06-103175

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted], by and through her parents, [redacted] and [redacted], [redacted], and [redacted], Plaintiffs,	)	ADMINISTRATIVE ACTION NO. OSAH-DOE-SE-0620214-67-JBG
v.	)	
GWINNETT COUNTY SCHOOL DISTRICT, JOHN SHAW, in his individual and official capacity; and MARY HENSIEN, in her individual and official capacity, Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION FOR INVOLUNTARY DISMISSAL

COUNSEL: Chris E. Vance, for Plaintiffs.

Victoria Sweeny, Catherine T. Followill, Elizabeth F. Kinsinger, for Defendants.

GATTO, Judge

I. BACKGROUND

Now before this Court on remand from the U.S. District Court for the Northern District of Georgia Atlanta Division is the single remaining claim of retaliation[1] alleged by [redacted], by and through her parents, [redacted] and [redacted], and [redacted] and [redacted] individually,

[1] The only jurisdiction the Court has to hear claims brought under Section 504 appears to stem from Georgia DOE Rule 160-1-3-.07(1)(a), which provides that a local board of education may request that the Court consolidate and hear claims under Section 504 as part of an IDEA action. However, the Court has found no authority to hear Section 504 claims independently of IDEA claims and it appears that such independent Section 504 claims are heard by a hearing officer appointed either by the by the local board of education or the Georgia DOE. Therefore, the Court ruled that it did not have jurisdiction to hear the retaliation and coercion claims once it had dismissed the IDEA claim.

("Plaintiffs") pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, § 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, and the Americans with Disabilities Act ("ADA") against Gwinnett County School District ("GCSD"), John Shaw, in his individual and official capacity; and Mary Hensien, in her individual and official Capacity ("Defendants").[2] At the conclusion of Plaintiffs' case-in-chief, Defendants' moved for an involuntary dismissal on the ground that upon the facts and the law the Plaintiffs have shown no right to relief. For the reasons indicated below, the motion for an involuntary dismissal of Plaintiffs' remaining retaliation claim is **GRANTED**.

II. PROCEDURAL ISSUES

Plaintiffs filed a motion to recuse the undersigned judge in the present action and in any other matter Plaintiffs' counsel serves as attorney of record. The Court denied the motion after concluding that the motion was legally insufficient and that recusal would not be authorized even if some or all of the facts set forth in the affidavits were true. See Order, Feb. 16, 2007.

The Court also denied Plaintiffs' motion to remove Defendants' counsel from the case after Plaintiffs' counsel unsuccessfully argued that Defendants' counsel had contacted her expert witness, even though the Court had not yet qualified the witness as an expert and subsequently ruled that the witness could not testify as an expert witness in the fields of "special education and disability law" or "psychology."

The Court also granted Defendants' motion to quash a subpoena and a notice to produce served by Plaintiffs. This action was set for trial beginning on February 18,

[2] John Shaw and Mary Hensien were not parties to the original action before this Court.

2008. On February 11, 2008, Plaintiffs served a notice to produce on Defendants' counsel containing fifty-two (52) numbered items describing in nine (9) pages documents that Plaintiffs were seeking. On February 12, 2008 Plaintiffs served a subpoena on the Gwinnett County School District's Custodian of Records through Defendants' Counsel. This subpoena was virtually identical to the notice to produce served upon Defendants. Like Plaintiffs' notice to produce, the subpoena was in excess of nine pages and demanded fifty three (53) categories of documents. The Court agreed with Defendants that Plaintiffs' notice to produce and subpoena were oppressive to Defendants since these 52 categories of requested items encompassed quite literally tens of thousands, and potentially hundreds of thousands, of documents. See Order, Feb. 14, 2008.

At trial, Plaintiffs also moved to allow Plaintiff [redacted] to present her testimony utilizing telephonic communications. Defendants objected and the Court denied the motion since the Georgia Administrative Procedure Act requires the consent of all parties. See O.C.G.A. § 50-13-15(5).

Finally, the Gwinnett County DFCS Custodian of Records failed to appear on the first day of trial after having been properly subpoenaed by Plaintiffs. On the second day of trial the Court's *sua sponte* contacted the DFCS attorney, and sought DFCS' voluntary compliance with the subpoena. Subsequently, by agreement of the parties, the DFCS attorney appeared in court on the third day of trial with the Custodian of Records and the subpoenaed documents under seal.

