08-069183

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Docket No.:**
	:	**OSAH-DOE-SE-0812310-29-Miller**
CLARKE COUNTY SCHOOL DISTRICT,	:	
	:	
	:	
Defendant.	:	

FINAL DECISION
ORDER GRANTING MOTION FOR SUMMARY DETERMINATION

I. INTRODUCTION

On November 8, 2007, the Plaintiff, [redacted], by and through his parents, [redacted] and [redacted], filed a Due Process Hearing Request contending that the Defendant Clarke County School District violated his rights under the Individuals with Disabilities Education Act ("IDEA"), the Vocational Rehabilitation Act ("Rehab Act"), and the Americans with Disabilities Act ("ADA"). The Plaintiff subsequently moved to amend his original Complaint, and his Second Amended Complaint was deemed filed on January 9, 2008. On January 22, 2008, the Defendant moved to dismiss the Plaintiff's Second Amended Complaint, or in the alternative, for summary determination. For the reasons stated below, summary determination in favor of the Defendant is **GRANTED**.

II. FINDINGS OF FACT

Viewing the evidence in the light most favorable to the Plaintiff, the following facts are undisputed:

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1.

[redacted] is a [redacted]-year-old boy who attends [redacted] School in the Clarke County School District. He is significantly cognitively impaired, visually impaired, and non-verbal. [redacted] is currently placed in a severe intellectual disabilities program. As a student with a disability, A.B. is covered by IDEA, 20 U.S.C. §1401, et seq. (Defendant Clarke County School District's Statement of Undisputed Material Facts in Support of Motion for Summary Determination ("Statement of Material Facts"), ¶¶ 1-2; Plaintiff's Response to Defendant's Statement of Material Facts ("Response to Statement of Material Facts"), ¶¶ 1-2; Plaintiff's Second Amended Complaint, ¶¶ 3-7; Answer, ¶¶ 3-7.)

2.

During the 2004-05 school year, [redacted]. attended [redacted] Elementary School. He was served in a class for students with severe/profound intellectual disabilities taught by Deborah Kincaid. (Statement of Material Facts, ¶ 5; Response to Statement of Material Facts, ¶ 5; Kincaid Aff., ¶ 3.)

3.

During the spring of 2005, another student in Ms. Kincaid's class ("S-1") had inappropriate contact with the Plaintiff. (Statement of Material Facts, ¶ 6; Response to Statement of Material Facts, ¶ 6; Kincaid Aff., ¶ 3.)

4.

On May 6, 2005, [redacted]'s mother, [redacted], spoke to Ms. Kincaid by telephone. Ms. Kincaid told [redacted]. that S-1 had groped and squeezed [redacted]'s sexual parts, and that S-1 had "humped" [redacted], with the associated sexual noises.[1] Ms. Kincaid told [redacted]. that S-1 had targeted [redacted] and another

[1] Both students were fully clothed. (Plaintiff's Evidence, Exhibit 13.)

student, as well as the teachers, with this behavior. Ms. Kincaid told [redacted]. that S-1 grabbed the teachers' breasts and verbalized "titties," and that he also imitated masturbation and said "get my dinkie." (L.B. Aff. at ¶ 5.)

5.

On May 7, 2005, [redacted]. filed a report with the Athens-Clarke County Police Department. [redacted]. reported to police that [redacted]. had been groped and "humped" by S-1 and that the behavior had been reported to her by Ms. Kincaid. The police report shows that [redacted].'s parents and the school principal were interviewed about the incident of inappropriate contact by S-1; that the po0lice intended to communicate with the Division of Family and Children Services ("DFACS") about the matter; and that the police communicated these intentions to [redacted].. (Statement of Material Facts, ¶ 13; Response to Statement of Material Facts, ¶ 13; L.B. Aff., ¶ 13; Plaintiff's Evidence in Opposition to Defendant's Motion for Summary Determination ("Plaintiff's Evidence"), Exhibit 13.)

6.

