receive fifteen minutes a week of occupational therapy. Ms. Stacy Abbott was [redacted]'s occupational therapist. On occasion, instead of providing fifteen minutes of occupational therapy per week, Ms. Abbott would provide thirty minutes of services every other week. (Testimony of Stacy Abbott; Testimony of Amanda Banks). Ms. Abbott believed that this larger chunk of time every other week was more effective for [redacted] than the shorter weekly periods. (Testimony of Stacy Abbott).

5.

Ms. Abbott was on maternity leave for some period of time in the Fall of 2008, and the school retained a substitute. On November 8, 2008, [redacted]'s daily planner reflected that a new occupational therapist would begin treating [redacted] the following week. (Testimony of Amanda Banks; Exhibit J-3). On this date, [redacted]'s parents realized [redacted] had missed some therapy sessions. (Testimony of [redacted]).

6.

Dr. Brandi Mauney worked for the Henry County Public Schools as a behavioral specialist. She observed students, made suggestions for classroom interventions, and provided [redacted]'s teachers with over forty hours a year of training for students with special needs. (Testimony of Brandi Mauney). As suggested by Dr. Mauney, [redacted]'s teachers implemented a number of sensory interventions including a sensory diet, body brushing, a visual schedule, a wiggle seat, a rocking chair, trampoline time, and walks around the school as needed. [redacted] responded well to these interventions. (Testimony of Brandi Mauney; Testimony of Amanda Banks).

7.

One of the instruction methods used by Flippen Elementary School teachers is Applied Behavioral Analysis. This approach suggests an instructor may physically guide a student if he fails to respond to verbal prompts. (Testimony of Brandi Mauney).

8.

On February 4, 2009, Ms. observed her during class. Ms. Banks requested come to his desk to do some work; did not want to comply with teacher's request. Ms. Banks gently took hand and arm and guided to the desk where began to do work. was laughing during this encounter; however Ms. was very upset that Ms. Banks had touched (Testimony of ; Testimony of Amanda Banks).

9.

Dr. Mauney observed around the same time period, on February 3, 2009 and two days later on February 5, 2009. During the February 5, 2009 observation, Ms. Banks showed Dr. Mauney a series of four or five video clips of approximately ten seconds each. The video clips were taken by Ms. Patterson and demonstrated that was highly energetic during class. Dr. Mauney observed running, rolling on the floor, and laughing. She heard Ms. Patterson off-camera directing to calm down. Ms. Banks had shown the same videos to Ms. on February 4, 2009. While Ms. claims that she saw Ms. Patterson dragging on the videos, the undersigned determines that Ms. 's testimony is not credible. (Testimony of Amanda Banks; Testimony of Brandi Mauney; Testimony of).

10.

Ms. Banks had made the videos on a media drive checked out from the Flippen Elementary School library. After showing Dr. Mauney the video, Ms. Banks returned the media drive to the library. As part of their regular procedure, the media specialists delete any videos on the returned media drives, as the drives are loaned to other teachers for a variety of purposes. (Testimony of Brenda Mooney; Testimony of Amanda Banks).

11.

On February 10, 2009, Ms. [redacted] requested a copy of the video Ms. Banks had shown her. On February 25, 2009, Ms. Banks told Ms. [redacted] she could not provide a copy of the video, explaining that she did not have a copy of the video because she had not downloaded a copy of it on to her computer. (Exhibit J-10).

12.

In February 2009, Ms. [redacted] claimed she saw fingernail marks on [redacted]'s arm. She believed that Ms. Patterson had scratched him. (Testimony of [redacted]). Ms. Patterson denied scratching [redacted], and the undersigned finds Ms. Patterson's testimony that she did not scratch [redacted] to be credible. (Testimony of Brenda Patterson). None of [redacted]'s teachers saw fingernail marks on [redacted] arm, although they observed that [redacted] did have a scab on [redacted] arm from what appeared to be an old scratch. Ms. Banks took [redacted] to the school nurse so that she could evaluate the scratch, and the school nurse did not feel treatment was necessary. (Testimony of Brandi Mauney; Testimony of Amanda Banks).

13.