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III. FINDINGS OF FACT

[redacted]. was evaluated by Dr. Kathryn Bush at age 4 ½ before her enrollment at [redacted] Middle School in the GCSD.[3] See Defs.' Ex. 1. Dr. Bush found [redacted]. intellectually to function with an IQ of 126. Dr. Bush's report states, "[redacted] was referred for evaluation by her parents because of concerns regarding behavioral difficulties . . . ." Id. "She has problems with aggressiveness and anger control, and will frequently strike out at her parents or other children." Id. The results of the Child Behavior Checklist and the Conners Parent Questionnaire "suggest [redacted] is experiencing significant behavioral concerns at home with conduct, aggressiveness, social difficulty, anxiety, and psychosomatic complaints." Id. Dr. Bush recommended, "continued individual and family counseling . . . to help D. with her behavioral control." Id. Thus, [redacted]. has received some form of therapy beginning at least as early as age 4. Additionally, the report noted, and B.L.S. testified that D.S., was sexually molested at the age of 3 ½.[4] Id., see also Defs.' Ex. 25.

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[3] [redacted]. began attending GCSD in kindergarten. Trial Tr. vol. 1, 248. During the relevant time, Plaintiff D.S. was a disabled child as defined by the ADA, Section 504, or the IDEA. Trial Tr. vol. 1, 40, February 18, 2008; Jt. Ex. 11. [redacted] has been diagnosed with bipolar disorder, attention deficit hyperactivity disorder with executive functioning issues, and anxiety disorder. Trial Tr. vol. 1, 40; Jt. Ex. 11. [redacted]. has scored in the superior range of intellectual functioning. Defs.' Ex. 1. While attending the GCSD and before the alleged retaliation began, [redacted]. was identified as a gifted student and placed in educational programming for children who are intellectually gifted, including the Focus Program in elementary school and the PROBE program in middle school. Trial Tr. vol. 1, 256, 257. When this case first arose, [redacted]. was a sixth grade student at [redacted] Middle School in the GCSD during the 2003-2004 school year. In July 2003, prior to her enrollment at [redacted] Middle School, [redacted].'s parents reported that D. S. had been diagnosed with generalized anxiety disorder and ADHD. See Defs.' Ex. 10.

[4] Plaintiffs [redacted]. and [redacted]. are the adoptive parents and sole guardians of [redacted]. Trial Tr. vol. 1, 41, 248. [redacted]. is [redacted].'s mother, and has been a school counselor for 29 years, approximately 22 years of which she has been with the Defendant GCSD. Trial Tr. vol.

These behavior problems at home apparently continued as an October 13, 1998 SST reported when [redacted] was six (6) years old, "Parents have concerns about D. being challenged and about anger at home." That document also noted, "[redacted]. is participating in an anger management group." See Defs.' Ex. 2. According to [redacted], [redacted]. had been hospitalized at three different mental health facilities prior to her enrollment at [redacted] Middle School, including after she struck her father and self reported herself to the police. Trial Tr. vol. 3, 616. Additionally, she and her parents were engaged in family therapy as least as early as the spring of 2003 at which time she was diagnosed with anxiety disorder, ADHD, and possible post traumatic stress disorder resulting from the molestation at 3 ½. Trial Tr. vol. 3, 611, 612; see also Defs.' Ex. 25.[5]

[redacted]. had been taken to a discipline panel while a fifth grader at [redacted] Elementary School for sexual misconduct.[6] Trial Tr. vol. 2, 556, 557; see also Defs.' Ex. 7. The police have also been called following incidents in the home where [redacted]. became physically violent and when she ran away from home. Trial Tr. vol. 3, 629, 665, 667. According to [redacted], the Gwinnett County Police Department has a bipolar unit which responds to such incidents. Trial Tr. vol. 3, 635.

[redacted].'s parents requested a Section 504 plan when she was in second grade. Trial Tr. vol. 1, 250. On August 19, 2003, when D.S. was in the sixth grade, a 504 committee including educators, B.LS., and S.S. convened a meeting to develop a Section 504 plan in

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1, 251, 252. [redacted]. is a licensed clinical social worker in Georgia, and has been a social worker for approximately 40 years. Trial Tr. vol. 1, 248.

[5] [redacted]. also suffers from a fear of rejection or fear of abandonment. Trial Tr. vol. 1, 41, 42.

