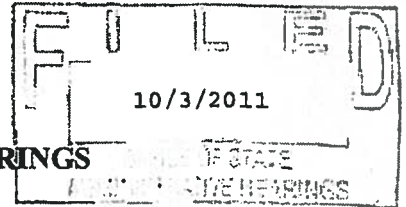


COPY



IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

_____, a minor, by and through her parent and
next friends, _____;
Plaintiffs,

Docket No.:
OSAH-DOE-SE-1130053-67-Gatto ✓

v.

GWINNETT COUNTY SCHOOL
DISTRICT,
Defendant.

_____, a minor, by and through her parent and
next friends, _____,
Plaintiffs,

Docket No.:
OSAH-DOE-SE-1132602-67-Gatto

v.

GWINNETT COUNTY SCHOOL
DISTRICT,
Defendant.

GWINNETT COUNTY SCHOOL
DISTRICT,
Plaintiff,

DOCKET NO.:
OSAH-DOE-IEE-1206491-67-Gatto ✓

v.

_____, a minor, by and through her parent and
next friends, _____,
Defendants.

FINAL ORDER

COUNSEL: _____, a minor, by and through _____ parent and next friend, _____, *Pro se*, for _____ and
_____.

Victoria Sweeny, Catherine Trial Tr. vol. 1, Followill, for Gwinnett County School District

GATTO, Judge

OCT 06 2011.
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I. INTRODUCTION

The above-styled actions came before the Court pursuant to two complaints filed by [REDACTED], a minor, by and through [REDACTED] parent and next friend, [REDACTED], against Gwinnett County School District ("the District") and one complaint filed by the District against [REDACTED], all pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.* and its implementing regulations, 34 C.F.R. Part 300. All three actions were consolidated by the Court for disposition and resolution. For the reasons that follow, this Court concludes that [REDACTED]'s claims are DENIED and [REDACTED] is entitled to no relief, including an independent educational evaluation ("IEE") at public expense.

II. PROCEDURAL HISTORY

[REDACTED] initiated this action on April 22, 2011 by filing a Due Process Complaint, which alleged that the District improperly determined [REDACTED] ineligible for special education services in "April/May 2010" and that [REDACTED] parent had been denied access to [REDACTED] student records in violation of the IDEA. On May 13, 2011, [REDACTED] filed an Amended Complaint detailing the issues set forth in the initial Complaint. After an early resolution conference between the parties on May 4, 2011 failed to resolve the issues in dispute, the matters proceeded to trial beginning on June 22, 2011. During the trial, [REDACTED]'s parent consented to a formal speech/language evaluation by the District. The District conducted a speech/language evaluation of [REDACTED] on July 14, 2011 and convened a second eligibility meeting on July 15, 2011 where [REDACTED] was again determined to be ineligible for special education services under the IDEA. [REDACTED]'s parent subsequently requested an independent speech/language evaluation at public expense. Rather than fund an independent evaluation, the District filed its own Due Process Complaint to defend its July 14, 2011 speech evaluation of

§§. as appropriate. Following an unsuccessful early resolution conference concerning the District's Due Process Complaint, the trial was completed on September 9, 2011.

III. FINDINGS OF FACT

§§ is a §-year old student who resides within the territorial boundaries of the Gwinnett County School District and attends Starling Elementary School. §§'s Ex. 3.¹ Until May 25, 2010, §§ was eligible to receive special education services from the District as a student with speech/language impairment ("SLI"). §§'s Ex. 3. On May 25, 2010, §§ was determined to no longer meet eligibility requirements for receipt of special education services under the IDEA. D.S.'s Ex. 3. §§ began receiving speech therapy from the District at the age of three due to an articulation disorder, which qualified §§ for IDEA eligibility as a student with speech/language impairment. §§'s Ex. 3; Trial Tr. vol. 1, 61:7-10, June 22, 2011.² Specifically, §§ exhibited difficulty appropriately articulating a "vocalic r," or producing the /r/ sound when the letter "r" is accompanied by a vowel in a word. Trial Tr. vol. 1, 60:13-17. Though §§'s difficulty articulating the vocalic /r/ impacted §§ speech intelligibility when §§ was a young child, the disorder is of the type that can be remediated with age when a student receives speech/language therapy. Trial Tr. vol. 1, 61:20-23.

The District continued to provide §§ with direct speech therapy from a speech/language pathologist ("SLP") to address §§ articulation throughout preschool, kindergarten, first grade, second grade, and third grade. Trial Tr. vol. 1, 52:19-22, 65:4-6, Trial Tr. vol. 2, 287:6-14, September 9, 2011. By the end of the 2008-2009 school year, §§'s second grade year, §§ academics, language, voice, and fluency were all within normal limits, and §§ articulation of the

¹ Since these actions involve both parties as plaintiffs and defendants, citations to the exhibits are to §§'s Ex. and District Ex.