In the Complaint and at the hearing, Ms. [redacted] claimed that Ms. Banks took [redacted] to the vice-principal's office as a disciplinary measure in violation of [redacted] IEP. (Testimony of [redacted]). [redacted]'s teachers testified [redacted] was never taken to the vice-principal's office for any reason. (Testimony of

Amanda Banks; Testimony of Elaine Patterson; Testimony of Robin Watts). Flippen Elementary School's vice-principal testified that [redacted]. was never brought to his office, and that [redacted] does not have a disciplinary record. (Testimony of Johnny Harrell).

14.

On May 7, 2009, the parties convened to review [redacted]'s annual progress. While [redacted]. was highly active during February of 2009, by March 2009 [redacted] was back on track. (Testimony of Brandi Mauney). The written report submitted by [redacted] teachers reflected that [redacted]. had mastered the large majority of [redacted] academic goals; any [redacted] had not mastered were listed as progressing.[3] Specifically, [redacted]. mastered four out of five language arts goals; four out of seven math goals; and two out of three social/emotional goals. (Testimony of Amanda Banks; Exhibit J-7).

15.

At the end of the academic year, Dr. Mauney felt [redacted] was making "tremendous progress." Philip Mellor, Henry County Executive Director of Special Education, also testified that [redacted] had made good progress for the year. The IEP team determined that [redacted] should advance to the second grade. (Testimony of [redacted]; Testimony of Brandi Mauney; Testimony of Philip Mellor; Exhibit J-7).

16.

Although an IEP was prepared for [redacted]. for 2009-2010, [redacted] did not return to the Henry County Public Schools. (Testimony of [redacted] Exhibit J-2).

III. CONCLUSIONS OF LAW

The purpose of the Individuals with Disabilities Education Act ("IDEA") is to ensure "that all children with disabilities have available to them a free appropriate public education that emphasizes

[3] The report is misdated May 7, 2008, but it is clear from its contents that it reviews the academic year 2008-2009.

special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A); *Sch. Bd. of Collier County v. K.C.*, 285 F.3d 977, 979 (11th Cir. 2002). A parent may challenge the "identification, evaluation, and educational placement of the child, and the provision of a free appropriate education to such child." 20 U.S.C. § 1415(b)(1).

Plaintiff has filed a Complaint alleging that Defendant denied [redacted] a free appropriate public education ("FAPE") by 1) failing to provide occupational therapy or monitor Plaintiff's sensory diet for over a period of eight weeks; 2) failing to provide teachers with adequate training, which resulted in inhumane physical and emotional abuse towards Plaintiff; 3) taking Plaintiff to an administrator to be disciplined in violation of his IEP; and 4) violating FERPA by refusing to turn over educational records. Plaintiff has the burden to prove his claims by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *see also* Ga. Comp. R. & Regs. 160-4-7-.12.

A. Occupational Therapy Claims

Plaintiff's Complaint alleges that Defendant failed to provide a "certified occupational therapist to monitor [redacted]'s] sensory diet (set of by o/t) [sic] for over a period of eight weeks." Although [redacted]'s IEP for the 2008-2009 academic year required that he receive fifteen minutes a week of occupational therapy, Plaintiff's parents learned that there had been a cessation of occupational therapy services for some period of time on November 8, 2008, the day they read a note in Plaintiff's planner stating that a new occupational therapist would begin treating Plaintiff the following week.

The IDEA requires that a hearing be requested "within [two] years of the date the parents knew or should have known about the alleged action that forms the basis of the complaint...." 20 U.S.C. § 1415(f)(3)(C). *See Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1287-88 (11th Cir. 2008) (finding a two-year statute of limitations enforceable if parents had all facts necessary to know of the injury). Plaintiff's parents learned of this potential cause of action on November 8, 2008; however, they did not

file a Complaint until January 18, 2011. Accordingly, as more than two years elapsed from the date that [redacted].'s parents knew of the injury to the filing of the Complaint, this claim is barred by the applicable statute of limitations.

Even if Plaintiff's claims were not barred by the statute of limitations, [redacted] provided inadequate proof of the facts underlying this claim at the hearing. Although there was evidence suggesting that Plaintiff's regular occupational therapist was absent from the school for some period of time, there was no evidence presented as to the duration of her absence, or that [redacted]'s teachers failed to implement appropriate sensory interventions during this time.