[6] Although [redacted]. alleged that [redacted]. had been molested, the State Board of Education reviewed the matter on appeal of the tribunal hearing and upheld the decision of the local school board. Trial Tr. vol. 2, 557.

order to put in place accommodations to address [redacted]'s ADHD and anxiety disorder.[7] See J. Ex. 11; Pls.' Ex. 50. The 504 team met again in October, November, and December, 2003. See id. GCSD agreed to provide services including a special bus for transportation when [redacted]'s bus behavior became an issue. Although [redacted]'s 504 plan also required that [redacted] receive assistance to take medication, Defendants did not comply with this 504 accommodation. Trial Tr. vol. 1, 273-275; J. Ex. 11. D.S. also did not receive the watch-minder to help her remember to take her medication.[8] Trial Tr. vol. 1, 263; Pls.' Ex. 266. Both Mary Hensien's and John Shaw's names were on the 504 low technology request. *Id.* Trial Tr. vol. 1, 258; J. Ex. 11; Pls.' Ex. 50.

During this time, [redacted]. had good grades; however her behavior began to escalate. See Defs.' Ex. 63. For the period of time from August 2003 to January 2004, [redacted] was cited eighteen times for disciplinary infractions.

On January 26, 2004, D.S. admittedly kicked another student in the head and in the groin multiple times at school. See J. Ex. 28 and Pls.' Ex. 118; Defs.' Ex. 26. [redacted] also ran from school officials following this incident. Judd Wolfe, the school resource officer ("SRO"), was notified by Defendant Hensien and summoned to the school. See Pls.' Ex. 108. SRO Wolfe filed his report of this incident on January 27, 2004. See

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[7] When [redacted]. began attending [redacted] Middle School in the GCSD, Defendant John Shaw was employed with the GCSD as the Section 504 coordinator and compliance officer for the district. Trial Tr. vol. 1, 205, 206, 250, 266. Shaw attended the very first 504 meeting for D.S. Trial Tr. vol. 1, 250, 266. [redacted] thought Shaw was an attorney as he gave legal advice and was listed as the District's legal representative. Trial Tr. vol. 1, 205, 206, 213, 214, 266; Trial Tr. vol. 2, 504, February 19, 2008. The GCSD stipulated that Shaw was not a licensed attorney at the relevant time involved. Trial Tr. vol. 1, 181, 182. When [redacted] began attending [redacted] Middle School in the GCSD, Defendant Mary Hensien was an assistant principal with the GCSD at [redacted] Middle School. Trial Tr. vol. 1, 250.

[8] [redacted] did receive a watch-minder in eighth grade but it was defective. Trial Tr. vol. 1, 269.

Defs.' Ex. 26. The records presented by Plaintiffs showing juvenile charges are from the Juvenile Court, an agency separate from the GCSD. See Pls.' Ex. 112. No evidence was presented that the GCSD had any involvement in the prosecution of those charges or the timing of when the family was notified of those charges. There is no evidence that either of the individual Defendants in this case instructed Wolfe to file charges or was involved in his decision to file criminal charges.

On January 29, 2004, school personnel and [redacted]'s parents reconvened and determined that [redacted]. should be placed in a temporary self-contained emotional behavior disabled ("SCEBD") crisis placement for twenty school days for diagnostic purposes. Trial Tr. vol. 2, 332, 341-343; see also J. Ex. 35. Plaintiffs were offered an opportunity for [redacted]. to go back to school if they agreed to have her either in a SCEBD class or if they agreed to move her to another school. Defendants did not accept the offer of another school but did agree to a temporary placement for 20 days in a SCEBD class. Trial Tr. vol. 2, 386. B.L.S. testified that he knew [redacted]. would be destabilized if she had to go to a panel, Trial Tr. vol. 2, 346, and that he and his wife were coerced and intimidated into allowing the SCEBD placement. Trial Tr. vol. 2, 345, 361. On the same date, [redacted] was referred for an evaluation to determine her eligibility for special education services. [redacted]'s parents provided written consent for the evaluation and for the crisis placement. See Joint 35.

[redacted]. testified that John Shaw and Mary Hensien were pushing to place [redacted]. in the SCEBD classroom. Trial Tr. vol. 2, 345. He also testified that Hensien and Shaw stated they would ensure no criminal charges were filed against [redacted] if they agreed to the temporary SCEBD placement. Trial Tr. vol. 2, 439.

On a February 1, 2004 question sheet for the upcoming psychological, [redacted]'s parents noted that [redacted] has "appeared depressed" and that actions taken to help her include "psycho therapy; suicide watches; medical management." Defs.' Ex. 48.