² Though there are four areas for which a student may qualify as eligible under the speech/language impairment classification (articulation, language, fluency, or voice), §§ was found eligible based only upon §§ articulation. Trial Tr. vol. 2, 257:16-258:18; Ga. Comp. R. & Regs. 160-4-7-.05.

vocalic /r/ was the only sound which required monitoring. [REDACTED]'s Ex. 1, D. 27. Consequently, [REDACTED]'s IEP for the 2009-2010 school year, [REDACTED] third grade year, provided for one hour per week of speech therapy from an SLP addressing [REDACTED]'s articulation of the /r/ sound. [REDACTED]'s Ex. 1, D. 29; Trial Tr. vol. 1, 232:2-15. Although [REDACTED] continued to receive speech therapy concerning the vocalic /r/ during third grade, academically [REDACTED] performed at or above grade level across all content areas. Specifically, by the end of third grade, [REDACTED] exceeded grade level expectations in each content area on the Criterion Referenced Competency Test (commonly known as the "CRCT"), a standardized achievement test, which measures students' academic performance according to grade-level performance standards. District's Ex. 78 - 80; Trial Tr. vol. 2, 333:24 - 334:2.

Marti Ellwood, [REDACTED]'s SLP during [REDACTED] third grade year, provided [REDACTED] with speech therapy two times per week, for thirty minutes each session, to address [REDACTED] articulation of the vocalic /r/. Trial Tr. vol. 2, 320:19-22, 323: 2-5.³ Interventions Ellwood used with [REDACTED] during the 2009-2010 school year included direct instruction in a small group setting, oral motor exercises, articulation drills, and auditory discrimination exercises. [REDACTED]'s Ex. 3; Trial Tr. vol. 2, 322: 2-20. [REDACTED] was instructed in correct tongue placement for appropriate articulation, as well as how to monitor and self-correct error productions in multiple settings. [REDACTED]'s Ex. 3.⁴

³ Ellwood has been a practicing speech/language pathologist for twenty-nine years. She holds a Bachelor of Science in speech pathology and audiology from Southern Illinois University and a Master of Arts in speech pathology from Northern Illinois University. She is a member of the American Speech and Hearing Association from which she has received a Certificate of Clinical Competence. Ellwood is additionally certified by the state of Georgia as a special education teacher for grades K through 12 in all curriculum areas. Ellwood was qualified to testify as an expert in the selection of assessment instruments, the administration of assessments to children suspected of having a speech/language disorder, the determination of eligibility of children for speech/language services under the IDEA, and the provision of speech/language services to children who qualify for services under the IDEA. Trial Tr. vol. 2, 313:17-319:16, 319:18-320:3

⁴ [REDACTED] is described as a "perfectionist" and is extremely successfully in self-correcting any errors when they do occur. Trial Tr. vol. 2, 324:17-325:13.

At the beginning of the 2009-2010 school year, [REDACTED] was already performing at a high level and correctly pronouncing the vocalic /r/. The baseline data taken on [REDACTED] by Ellwood in August and September of 2009 showed [REDACTED]'s correct pronunciation of the vocalic /r/ phoneme in words and sentences ranged from 85% at the lowest to 100% at the highest. [REDACTED]'s Ex. 3; Trial Tr. vol. 2, 326:11-328:8.⁵ Ellwood took data on the use of [REDACTED]'s vocalic /r/ in multiple settings. In addition to data taken during direct speech therapy sessions, she observed [REDACTED] and took data on [REDACTED]'s use of the vocalic /r/ in conversation when [REDACTED] was on the playground interacting with friends during lunch in [REDACTED] third grade class (both during large group activities and in small group activities), and during classes known as "specials." [REDACTED]'s Ex. 3; Trial Tr. vol. 2, 302:24-303:6, 331:1- 340:15; District's Ex. 57-72. In addition, Ellwood had [REDACTED] do a variety of activities to practice the use of the vocalic /r/.⁶ Trial Tr. vol. 2, 331:1-340:15. [REDACTED] consistently performed at high levels, often times reflecting 100% accurate pronunciation and never demonstrating anything less than 91%. [REDACTED]'s Ex. 3.