On May 9, 2005, [redacted]. located a note from Ms. Kincaid dated May 5, 2005, in [redacted].'s backpack. The note stated, in relevant part, that S-1 "attempts to grope (grab genital area) the other students and teachers in the class . . . [t]he groping is inappropriate and purposeful." (L.B. Aff. at ¶ 8; Kincaid Aff. at ¶ 3 and Exhibit A; Plaintiff's Evidence, Exhibit 14.)

7.

On May 11, 2005, an administrator at [redacted] Elementary School made a report to Clarke County DFACS regarding suspected child abuse or neglect with respect to S-1.[2]

[2] The fact that A.B. was not listed as the victim in the report is immaterial. Further, to the extent the Defendant erroneously admitted, in response to the Plaintiff's original Complaint, that it had not made a report to DFACS, the Defendant permissibly amended its pleadings in its Answer to the Second Amended Complaint.

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(Statement of Material Facts, ¶ 12; Response to Statement of Material Facts, ¶ 12; Spires Aff., ¶¶ 4-9 and Exhibit A.)

8.

[redacted]. and S-1 remained in Ms. Kincaid's class for the remainder of the 2004-2005 school year. School district personnel informed [redacted]. that S-1 and his family were moving and that he would not attend the same school as [redacted]. the following year. School district personnel did not make any promises to [redacted].'s parents that S-1 would never again be assigned to the same school or classroom as [redacted]. (Statement of Material Facts, ¶ 9; Response to Statement of Material Facts, ¶ 9; L.B. Aff., ¶¶ 15, 18; Kincaid Aff., ¶ 7, 9; Dunne Aff., ¶ 6-7; Blake Aff., ¶ 9.)

9.

The Plaintiff's Second Amended Complaint does not allege that [redacted]'s parents requested an IEP meeting at any time after S-1's 2005 inappropriate contact with [redacted]. to request that the IEP team preclude S-1 from attending the same school or classroom as [redacted]. (Statement of Material Facts, ¶ 16; Response to Statement of Material Facts, ¶ 16.)

10.

Prior to November 2007, neither [redacted]. nor his parents filed a request for due process hearing, or any other judicial or administrative action against the Defendant, alleging that [redacted] was denied a free and appropriate public education, was discriminated against, or was otherwise denied any right or privilege to which he was entitled under law, with respect to the 2004-2005 school year. (Statement of Material Facts, ¶ 17; Response to Statement of Material Facts, ¶ 17.)

11.

In October 2007, S-1 enrolled at [redacted] School, his home school, and was assigned to [redacted].'s class. On October 23, 2007, [redacted]. attended a parent-teacher conference with

[redacted].'s teacher, Erin Stevenson, at which time [redacted]. became aware that S-1 had become a student in the class. [redacted]. requested that [redacted]. and S-1 be separated immediately and that no contact between them take place. (L.B. Aff., at 19-20; Stevenson Aff., ¶ 4-6.)

12.

Since October 29, 2007, [redacted]. and S-1 have been served in different classrooms at [redacted] School, and they do not have direct contact during the school day. (Stevenson Aff., ¶ 7; Blake Aff., ¶8.)

13.

The Plaintiff's Second Amended Complaint does not allege any inappropriate contact or interaction between S-1 and [redacted]. while the two students were in the same classroom in October 2007.[3] (See generally Second Amended Complaint.)

III. STANDARD ON SUMMARY DETERMINATION

Summary determination in this proceeding is governed by Office of State Administrative Hearings ("OSAH") Rule 15, which provides, in relevant part:

> Any party may move, based on supporting affidavits or other probative evidence, for a summary determination in its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

OSAH Rule 15(1) [GA. COMP. R. & REGS. § 616-1-2-.15(1)]. On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party "is entitled to a judgment as a matter of law on the facts established." Pirkle v. Envtl. Prot. Div., Dep't of Natural Res., OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (OSAH 2004) (citing Porter v. Felker, 261 Ga. 421 (1991));

[3] The Plaintiff asserts that the Defendant "created a hostile educational environment for [redacted] [in 2007], subjecting him to injury and re-injury . . . ." (Second Amended Complaint, ¶ 82.) However, Plaintiff does not elaborate on what these alleged injuries or re-injuries were.

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See generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2006) (observing that a summary determination is "similar to a summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by summary adjudication).