On February 2, 2004, her first day in the crisis placement, [redacted]. was suspended for bringing to school in her jacket pocket a broken toy gun that was designed to shoot soft rubber balls. Trial Tr. vol. 2, 338, 345, 346, 355, 356, 360; see also Joint Ex. 40, 41; Pls.' Ex. 149. When [redacted]'s father got the call from Mary Hensien to come and pick up [redacted] yet again from school, [redacted]'s father told her [redacted] was disabled and her 504 plan was not being implemented, and Mary Hensien hung up the phone on him. Trial Tr. vol. 2, 327. Pursuant to state law and school rules, the SRO was notified, the incident was reported to the district attorney, and the family was notified in April that juvenile court charge was brought against [redacted]. Trial Tr. vol. 2, 388, 389, 406; Pls.' Ex. 112.

A committee of school personnel and the parents met on February 10, 2004 pursuant to the school's Section 504 procedure requirements in order to discuss whether D.S.'s behavior of bringing a gun to school was a manifestation of her disabilities. Trial Tr. vol. 2, 362. It was determined, based on information available at that time, that the misbehavior was not a manifestation of disability. Trial Tr. vol. 2, 384. D.S.'s parents filed a request for an expedited due process hearing on February 11, 2004 asserting claims under the IDEA, ADA, and Section 504. Trial Tr. vol. 2, 387; Pls.' Ex. 273, 274.

During the February 10, 2004 meeting, when [redacted]'s mother was speaking regarding [redacted]'s serious medical issues, Mary Hensien wrote in the handwritten notes "on + on bla, bla, bla, bla, bla, bla." Trial Tr. vol. 2, 383; Pls.' Ex. 167. Hensien showed

the handwritten notes referenced in paragraph 44 to Shaw, who smiled at the time he read it. Trial Tr. vol. 2, 381, 382.

With parental consent obtained at the January 29, 2004 meeting, Dr. Janet Benford conducted a psycho-educational assessment of D.S. on February 18, 2004. Dr. Benford met with Plaintiffs B.S. and S.S. on February 23, 2004 at Lawrenceville East to review the results of the psycho-educational evaluation. Other than conducting the psycho-educational evaluation of the student, no evidence was presented that Dr. Benford is in any way connected to the local school. Defs.' Ex. 26 50-52.

A school disciplinary tribunal meeting was held on February 23, 2004. Following the tribunal, a committee met to discuss whether the misconduct was a manifestation of disabilities in light of the recently completed psychological evaluation results and other information discussed by the committee previously. Trial Tr. vol. 2, 365. The committee determined, as Plaintiffs B.S. and S.S. had previously advocated that the misbehavior was a manifestation of the disabilities and therefore, D.S. was not subject to any disciplinary action for this infraction. Trial Tr. vol. 2, 366.

On March 1, 2004, a mandatory report was made to DFACS by Bobby Crawson based upon information from Dr. Benford. Trial Tr. vol. 2, 436, 437; see also Pls.' Ex. 330. There is no evidence that either of the individual Defendants was involved in this report, caused the report to be made, or even knew about the report. The case was closed by DFCS as "unfounded". Trial Tr. vol. 2, 397.

Despite her behavior, D.S. benefited from her education at Creekland Middle School and earned As and Bs in all her classes including gifted science and maintained a GPA of 91.3 through December of 2003. See Defs.' Ex. 63.

Jean Estes, a special education attorney testified that John Shaw made representations that he would do something involving another disabled child's education and then not do it. Trial Tr. vol. 1, 147-149, 152-154, 173. Carol Saddler, an advocate for disabled children, testified that John Shaw did not report the facts correctly. Trial Tr. vol. 2, 496. In a matter involving another disabled child, John Shaw called an air pistol a BB gun when in fact it was not. Trial Tr. vol. 1, 495.

Annette Thomas, a teacher in a different school district that was also a mother of a child with disabilities testified that John Shaw stated he would address issues involving her disabled child and did not do so, and that John Shaw had not been honest with her, and that she did not trust him. Trial Tr. vol. 1, 211, 213, 214, 217,219, 227, 239. She testified that John Shaw made unilateral decisions regarding disabled children instead of allowing a committee decision. Trial Tr. vol. 1, 214, 215. She also testified that the GCSD (when John Shaw and Mary Hensien attended) retaliated against her when she advocated for her disabled child and that retaliation, harassment was commonplace with the GCSD, that her disabled child went months without an Individualized Education Program ("IEP") and that she had to hire counsel to enforce her disabled child's rights. Trial Tr. vol. 1, 211-217, 230, 231, 236-238; Trial Tr. vol. 2, 484, 485, 487, 489, 501.