[REDACTED] performed so well that Ellwood called [REDACTED]'s parents in November of the 2009-2010 school year to report on [REDACTED]'s progress and to inquire if they had any specific concerns. Trial Tr. vol. 2, 341:15-342:15. Ellwood indicated to [REDACTED]'s parents that [REDACTED] was performing so well that [REDACTED] may not need speech therapy much longer. Trial Tr. vol. 2, 341:15-342:15. At no time did either [REDACTED]'s mother or father indicate to Ellwood that they had any concerns regarding [REDACTED]'s

⁵ Ellwood testified that in taking data and marking the correct (or incorrect) pronunciation of the vocalic /r/, "since [REDACTED] had been in speech for quite some time and had worked on the /r/, I was very picky. . . because I knew [REDACTED] could do it too, so I wanted [REDACTED] to make very, very good /r/'s." Trial Tr. vol. 2, 326:14-17.

⁶ These activities included having [REDACTED] read a book to a Kindergarten class (97% accuracy), playing academic and non-academic games with [REDACTED], recording [REDACTED] and having [REDACTED] rate [REDACTED] self ([REDACTED] rated [REDACTED] self a "10"), and orally reading aloud. Ex. P. 3; Trial Tr. vol. 2, 302:24-303:6, 331:1- 340:15; District's Ex. 57-72

social skills or socialization at school or any concern that [REDACTED] was hesitant to speak, nor did [REDACTED]'s classroom teacher indicate any such concerns. Trial Tr. vol. 2, 342:15-343:14.⁷

Similarly, [REDACTED] did not report any concerns to Ellwood about [REDACTED] speech or any social problems at school. Trial Tr. vol. 2, 321: 2-4. Indeed, each time Ellwood observed [REDACTED], whether at lunch, in class, on the playground, or on the way to the bus, [REDACTED] was interacting with [REDACTED] peers and friends, "laughing, having fun," and did not appear reticent to participate. Trial Tr. vol. 2, 302:24-303:7, 341:9-11. By the spring of the 2009-2010 school year, [REDACTED] was not exhibiting problems with the articulation of any sounds, including the vocalic /r/. Trial Tr. vol. 2, 340:16-23. Furthermore, any articulation error that [REDACTED] did make was "no more than what you or I might [make] in conversation. You know, in conversation sometimes we all. . . mispronounce a word here or there, and no, [REDACTED] was doing very well." Trial Tr. vol. 2, 340:20-23.

While [REDACTED]'s parents had been informed that Ellwood did not believe that [REDACTED] appeared to need speech services much longer, they refused to consent to the administration of formal speech testing. Trial Tr. vol. 2, 294:16-295:23. Parental consent forms and prior written notice explaining the request for testing were sent home to the parent, yet multiple forms were not returned or were returned unsigned. Trial Tr. vol. 2, 295:1-2; District's Ex. 101-130, 114-125, 126. In February 2010, [REDACTED] returned a consent form on which she wrote that she would not sign the form. District's Ex. 91.

On April 28, 2010, [REDACTED]'s IEP team including [REDACTED] parent convened a Reevaluation Conference Review. District's Ex. 11. Since [REDACTED]'s parents had refused to consent to the administration of a formal speech assessment, the team reviewed informal assessments, including [REDACTED]'s speech therapy data, [REDACTED] performance on standardized tests, [REDACTED] classroom

⁷ In fact, [REDACTED] was doing so well that [REDACTED] classroom teacher agreed that [REDACTED] should be reevaluated as quickly as possible so that [REDACTED] would not continue to miss one hour of academic instructional time each week when [REDACTED] was pulled out of class for speech therapy services. Trial Tr. vol. 2, 343:2-344:23.

performance, adaptive behavior, observations by teacher and SLP, and progress on speech goals and objectives, among other information. District's Ex. 11. Ellwood presented data indicating that had mastered all of speech goals and objectives and that was able to produce the /r/, r-blends, and the vocalic /r/ in all positions of words at the conversational level with 90% or greater accuracy in multiple settings. District's Ex. 11-12. 's classroom teacher shared that she observed few errors in 's articulation in class, and was able to self-correct those infrequent errors that did occur. District's Ex. 17. Both 's classroom teacher and Ellwood reported that they observed engage in positive social experiences with peers in all settings of the school. District's Ex. 17. The consensus of the IEP team agreed that did not appear to continue to qualify for eligibility under the category of speech/language impairment, and that an eligibility conference should be convened. District's Ex. 13.