Most importantly, Plaintiff cannot demonstrate that Defendant failed to provide [redacted] FAPE as a result of the alleged omissions. The "failure to provide all the services and modifications outlined in an IEP does not constitute a per se violation of the IDEA...when significant provisions of the IEP were followed, even though [a plaintiff] clearly demonstrate[s] that portions of the IEP were not implemented at all." *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (citation and emphasis omitted). As a result, [redacted]'s parents' dissatisfaction with the implementation of [redacted] occupational therapy or sensory diet is not actionable unless it implicated Defendant's ability to provide [redacted] with FAPE. *See White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003) ("The right to provide meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such.") (citations omitted).

In the instant case, the services provided by Defendant conferred a substantial benefit. The evidence was undisputed that [redacted] mastered the majority of his IEP goals in the 2008-2009 school year, made steady progress on the remaining goals, and was slated to advance to second grade. As a result, the evidence demonstrated that Defendant did provide FAPE to Plaintiff. Thus, even were this claim not barred by the statute of limitations, Plaintiff could not prevail. *See Cerra v. Pawling Cent. Sch. Dist.*,

427 F.3d 186, 196 (2d Cir. 2005) (" '[T]he attainment of passing grades and regular advancement from grade to grade' will generally constitute evidence of satisfactory progress") (citation omitted); *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.,* 375 F.3d 603, 615 (7th Cir. 2004) (stating that factors such as passing grades and advancement "usually show satisfactory progress") (citations omitted).

B. Teacher Training Claims

Plaintiff's Complaint also alleges that Defendant "failed to provide teachers with adequate training which resulted [in] inhumane physical and emotional abuse." As an initial matter, the undersigned rejects Plaintiff's claims of emotional and physical abuse in this case, finding that no credible evidence supports these assertions. In the one instance that Petitioner was guided to [redacted] seat by Ms. Banks, this guidance was neither rough nor inappropriate. Plaintiff's assertions that Ms. Patterson scratched [redacted] and/or dragged [redacted] also are not credible.

Further, Plaintiff did not present sufficient support for [redacted] allegation that [redacted] teachers received inadequate training. To the contrary, the evidence at the hearing indicated that Dr. Mauney provided [redacted]'s teachers with over forty hours of training per year. Plaintiff failed to cite to any educational standard suggesting that this level of training was inadequate.

Even if [redacted]'s parents would have liked for [redacted] teachers to have had additional training, the IDEA confers the right to a free appropriate public education, not a right to the absolute best program available. *M.M. v. Sch. Bd. of Miami-Dade County*, 437 F.3d 1085, 1102 (11th Cir. 2006) (finding that as long as the child's IEP provides some educational benefit under the IDEA, there is no entitlement to the "best" program) (citations omitted). While parents are permitted and encouraged to participate in education decisions affecting the special needs of their child, "the school board is not required to follow [the] parents wishes at ever[y] step, so long as [the student] is receiving a FAPE in the least restrictive means possible." *L.G. v. Sch. Bd.,* 512 F. Supp. 2d 1240, 1249 (S.D. Fla. 2007). The evidence supported

Dr. Mauney's testimony that [redacted]. was making tremendous progress. As such, [redacted] "educational benefits [were] adequate based on surrounding and supporting facts, [and IDEA] requirements have been satisfied." *JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1573 (11th Cir. 1991)) (internal citations omitted).

C. Disciplinary Claims

Plaintiff's Complaint alleges that [redacted] teachers violated his IEP by taking [redacted] to the vice-principal's office to be disciplined. Plaintiff provided no credible support for this assertion at the hearing. All of [redacted]'s teachers testified that [redacted] was never taken to the vice-principal's office for any reason. The vice-principal himself testified that [redacted] was never brought to his office, nor does [redacted] have any disciplinary record. As there is a complete absence of proof in support of this allegation, this claim must fail.

D. FERPA Claims

Plaintiff's Complaint alleges that Defendant withheld records from [redacted] parents in violation of FERPA, 20 U.S.C. § 1232g. As an initial matter, the undersigned is doubtful that this administrative court has jurisdiction over this FERPA claim. However, while stated as a claim under FERPA, the IDEA also requires that school districts allow parents to examine all relevant records. 20 U.S.C. § 1415(b)(1). Accordingly, for the purposes of this proceeding the undersigned construes Plaintiff's FERPA claim as an IDEA claim under 20 U.S.C. § 1415(b)(1). *Cf. J.P.E.H. v. Hooksett Sch. Dist.*, No. 07-CV-276-SM, 2007 U.S. Dist. LEXIS 95442 (D.N.H. Dec. 18, 2007) (holding that claims by a parent of a disabled student that the school improperly shared information about her child may proceed as a violation of IDEA records confidentiality, but dismissing parents' FERPA claims).