Sadler testified that she could not get Mary Hensien to respond to parent requests. Trial Tr. vol. 2, 473, 474, 478-480. In one situation involving another disabled child, where Mary Hensien was the principal, two complaints had to be filed, one to get Mary Hensien to reply to a parent of a child with disabilities and a second complaint because Mary Hensien and her school refused to provide the parent a copy of her child's psychological report from the GCSD. Trial Tr. vol. 2, 481, 482, 484, 489, 490. In one

case, Mary Hensien stated in a meeting for another disabled child that ADHD is not a disability. Trial Tr. vol. 2, 486. Ms. Hensien also refused to provide the parent and advocate of another disabled child with an Other Health Impaired medical form required for eligibility to be completed by the child's doctor. Trial Tr. vol. 2, 488. Ms. Hensien was involved in a case involving another disabled child being suspended for 180 days involving an air pistol brought on the bus. Trial Tr. vol. 2, 494. Sadler rated the GCSD in the top two for school districts that intimidate parents. Trial Tr. vol. 2, 505. She also testified that due to the hostility and nastiness when Hensien was involved, the GCSD retaliated against parents who advocate and who hire advocates when it conducted meetings with parents who advocated for their children. Trial Tr. vol. 2, 506, 507.

IV. STANDARD OF LAW

After a party with the burden of proof has completed the presentation of its evidence, any other party, without waiving its right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that the party which has presented its evidence has failed to carry its burden so as to demonstrate its right to some or all of the determinations sought by that party. A.R.P. Rule 35; see also O.C.G.A. § 9-11-41(b). However, unlike a motion for directed verdict, an involuntary dismissal does not require the trial court to construe the evidence most favorably for the non-moving plaintiff and an involuntary dismissal may be warranted """even though plaintiff may have established a prima facie case." (Cit.)' [Cit.]" Smith v. Ga. Kaolin Co., 269 Ga. 475 . Thus, at a bench trial, the trial court "can determine when essential facts have not been proved." [Cit.] Id.

V. ANALYSIS

A. Statutory Framework

The IDEA provides federal funding to assist state and local educational agencies in educating children with disabilities. See generally, 20 U.S.C. § 1400 et seq.; Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982.) The purpose of the IDEA and its implementing regulations is to ensure that all children with disabilities have available to them a free appropriate public education ("FAPE"). See 34 C.F.R. § 300.1. The IDEA provides a right to file a due process complaint to challenge issues relayed to FAPE. See 20 U.S.C. § 1415. In Georgia, this Court has jurisdiction over most "contested cases," as that term is defined in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," including IDEA cases. See O.C.G.A. §§ 50-13-41, 50-13-42.

In Count 1, the plaintiffs allege that Defendants have acted purposefully as a matter of policy and practice and in concert to retaliate, coerce, intimidate, threaten, and interfere with [redacted]. in the exercise and enjoyment of her rights under the law to receive an appropriate public education in the least restrictive environment and free from discrimination based upon disability and with [redacted]'s parents in the exercise of and on account of their having exercised their protected activity of participating as 504 team members and in advocating for their disabled child to receive her rights under the IDEA, ADA, and Section 504, including their requests for a due process hearings.

Specifically, Plaintiffs alleged they were coerced into agreeing to [redacted]'s placement in the [self-contained Emotional Behavior Disorder ("SC EBD"] classroom, that following their filing of a due process complaint, Defendants turned them into

DFACS and filed criminal charges against [redacted], and that Defendants acted purposefully to retaliate against them due to their advocacy and participation as Section 504 team members.

Both the ADA and Section 504 protect disabled persons from discrimination in the provision of public services. The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Similarly, Section 504 provides, "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a).

Both statutes also contain anti-retaliation provisions. Specifically, the ADA provides, "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter . . . ." 42 U.S.C. § 12203(a). The ADA further indicates that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter. Id. § 12203(b). Although the statutory language of Section 504 does not contain a similar provision, its regulations indicate that the discriminatory actions prohibited by the statute include "[i]ntimidat[ing] or retaliat[ing] [*23] against

any individual, whether handicapped or not, for the purpose of interfering with any right secured by section 504 or this subpart." 28 C.F.R. § 42.503(b)(1)(vii).