The District indicated that it was willing to perform an additional formal assessment prior to the eligibility conference if 's parents would consent. District's Ex. 18.⁸ 's parents responded that that they would like a list of proposed formal assessments and would consider whether to consent to any testing prior to the eligibility conference. District's Ex. 13. Following the Reevaluation Conference, the parents were again provided a list of three formal articulation assessments proposed by Ellwood and the opportunity to consent to an evaluation. District's Ex. 114-125. On or about May 10, 2010, returned a consent form which she had signed, but she specifically rejected the three articulation assessments proposed by Ellwood as "not adequate" and placed multiple stipulations on the form. District's Ex. 92. The District interpreted the parent's rejection of Ellwood's proposed assessments and multiple stipulations on the consent

⁸ Expert testimony established that while a formal assessment of articulation may be "helpful" because it yields a standard score, for students like who have a single sound error, "performance in more functional tasks, such as oral reading, reciting in class, is more indicative of how [the student] performs," particularly when the performance is viewed across areas and over "a longer period of time." Trial Tr. vol. 2, p. 297:1-10. Thus, given the abundant informal assessment data, a formal articulation assessment was not critical in order to make an eligibility determination.

form as a declination of consent, and consequently informed ██████'s parents that an eligibility conference would proceed based upon a review of existing data and informal assessments.⁹ District's Ex. 126; Trial Tr. vol. 2, 294:18-23.

██████'s IEP team including ██████'s parent met on May 25, 2010 to review ██████'s eligibility of speech/language services under the IDEA. District's Ex. 1-10. In light of the District's determination that the parents had failed to provide consent for a formal assessment, the IEP team again reviewed a summary of previous interventions, Ellwood's data of ██████'s progress across multiple settings, ██████'s academic performance, observations of ██████'s social interaction, and standardized test scores.¹⁰ District's Ex. 1-10. ██████'s self-report was also reviewed. When asked to rate ██████ speech production from a scale of one to ten after orally reading a book in class, ██████ rated ██████ self as performing at a level ten and reported that ██████ is not reluctant to participate in class. District's Ex. 4.

Based on a review of the informal assessment and data, the IEP team determined that there was no evidence of any adverse impact on ██████'s educational performance and that ██████ no longer met the eligibility requirements for speech/language impairment. District's Ex. 1-10. ██████ disagreed and expressed concerns about ██████ being teased about ██████ speech by ██████ classmates. District's Ex. 1-10. ██████'s concerns were included in the Eligibility Report and ██████ was permitted to handwrite ██████ input and concerns at the end of the form. District's Ex. 5, 8.

Despite not receiving speech services during the 2010-2011 school year, evidence was presented that ██████ excelled during her fourth grade year. Karen Skrine, ██████'s fourth grade teacher, testified that ██████ is an "exceptionally bright" student whose participation in class is on

⁹ The parent subsequently filed a formal complaint under the IDEA with the Georgia Department of Education (DOE) concerning the District's interpretation of the parental stipulations on the consent form as amounting to a refusal to provide consent. Trial Tr. vol. 1, District's Ex. 204-206. The DOE determined that the District was in compliance with the IDEA's evaluation procedures. District's Ex. 204-206.

¹⁰ ██████'s grades reflected that ██████ earned all "A"s and "B"s for each subject during the school year and generally excelled in ██████ academic subjects. District's Ex. 5.

par with all of her other students. Trial Tr. vol. 2, 367:21-368: 1. [REDACTED] again exceeded grade level expectations in each content area of the CRCT in the fourth grade, and [REDACTED] earned a 90% or above in every subject on each report card. District's Ex. 83-90.

On April 22, 2011, almost one year after [REDACTED]'s IEP team determined [REDACTED] ineligible for services, [REDACTED]'s parent initiated the instant Due Process Complaints primarily concerning the IEP team's determination of ineligibility.¹¹ In particular, [REDACTED] alleged that the District inappropriately found [REDACTED] ineligible for special education services without conducting formal testing. She also alleged that [REDACTED] was teased at school because of [REDACTED] speech, had no friends, and was reluctant to go to school. The evidence before the Court, however, established the contrary.

Skrine, [REDACTED]'s fourth and fifth grade teacher, testified that [REDACTED] has "many friends" and that [REDACTED] demonstrates no reluctance to speak in class. Trial Tr. vol. 2, 368:16-23. As Skrine testified, "[REDACTED]'s very articulate, very social, very sweet. I would love to have a classroom full of [REDACTED]'s." Trial Tr. vol. 2, 370: 8-10. Indeed, [REDACTED] is so confident in [REDACTED] speaking abilities that [REDACTED] recently wrote and delivered a speech to [REDACTED] class as part of [REDACTED] voluntary campaign for a seat on the student council. Trial Tr. vol. 2, 368: 4-10. In this speech, [REDACTED] even characterized [REDACTED] herself as a "great speaker." Trial Tr. vol. 2, 368:2-369:23; District's Ex. 251.¹² No evidence was presented to the Court that [REDACTED] has an articulation impairment, or any speech impairment, which adversely affects her educational performance.¹³

¹¹ Though [REDACTED]'s Due Process Complaint complains that [REDACTED] parent was denied access to [REDACTED]'s educational records under IDEA, [REDACTED] presented no evidence in support of this contention. To the contrary, the evidence that was presented suggested that [REDACTED] has been offered the opportunity by the District to review [REDACTED]'s educational records on several occasions but [REDACTED] has declined to do so. Trial Tr. vol. 1, 37:12-43:11.