Further, pursuant to OSAH Rule 15(3):

> When a motion for summary determination is made and supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination in the hearing.

See Guy Lockhart v. Dir., Envtl. Prot. Div., Dep't of Natural Res., OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at *3 (OSAH 2007) (citing Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)). In this case, as set forth below, the Court concludes that no genuine issue of material fact remains for determination.

IV. Conclusions of Law

A. 2005 IDEA Claim

The Plaintiff contends that in May 2005, the actions of S-1 and the actions and inactions of the Defendant created a harassing and hostile educational environment for [redacted]., and therefore denied [redacted] a free and appropriate education in violation of IDEA. (Second Amended Complaint, ¶¶ 72, 93-96.) The Plaintiff's 2005 claims are barred by the statute of limitations.

Congress has provided the following statute of limitations for impartial due process hearings pursuant to IDEA:

> Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows.

20 U.S.C. § 1415(f)(3)(C).

In this case, although [redacted].'s parents had actual knowledge of S-1's conduct toward [redacted]. in May 2005, they did not file a due process hearing request until November 8, 2007, over two years later. The only question, then, is whether one of the exceptions to the statute of limitations applies to this case.

IDEA provides two exceptions to the statute of limitations for impartial due process hearings:

> Exceptions to the timeline. The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—
>
> (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
>
> (ii) the local educational agency's withholding of information from the parent that was required under this part [20 USCS §§ 1411 et seq.] to be provided to the parent.

20 U.S.C. § 1415(f)(3)(D).

IDEA's requirement that a party allege "specific misrepresentations" can be analogized to Rule 9(b) of the Federal Rules of Civil Procedure, which provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. R. 9(b). The Eleventh Circuit has elaborated on the requirements set forth in Rule 9(b):

> Rule 9(b) is satisfied if the complaint sets forth (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

United States ex rel. Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1310 (11th Cir. 2002). This the Plaintiff has failed to do.

The Plaintiff contends that [redacted]'s parents relied on assurances made by the Defendant that were intended to induce them to forego legal remedies available to them. (Second Amended Complaint, ¶¶ 87-89.) However, the Plaintiff has failed to come forward, in response to the Defendant's Motion and Affidavits in support, with any evidence that school district personnel made specific misrepresentations regarding its resolution of the problem forming the basis of the complaint.

The whole of the Plaintiff's argument appears to rest on his unsupported allegation that school district personnel made a promise to [redacted]'s parents that S-1 would never again be placed in the same school or classroom as [redacted]. A close reading of [redacted]'s affidavit reveals that the Defendant never made such a promise. The Plaintiff attempts to support his allegation with [redacted]'s artfully crafted statement that she "understood from Defendant that S-1 would no longer be in my child's class even for ESY services,[4] that he was moving, that there were DFACS reports that he had abused my son as the victim[5] and that he rarely came to school." (L.B. Aff., ¶ 18.) At best, however, [redacted]'s "understanding" consists of her interpretation (or misinterpretation) of generalized information provided by school district personnel.[6] Since her "understanding" was not based on any specific misrepresentations of material fact by the Defendant, the exception to the statute of limitations provided in 20 U.S.C. § 1415(f)(3)(D)(i) is inapplicable.

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[4] For example, elsewhere in her affidavit, [redacted]. states that Ms. Kincaid told her that S-1 was moving and would not attend Clarke Middle School the following year. This was apparently true, although S-1 returned to the district and Clarke Middle School in 2007. (L.B. Aff., ¶ 15.)

[5] The undisputed facts show that the Defendant made a report to DFACS regarding S-1. As stated above, the listing of S-1, rather than [redacted]., as the victim is immaterial.

[6] It would also be expected that such a promise would be made part of the student's IEP, or at the very least confirmed in writing.