The IDEA has also been interpreted to allow for claims of retaliation. See, e.g., Weber v. Cranston Sch. Comm., 212 F.3d 41, 51-52 (1st Cir. 2000); Radcliffe v. Sch. Bd. of Hillsborough County, 38 F. Supp.2d 994, 1000 (M.D. Fla. 1999). Thus, plaintiffs may bring retaliation claims under all three statutes. However, the Eleventh Circuit, like most of its sister circuits, has held that "claims asserted under Section 504 and/or the ADA are subject to Section 1415(f)'s requirement that litigants exhaust the IDEA's administrative procedures to obtain relief that is available under the IDEA before bringing suit under Section 504 and/or the ADA." Babicz v. Sch. Bd. of Broward County, 135 F.3d 1420, 1422 (11th Cir. 1998).

To make out a case of retaliation under Section 504, Plaintiffs must establish four elements in order to present prima facie claim of retaliation: (1) that Plaintiffs were engaged in a protected activity; (2) that the Defendants were aware of the protected activity; (3) that the Defendants subsequently subjected the Plaintiffs to specific adverse actions; and (4) that there was a causal connection between the adverse actions and the protected activity. See Weixel v. Board of Educ. of the City of New York, 287 F.3d 138 (2nd Cir. 2002); Bradley v. Arkansas Dept. of Educ., 443 F.3d 965 (8th Cir. 2006). "The failure to satisfy any of these elements is fatal to a complaint of retaliation." Higdon v. Jackson, 393 F.3d 1211, 1218 (11th Cir. 2004).

Here, Plaintiffs participation in meetings about their child does not rise to the level of protected activity. See e.g. Gupta v. Montgomery County Public Schools, 25 IDELR 115 (D. Md. 1996) ("merely raising concerns over the quality of [the student's]

education" without more is not protected activity under Section 504 and the ADA). However, their filing of due process complaints under the IDEA might be a protected activity for purposes of a Section 504 retaliation claim.

Assuming, *arguendo* that Plaintiffs' actions do rise to the level of protected activity, Plaintiffs have not suffered any adverse action, as Plaintiffs did not experience any harm or change in their status. Plaintiffs have alleged that the placement of [redacted] in the SC EBD class was adverse; that the filing of criminal charges against [redacted] was adverse; and that the report to DFACS was adverse. However, the SC EBD placement was temporary, the criminal charges were not prosecuted[9]; and the DFACS case file was closed without prosecution. In Ariel B. v. Fort Bend Indep. Sch. Dist., 428 F.Supp.2d 640 (S.D. Tx 2006), a parent alleged retaliation pursuant to Section 504 and the ADA after a school official reported the parent to the police for making an alleged terroristic threat after an IEP meeting. In rejecting the parent's claim, the court ruled the school's action did not amount to adverse action since the parent "suffered no change in benefits as a result of defendant's report to the police." Id. at 666.

Plaintiffs further allege that Defendant Hensien was "rude," "rolled her eyes" and wrote "bla bla bla" in some minutes; however, the ADA is not a code of civility and "not every unkind act is sufficiently adverse." Higdon v. Jackson, 939 F.3d 1211, 1219 (11th Cir. 2004.) Plaintiffs cannot point to a single case in this circuit in which a court has recognized such an inconsequential action as constituting adverse action. Thus, Plaintiffs have not met their burden of proving adverse action.

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[9] [redacted]. testified that [redacted]. did not ever have to go before a Judge and that the charges were dropped.

Even if the Court were to find that Plaintiffs have proved adverse action there is no requisite causal connection between the adverse action and any protected activity. See Bradley v. Arkansas Dept. of Educ., 443 F.3d 965 (8th Cir. 2006) (plaintiffs could not show that the school's actions were "taken *in response to* protected activity. That is, they cannot show a causal connection between the two" (emphasis in original.) Id. at 976.)

1. Plaintiffs have not shown any adverse action by Defendants Shaw and Hensien that is causally connected to protected activity.

The only cause of action that theoretically exists against Defendants Shaw and Hensien is under the ADA. There are no provisions in the IDEA or its regulations extending its obligations to private actors or suggesting that private actors may be subject to individual liability under the statute. See M.T.V. v. Perdue, 2004 WL 3826047, at *11 (N. D. Ga. 2004) (unpublished). Similarly, Section 504 is limited to those who actually "receive" federal financial assistance.[10]

There is no evidence that either of these Defendants was in any way involved in the filing of the DFACS report. In fact, there is no evidence that either of these