¹² Notably, [REDACTED]'s hand-written speech for student council contrasts markedly with the single item of evidence presented by the parent to support [REDACTED] claim that [REDACTED] had socialization issues related to [REDACTED] speech; that is, a typed statement purportedly written by [REDACTED] describing [REDACTED] social concerns. Trial Tr. vol. 2, 426:13-428:24. This statement was discredited by [REDACTED]'s teacher Skrine and was inconsistent with the testimony offered by multiple witnesses. Trial Tr. vol. 2, 386:14-391:16. The Court does not find this evidence credible.

¹³ Though [REDACTED] provided testimony that [REDACTED] sees a private speech/language pathologist, [REDACTED] did not call this private SLP as a witness to establish that [REDACTED] had an articulation impairment and [REDACTED] has never shared any private speech

To the contrary, however, testimony from an expert in the determination of eligibility of children for speech/language services under the IDEA and in the provision of speech/language services to children established that [REDACTED] communicates effectively, fluently, with good intelligibility, and that [REDACTED] exceeds expectations in the classroom. Trial Tr. vol. 2, 351:1-5. Indeed, [REDACTED]'s own testimony before the Court established that [REDACTED] is articulate, communicates effectively, and speaks beautifully. After having personally observed [REDACTED] when [REDACTED] testified, the Court also concluded that [REDACTED] no longer had an observable articulation impairment or speech impairment.

During the first day of trial, [REDACTED]'s parents signed a limited consent to evaluation in which they consented to the administration of a formal speech assessment.¹⁴ The District's SLP, Debra Cruce, conducted an evaluation of [REDACTED] on June 14, 2011.¹⁵ Trial Tr. vol. 2, 395:8-22. Cruce's evaluation consisted of a pre-evaluation review of [REDACTED]'s records and consultation with staff, administration of the Goldman-Fristoe Test of Articulation-2 (GFTA-2), a conversational speech sample,¹⁶ and an oral-motor exam. District's Ex. 226, 233-244; Trial Tr. vol. 2, 369:3-409:5. [REDACTED] scored a standard score of 92 on the GFTA-2, placing [REDACTED] well within the average

reports with the District. Trial Tr. vol. 1, 66:4-5, 37:2-5, 171:13-172:8, 196:15-198:20, 202:23-205:14, Trial Tr. vol. 2, 400:14-16.

¹⁴ [REDACTED]'s parents also agreed as part of their consent to obtain a copy of any reports concerning tests recently administered by [REDACTED]'s purported private SLP and to provide those reports to the District in order to avoid the duplication of test instruments. Trial Tr. vol. 2, 359:11-360:8. They did not do so. Trial Tr. vol. 2, 360:5-8. Similarly, though [REDACTED]'s parents received a Notice to Produce from the District requesting copies of any records that had been provided by [REDACTED]'s purported private SLP, nothing was produced. Trial Tr. vol. 2, 360:11-19. Thus, there is no credible evidence before the Court that [REDACTED] in fact receives private speech/language services. Therefore, the Court finds that [REDACTED]'s testimony in this regard is not credible.

¹⁵ Cruce has 30 years of experience as an SLP. She holds a Master's degree in speech/language pathology as well as a clinical certificate of competence (CCC) in the area of speech/language pathology through ASHA. She is licensed by the State Board of Examiners to deliver speech and language therapy. In the course of her 30 years of experience as a practicing SLP, Cruce has evaluated "hundreds" of students with suspected articulation disorders. Trial Tr. vol. 2, 392:7-395:14. Cruce was qualified to testify as an expert in the assessment of children for articulation disorders and other speech/language disorders and in determining the eligibility for students with speech/language services under IDEA. *Id.*

¹⁶ Though [REDACTED], who chose to be in the same room as [REDACTED] during the test administration, despite the ability to observe from an observation window, interrupted the administration of the assessment on several occasions and instructed [REDACTED] not to respond to certain items, Cruce nonetheless was able to obtain a sufficient conversational sample to determine that [REDACTED] did not display any sound errors. Trial Tr. vol. 2, 401:22-404:4.

range of 85-115.¹⁷ Trial Tr. vol. 2, 407:18-21. Cruce obtained a conversational speech sample from [REDACTED] and [REDACTED]. [REDACTED] did not display any sound errors with the /r/ sound and displayed 100% intelligibility. Trial Tr. vol. 2, 403:22-404:4; District's Ex. 226. Cruce also conducted an oral-motor exam of [REDACTED] and determined that the structure and function of [REDACTED]'s mouth is adequate for correct speech sounds production, despite the fact that [REDACTED] refused to allow Cruce to physically examine her mouth.