"The core of the [IDEA] . . . is the cooperative process that it establishes between parents and schools." *Schaffer v. Weast*, at 52 (2005) (citation omitted). In matters alleging a procedural violation,

such as an institution's failure to provide educational records, a court may find that the Plaintiff did not receive FAPE "only if the procedural inadequacies significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of [FAPE] to the plaintiffs." 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Gwinnett County Sch. Dist. v. J.B.*, 398 F. Supp. 2d 1245, 1249 (N.D. Ga. 2005) (explaining how to seek compensation from a procedural violation); *A.I. v. District of Columbia,* 402 F. Supp. 2d 152 (D.D.C. 2005) (reviewing the types of IEP procedural defects that have been held to violate a child's right to a FAPE: those that "result in the loss of educational opportunity," "seriously infringe upon the parents' opportunity to participate in the IEP formulation process," or "cause[] a deprivation of educational benefits") (citations omitted).

In this case, Plaintiff charges that Defendant's failure to provide the video clips taken by [redacted] teachers constituted a procedural violation under the IDEA. Plaintiff's claim fails for two reasons. First, "[f]or the purposes of the IDEA, 'education records' means the types of records covered under [FERPA], 20 U.S.C. § 1232g; 34 C.F.R. § 300.560 (b)." *K.C. v. Fulton County Sch. Dist.*, No. 1:03-CV-35501-TWT 2006 U.S. Dist. LEXIS 47652 (N.D. Ga. June 30, 2006). "FERPA grants parents the right 'to inspect and review the education records **maintained by the State educational agency**.' 20 U.S.C. § 1232g(b)." *Id.* at 28 (emphasis added). In this case, the video clips do not constitute educational records under FERPA, as the video clips were not maintained by Defendant. In fact, the testimony was that all video was routinely erased when teachers returned the borrowed media drives to the school library. *See Cerra,* 427 F.3d at 194 (holding that a failure to provide a parent with class profiles that the school district had not yet created did not violate IDEA). Thus, the video clips would not constitute education records either under FERPA or the IDEA.

Second, a procedural IDEA claim is viable only if procedural violations "affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834, 371 U.S.

App. D.C. 53 (D.C. Cir. 2006) (citations omitted). The Plaintiff bears the burden of proving a violation of substantive rights. *See Holdzclaw v. District of Columbia,* 524 F. Supp. 2d 43, 48 (D.D.C. 2007); *see also Kruvant v. District of Columbia, 99 Fed. Appx. 232, 233* (D.C. Cir. 2004) (denying parents relief because "although [the school] admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error").

Even if Plaintiff could demonstrate that the video clips constituted educational records, the evidence did not show that the failure to disclose these records restricted [redacted]'s parents from fully participating in their [redacted] education. The video captured [redacted] running, rolling on the floor, and laughing. Both Ms. [redacted] and Dr. Mauney were able to view the video, were aware that [redacted] was highly active during class, and recognized that sensory interventions could be used to improve [redacted] performance. Accordingly, Defendant's failure to provide the video did not deny [redacted]'s parents the opportunity to fully participate in the development of [redacted] IEP, result in the loss of an educational opportunity, or cause a deprivation of educational benefits. *Cf. K.C. v. Fulton County Sch. Dist.*, 2006 U.S. Dist. LEXIS 47652 at *30 (finding that a school's denial of access to individual pieces of student work did not limit the parents' ability to participate in their child's education and therefore did not violate the IDEA); *Amanda J. v. Clark County Sch. Dist.,* 267 F.3d 877, 892-93, 894 (9th Cir, 2001) (finding that school's failure to provide reports that student exhibited behavioral characteristics associated with autism was a procedural violation which denied FAPE because the "parents [were] prevented from participating fully, effectively, and in an informed manner in the development of [the student's] IEP"). As there was no substantive impact of any alleged procedural error, Plaintiff cannot prevail in [redacted] claim regarding educational records.

IV. DECISION

For the foregoing reasons, Plaintiff's claims are **DENIED.**

SO ORDERED, this 20th day of April, 2011.

Ronit Walker
Administrative Law Judge

Volume _____ Page _____