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[10] The ADA incorporates by reference the remedies, procedures, and rights of Section 504. Section 504 incorporates by reference the remedies, procedures and rights of Title VI. Thus, all three statutes rely for their remedies on Spending Clause legislation. "Like the IDEA, the Rehabilitation Act is Spending Clause legislation, and it must be construed accordingly." Taylor v. Altoona Area School Dist., 513 F.Supp.2d 540, 556 (W.D. Pa. 2007). Although most courts have determined that no cause of action exists against an individual under Spending Clause legislation because it involves, essentially, a contract between the federal government and some entity, the 11th Circuit held in Shotz v. City of Plantation, 344 F.3d 1161 (11th Cir. 2003), that an individual may be sued under the ADA in public services retaliation cases. The Court found that the distinction between the ADA and the other spending clause statutes is the ADA's use of the word "person" in the retaliation provision of subchapter II. "Person" is not contained in Section 504 as it is in the ADA and the Shotz analysis does not apply. "Congress limited the scope of Section 504 to those who actually "receive" federal financial assistance because it sought to impose Section 504 coverage as a form of contractual cost of the recipient's agreement to accept the federal funds." U. S. Dept. of Transp. V. Paralyzed Veterans of America, 477 U.S. 597, 604 (1986).)

Defendants even knew about the DFACS report. Certainly there is no evidence that they caused the report to be made.

Likewise, there is no evidence that either of these Defendants filed criminal charges against [redacted]. The evidence presented by Plaintiffs with respect to Defendants Shaw and Hensien was limited to the fact that they attended some of the meetings involving [redacted]'s Section 504 plan and that Hensien was involved in calling the SRO to school following [redacted]'s attack on another student and running from school officials. Of course, at these meetings, the school district was typically agreeing to provide services which would not constitute an adverse action. While Shaw and Hensien were present at the meeting where [redacted]. and [redacted]. agreed to the temporary 20 school day crisis placement in the SC EBD classroom, there is no evidence that either of these Defendants "coerced" Plaintiffs into doing anything.[11] The documents from that meeting reflect that the parents presented a list of requests, including canceling the discipline panel which was done. See J. Ex. 32. The meeting notes reflect that Assistant Principal Heidi Hill, and not Defendant Shaw or Hensien, was doing most of the talking in explaining options to the parents.[12] Id. Simply put, the meeting culminated with the school district offering services to D.S. which her parents accepted. The provision of services, which a student is entitled to, cannot constitute adverse action.[13]

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[11] [redacted] is an advocate for people with disabilities and has served in this capacity since 1973 and from his demeanor in Court, it appeared unlikely that he could be "coerced" into doing anything he did not want to do.

[12] The notes do reflect that Defendant Shaw stated the *school* would agree to "s/w the SRO" following AP Hill stating the SRO was pressing charges. Nowhere is it stated that the school or either of the Defendants had any control over the criminal charges and no evidence was presented to this effect. See Joint Ex. 32.

[13] Plaintiffs [redacted] and [redacted] allege they wanted services under Section 504 and not the IDEA. However, the rights to a free appropriate public education under these statutes are

Regarding calling the SRO to school following the January 26 incident, an email sent by Hensien indicates that [redacted] was disruptive and that her disorderly conduct including, screaming profanity, running through the school, and assaulting another student caused "great concern" and "disrupted the learning environment." Pls.' Ex. 108. Just as [redacted]'s parents had called the police following her violent outbursts and running from home in the past, this action was reasonable under the circumstances and Plaintiffs have presented no evidence otherwise. Moreover, the evidence does not reflect that Defendant Hensien was in any way involved in the SRO's decision to file criminal charges or in the prosecution of those charges.

Furthermore, after the January 29 meeting, it was Assistant Principal Heidi Hill, and not Defendant Hensien, who wrote up [redacted]'s disciplinary infraction for the February 2 pellet gun incident and referred her to a discipline panel. See Joint 40 and 41. Thus, the evidence does not show that either of these Defendants took any adverse action whatsoever with respect to Plaintiffs. Rather the evidence demonstrates that Defendants Shaw and Hensien were involved in developing a plan to assist [redacted] at school, offering her services, and taking logical and necessary action in response to [redacted]'s behavior.

2. Defendant GCSD did not retaliate against Plaintiffs.

Plaintiffs have not established a causal connection between any protected activity and any adverse action by Defendant GCSD. There is no evidence that the report to DFACS which Plaintiffs complain about was made by anyone who had knowledge of Plaintiffs' advocacy. The report indicates it was made by "Bobby Crawson." Pls.' Ex.

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co-extensive and a school district may discharge its obligations under Section 504 by offering services under the IDEA. See 34 C.F.R. 104.33. Nevertheless, the SC EBD placement was only a temporary placement to which the parents consented. See Joint Ex. 35.