Cruce reviewed the results of her evaluation with [REDACTED]'s mother the following day and an eligibility team, including Cruce, Ellwood, Skrine, [REDACTED], and others, convened another eligibility conference on that date. District's Ex. 221-232. Upon a review of Cruce's evaluation of [REDACTED], [REDACTED]'s classroom performance and behavior, a summary of previous interventions provided including Ellwood's data during the 2009-2010 school year, and input from the parent, the eligibility team again determined that [REDACTED] does not meet eligibility criteria under the IDEA for speech/language services. District's Ex. 221-232. Every witness who testified at trial as an expert in the assessment of children for articulation disorders and other speech/language disorders and in determining the eligibility for students with speech/language services under IDEA agreed with this determination. Trial Tr. vol. 2, 350:21-351:5, 407:12-409:5.

IV. CONCLUSIONS OF LAW

The primary purpose of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.S. § 1400 et seq., is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living. 20 U.S.C.S. § 1400(d)(1)(A).

¹⁷ The GFTA-2 is a formal assessment of articulation and can be administered to individuals between the ages of 2 and 22. Trial Tr. vol. 2, 407:4-11. It was thus an appropriate assessment to administer to [REDACTED].

“The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs[,] was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child.” *Rowley*, 458 U.S. at 207. To meet that end, the IDEA provides funding to assist state and local agencies in educating children with disabilities. 20 U.S.C.S. § 1400(d). In turn, state and local education agencies must identify children with disabilities and develop annual individualized education programs (IEP) for each child. 20 U.S.C.S. § 1414. The IEP is a comprehensive document developed by a team of parents, teachers, and other school administrators outlining the goals of the child, and the special education and related services needed to meet those goals. 20 U.S.C.S. § 1414(d). The educators who develop a child’s IEP are entitled to “great deference.” *Todd D. v. Andrews*, 933 F.2d 1576, 1581 (11th Cir. 1991).

The IDEA is designed to open the door of public education to children with disabilities but it does not guarantee any particular level of education once inside those doors. *See Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *J.S.K. v. Hendry Co. Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991). The Eleventh Circuit has determined that when measuring whether a handicapped child has received educational benefits from an IEP and related instructions and services, courts must only determine whether the child has received the basic floor of opportunity. *J.S.K.* 941 F.2d at 1572-3.

However, before a child with a disability may begin receiving services under the IDEA, a state educational agency, other state agency, or local educational agency shall conduct a full and individual initial evaluation. 20 U.S.C.S. § 1414(a)(1)(A). Subsequent evaluations must be conducted if conditions warrant a reevaluation or if the child’s parent or teacher requests a reevaluation, but at least once every 3 years. 20 U.S.C.S. § 1414(a)(2)(A). Furthermore, every

court to consider the IDEA's reevaluation requirements has concluded "if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student." *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1160 1581 (11th Cir. 2006). School districts have a right to condition continued provision of special education services on a reevaluation of a student. *Id.* at 1153.

The IDEA defines a "child with a disability" as child who has been evaluated as having at least one of twelve specified impairments, and who "by reason thereof, needs special education and related services." 20 U.S.C. § 1402(3)(A); 34 C.F.R. § 300.8(a)(1). Only "children with disabilities and their parents" are afforded the procedural safeguards and protections of the IDEA, including the due process procedures. 20 U.S.C. § 1412(a)(6)(A); 34 C.F.R. § 300.121(b).

The burden of proof in an administrative action challenging an IEP is properly placed upon the party seeking relief. *See Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *see also* Ga. Comp. R & Regs. 160-4-7-.12(3)(n) ("The party seeking relief shall bear the burden of persuasion with the evidence at the administrative hearing."). Thus, █████ had the burden of proving by a preponderance of evidence that the District improperly determined █████ ineligible as a child with a speech/language impairment, and further, that █████ parents were improperly denied access to █████ educational records. With regard to the District's Due Process Complaint concerning █████'s request for an IEE at public expense, the District had the burden of proving by a preponderance of evidence that its July 14, 2011 evaluation was appropriate.

School districts must ensure that students who may be eligible to receive services are properly identified and evaluated. 20 U.S.C. §§ 1412, 1414; 34 C.F.R. §§ 300.111, 300.300-300.306; Ga. Comp. R & Regs. 160-4-7-.04. A reevaluation must be conducted at least once every three years, unless the parent and the public agency agree that a reevaluation is not

necessary to determine whether the child is a child with a disability and the child's educational needs. 20 U.S.C. § 1414 (a)(2); 34 C.F.R. § 300.303(b); 34 C.F.R. § 300.305(d). Further, school district "must evaluate a child with a disability . . . before determining that the child is no longer a child with a disability." 34 C.F.R. § 300.305(e)(1).