330. There is no evidence in the record as to who Bobby Crawson is or that he had any knowledge of Plaintiffs. The document states that [redacted] responded in the following way to Dr. Benford, "[w]hen asked what do your parents do when you misbehave or do something wrong, [redacted] responded with 'if I hit them they yank my hair and hit me on my head.' When asked by Dr. Benford, what does your dad do when you get on his nerves or make him angry, [redacted] said 'he hits me and when I push him he back hands me and it hurts.' [redacted] said her father hits her on the foot with his cane." Pls.' Ex. 330.

There is no evidence that Dr. Benford is connected to [redacted] Middle School or that she had any knowledge of Plaintiffs prior to conducting the psycho-educational evaluation. In fact, Dr. Benford met with Plaintiffs at Lawrenceville East on February 23, 2004. While [redacted] speculated that the information which resulted in the DFACS report was discussed at the February 10 meeting, this cannot be true as Dr. Benford did not evaluate [redacted] until February 18, 2004, and no evidence exists that Dr. Benford attended the February 10, 2004 meeting.

The Georgia Child Abuse Reporting Statute requires certain individuals, including school teachers, administrators, and counselors, who have a reasonable cause to believe that a child has been abused to report the abuse to the state, and failure to do so could result in criminal penalties. See O.C.G.A. §19-7-5(c)(1). Those who report suspected abuse in good faith are immune from civil or criminal liability pursuant to the statute. See O'Heron v. Blaney, 276 Ga. 871 (2003). As Joel Hitt and B.L.S. testified, a child's statement that she was hit, had her hair pulled, or cursed at by an adult should be reported to DFACS. Furthermore, Mr. Hitt testified that reporters are not supposed to investigate suspected child abuse to determine the veracity of the claims, so the fact that the charge

was apparently closed as unsubstantiated should have no bearing on whether on not the report should have been made in the first place.[14] Moreover, the evidence shows that it was not the filing of due process on February 11, 2004 which immediately preceded the report to DFACS, but rather the psycho-educational evaluation conducted by Dr. Benford and her meeting with the parents which occurred on February 18 and 23, 2004 respectively. Reporting suspected child abuse where a child has made a claim of being hit and having her hair pulled is reasonable and necessary and does not amount to retaliation. See Northside Indep. Sch. Dist., OCR Decision, 38 IDELR 129 (TX 2002).

With respect to the criminal charges for simple battery stemming from the January 26, 2004 incident, there is no dispute that [redacted] engaged in the behavior at issue. She admittedly hit and kicked another student. SRO Wolfe filed his report of this incident on January 27, 2004The records presented by Plaintiffs showing juvenile charges are from the Juvenile Court, an agency separate from the GCSD. However, no evidence was presented that the GCSD had any involvement in the prosecution of those charges or the timing of when the family was notified of those charges.

As to the toy gun charge, the GCSD had an obligation under O.C.G.A. § 16-11-127.1 and under its own code of conduct to report [redacted]'s possession of a toy gun within a school safety zone since the documents reflect that the toy gun was designed to shoot rubber balls.[15] Given that the District had an obligation under state law to report [redacted]'s possession of the toy gun, such report cannot be construed as retaliation. See Curritock

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[14] Notably, the charge was closed with the notation "[the parents] have signed a safety plan to include the use of appropriate discipline and supervision and continued on-going medical and psychological treatment." Plaintiffs Ex. 330.

[15] O.C.G.A. § 16-11-127.1(a)(2) defines a weapon as "any pistol, revolver, or any weapon designed or intended to propel a missile of any kind...." Plaintiff [redacted] contends the gun was broken; however, the law does not specify that the gun has to be operational.

County Schools, OCR Decision, 47 IDELR 142 (N.C. 2006) (no retaliation for filing criminal charges against bi-polar student where student assaulted SRO.) Thus, Plaintiffs have not proven that any adverse action was taken in response to protected activity. See Bradley v. Arkansas Dept of Educ., 443 F.3d 965 (8th Cir. 2006). Because Plaintiffs cannot show that the challenged actions of Defendants were taken because Plaintiffs were engaged in protected activity, their retaliation claim must fail.

Thus, the Court agrees with Defendants that essential facts have not been proved by Plaintiffs and they have failed to carry their burden so as to demonstrate a right to any of the determinations they sought on their retaliation claim. Accordingly,

VI. DECISION

IT IS HEREBY ORDERED THAT Defendants' motion for involuntary dismissal is **GRANTED** and Plaintiffs' retaliation claim is **DISMISSED**.

SO ORDERED THIS 12th day of March, 2008.

John B. Gatto

JOHN B. GATTO, Judge

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