The record in this case is replete with evidence that the District requested to reevaluate [REDACTED] multiple times during the 2009-2010 school year, prior to the May 25, 2010 eligibility conference. [REDACTED]'s parents, however, repeatedly refused to provide consent for a speech/language evaluation. On several occasions, [REDACTED]'s parents failed to respond to the consent forms sent home, and on the one occasion they did respond, they declined consent, stating that it was "N/A." After [REDACTED]'s parents again were asked to consent to a speech reevaluation and were provided with a list of three assessments proposed by Ellwood as appropriate for [REDACTED], they signed a consent form yet specifically rejected the three proposed assessments and placed multiple stipulations on the form. As recognized in *G.J. v. Muscogee Co. Sch. Dist.*, 704 F.Supp.2d 1299, 1309 (M.D. Ga. 2010) "[w]ith such restrictions, Plaintiffs' purported consent is not consent at all." See also *Shelby S. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450 (5th Cir. 2006). Since [REDACTED] failed to provide an unfettered consent to evaluate, and instead rejected the proposed assessments and provided multiple stipulations on any testing, the Court concludes that the District was left with little choice but to proceed with the reevaluation conference and eligibility meeting without a formal articulation assessment.

While the District did not perform a formal articulation assessment due to [REDACTED]'s parents' failure to consent, [REDACTED]'s IEP team did, however, have abundant and varied informal assessment data available to review. Ellwood's informal evaluative data was considered by the IEP team to be comprehensive and appropriate under the IDEA. The Court concludes that [REDACTED], bearing the

burden of proof, failed to show that the District lacked sufficient evaluative information to appropriately determine [REDACTED]'s speech eligibility.

[REDACTED] similarly failed to introduce any evidence suggesting that [REDACTED] still has a speech/language impairment as defined by the state's regulations. A "speech/language impairment is a communication disorder, such as stuttering, impaired articulation, language or voice impairment that adversely affects a child's educational performance." Ga. Comp. R. & Regs. 160-4-7-.05, Appendix (j). As it pertains to a speech sound production impairment (also referred to as an articulation impairment), the student must demonstrate "atypical production of speech sounds characterized by substitutions, omissions, additions or distortions that interferes with intelligibility in conversational speech and obstructs learning [and] successful verbal communication in the educational setting." *Id.* Specifically excluded from the definition of an articulation impairment are inconsistent or situational errors and speech sound errors at or above age level, when speech is intelligible and without documented evidence of an adverse impact on educational performance. *Id.*

Here, no credible evidence was introduced by [REDACTED] showing that [REDACTED] has a speech impairment that adversely affects [REDACTED] educational performance. [REDACTED] excels academically, as all parties agree. To the extent [REDACTED] asserts that an adverse educational impact exists because of purported social difficulties related to [REDACTED] speech, that allegation was resoundingly and uniformly rebutted by [REDACTED] classroom teacher, former SLP, and [REDACTED]'s own written statements. Thus, the Court concludes that both the initial eligibility determination on May 25, 2010, and the subsequent eligibility determination on July 15, 2011 were correct, and [REDACTED] does not meet the SLI eligibility criteria. As [REDACTED] failed to show any adverse educational impact, the Court concludes that [REDACTED] is not entitled to eligibility pursuant to the speech-language impairment

classification, or any other classification. Ga. Comp. R. & Regs. 160-4-7-.05; *see also In re: Hanover Public Sch.*, 43 IDELR 21 (Mass. SEA, March 1, 2005);¹⁸ *J.P.E.H., by his parent and next friend, Elizabeth Campbell, v. Hooksett Sch. Dist.*, 52 IDELR 262 (NH Dist. Ct. 2009) (student properly exited from speech/language impairment classification and special education services where he no longer required speech services or specialized instruction in order to receive educational benefit). Therefore, the Court concludes that [REDACTED] has not proven that the District erred in determining [REDACTED] ineligible for special education services.

In [REDACTED] Due Process Complaint, [REDACTED] also complained that [REDACTED] parents' access to [REDACTED] educational records was denied. The regulations implementing IDEA provide that [REDACTED]'s parents are entitled to access any education records that are "collected, maintained, or used by the agency." 34 C.F.R. § 300.613. The procedural safeguards established under the IDEA require that parents have the opportunity to examine all records relating to their child. 20 U.S.C. § 1415. For the purposes of the IDEA, "education records" means the types of records covered under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g; 34 C.F.R. § 300.560 (b). FERPA grants parents the right "to inspect and review the education records maintained by the State educational agency." 20 U.S.C. § 1232g(b). The United States Supreme Court has rejected a construction of the term "educational records" that would cover materials such as "student homework or classroom work would impose substantial burdens on teachers across the county." *Owasso Indep. Sch. Dist. No. 1-0111 v. Falvo*, 534 U.S. 426, 435 (2002). Thus, "parental access to educational records does not extend so far as to allow access to each

¹⁸ The similarities between the instant case and the facts of *In re: Hanover Public Schools* are striking. There, the case concerned an intellectually bright fourth grade student who had historically received speech services for an articulation impairment related to the sounds /s/ and /z/. By fourth grade, however, the student's speech was 100% intelligible even despite occasional inaccurate articulations, and the student was excelling at school. Though the parent claimed that the student was sensitive about his speech and teased by his peers, evidence from the student's teachers established the student volunteered to speak in class, was not hesitant to participate, and appeared confident at school. The hearing officer rejected the student's claim that he continued to require speech/language services as, just in the case at bar, there was no evidence of an adverse impact on the student's educational performance.

individual piece of student work.” *K.C. v. Fulton County Sch. Dist.*, 2006 U.S. Dist. LEXIS 47652, *30 (N.D. Ga. 2006). Here, [REDACTED] failed to present any evidence that the District denied [REDACTED] parent’s right to access [REDACTED] educational records. Indeed, evidence in the record reflects that [REDACTED]’s parent was provided the opportunity to review [REDACTED]’s educational records and declined to do so. The Court therefore concludes that [REDACTED] failed to establish that [REDACTED] parent was not provided with [REDACTED] educational records under IDEA.¹⁹

Finally, one of the procedural protections afforded to the parents of students with disabilities is the right, should they disagree with an evaluation conducted by the school district, to request and obtain an independent educational evaluation (IEE) at public expense. *See* 34 C.F.R. § 300.502. If a parent requests an IEE at public expense, “the public agency must, without unnecessary delay, either (i) file a due process complaint to request a hearing to show that its evaluation is appropriate, or (ii) ensure that an independent educational evaluation is provided at public expense. . . .” 34 C.F.R. § 300.502(b)(2).

Subsequent to the District’s speech evaluation of [REDACTED] during the course of the proceedings, [REDACTED]’s parents requested an IEE. As determined above, the District appropriately determined in May 2010 that [REDACTED] is ineligible for special education services under the IDEA. Therefore, [REDACTED] and [REDACTED] parents are not entitled to the procedural protections of the IDEA, including the right to request an IEE at public expense. *See P.R. and R.R. v. Woodmore Local Sch. Dist.*, 256 Fed. Appx. 751 (6th Cir. 2007) (not published) (school district not required to reimburse parents for the cost of obtaining a private evaluation where student was no longer qualified for special education under IDEA); *Krista P. v. Manhattan Sch. Dist.*, 255 F.Supp.2d

¹⁹ Even had [REDACTED] demonstrated a procedural violation of the IDEA regarding [REDACTED] parent’s ability to access [REDACTED]’s records or participate in meetings, that would still be insufficient to award relief. Rather, [REDACTED] would have to demonstrate that the procedural inadequacy (i) impeded [REDACTED] right to a FAPE; (ii) significantly impeded [REDACTED] parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE; or (iii) caused a deprivation of educational benefit. Having failed to make such a showing, [REDACTED]’s claims must still be denied. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513.

873 (N.D. Ill. 2003) (where school denied parent's request for a third evaluation to determine if student was eligible for services under IDEA, student not entitled to IEE at public expense.) As [REDACTED] is not eligible for the procedural protections of the IDEA, this Court is without jurisdiction to award an IEE.

Furthermore, even had [REDACTED] and [REDACTED] parent shown that the District erred in its two determinations of ineligibility and that [REDACTED] was entitled to the protections of the IDEA such that this Court maintained jurisdiction, their claim for an IEE would be still denied as the District demonstrated that Cruce's speech evaluation of [REDACTED] was appropriate. The evaluation was conducted by an expert in the assessment of children for articulation disorders who has thirty years experience in evaluating students. Cruce administered an age-appropriate formal test of articulation – the GFTA-2 – which resulted in a standard score within the average range. The evaluation also included a conversational sample in which [REDACTED] demonstrated no sound errors and 100% intelligibility, and an oral-motor examination was additionally included. Therefore, the Court concludes that since the District's evaluation was appropriate, [REDACTED] is not entitled to an IEE at public expense. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT [REDACTED] and [REDACTED]'s requests for relief are DENIED and the District's request is GRANTED such that an IEE at public expense is not required.

SO ORDERED THIS 3rd day of October, 2011.


JOHN B. GATTO, Judge