The statute of limitations would also be tolled if the Defendant had failed to provide the [redacted].'s parents with required information, pursuant to 20 U.S.C. § 1415(f)(3)(D)(ii). IDEA elaborates that the following information must be provided to parents:

> Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency—
>
> (A) proposes to initiate or change; or
>
> (B) refuses to initiate or change,
>
> the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

20 U.S.C. § 1415(b)(3). However, the need for notice and hearing with respect to a change in the educational placement of the child is not occasioned by every change in his educational program. See P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2d Cir. 1990). The Defendant's alleged failure to report the full scope of S-1's inappropriate conduct to [redacted].'s parents – or other authority – is immaterial to an inquiry into whether Defendant changed [redacted].'s educational placement or the provision of a free and appropriate education to him.

Furthermore, even assuming, for the sake of argument, that S-1's conduct caused a change in A.B.'s educational placement or impacted his right to a free and appropriate education, the undisputed facts demonstrate that the Defendant provided A.B.'s parents with all necessary and appropriate information. [redacted].'s parents had information sufficient to file a police report and to make very specific allegations regarding S-1's conduct toward their son. They simply did not have the right to obtain personal and confidential information regarding S-1 and his disabilities, which is protected by both IDEA and the Family Rights and Privacy in Education Act ("FERPA"). See 20 U.S.C. § 1412, 1417, 1221-3; 20 U.S.C. § 1232g; 34 C.F.R. §§ 300.610-615; 34 C.F.R. Part 99. Thus, the second exception to the statute of limitations, as provided in

20 U.S.C. § 1415(f)(3)(D)(ii), is likewise inapplicable, and the Plaintiff's IDEA claims as to events that occurred in May 2005 are barred by the two-year statute of limitations set forth in Section 1415(f)(3)(D).

B. 2007 IDEA Claim

Plaintiff asserts that the presence of S-1 and the actions of the Defendant created a hostile and harassing educational environment for [redacted]. in the 2007-08 school year, changed his educational placement, and denied him a free and appropriate education in violation of IDEA. (Second Amended Complaint, ¶¶ 73, 79-82.) However, even construing the undisputed facts in the light most favorable to the Plaintiff, the mere presence of S-1 at [redacted] School cannot amount to a change in [redacted].'s placement or a denial of [redacted]'s right to a free and appropriate education.

The Seventh Circuit has noted that "the meaning of 'educational placement' falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP." Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Illinois State Bd. of Educ., 103 F.3d 545, 548 (1996). However, no court has ever determined that the presence of a particular student in a school building amounts to a change in educational placement, and the Court declines to adopt such an interpretation here. See, e.g., Concerned Parents & Citizens for the Continuing Educ. at Malcolm X v. New York City Bd. of Educ., 629 F.2d 751 (1980); John M. v. Bd. Of Educ. of Evanston Twp. High Sch. Dist. 202, 502 F.3d 708 (2007).

In some instances, student-on-student harassment may be so severe and prolonged that it deprives a child of access to educational benefits, and thus violates the IDEA. See M.L. v. Fed. Way Sch. Dist., 394 F.3d 634, 650 (9th Cir. 2005) ("If a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the

services that he or she is offered by the school district, the child has been denied a FAPE."); Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 197 (3d Cir. 2004) (affirming an administrative law judge's conclusion that a school could not provide a student with a free and appropriate public education because of the "legitimate and real fear that the same harassers who had followed [the student] through elementary and middle school would continue [to bully him]," particularly given that the school district had failed, over a period of many years, to protect the student); see also Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999) (recognizing cause of action under Title IX for student-on-student harassment which is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

Even considering the undisputed facts in the light most favorable to the Plaintiff, there is no evidence of the type of severe and prolonged harassment that would allow the Court to find in the Plaintiff's favor. The Plaintiff has not alleged any inappropriate conduct whatsoever between [redacted] and S-1 in 2007; in fact, after a brief and apparently uneventful period of coexistence in the same classroom in October 2007, S-1 was placed in a different class altogether. In the cases where student-on-student harassment was found to violate the IDEA, the harassment was severe, prolonged, and marked by the indifference of school personnel. M.L., 394 F.3d at 650; Shore, 381 F.3d at 195, 200-201. Such is not the case here. Accordingly, this Court finds that the Plaintiff's IDEA claim as to events occurring in 2007 fails as a matter of law.

C. **2007 Stay-Put Claim**

The "stay-put" provision of IDEA requires that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child."

20 U.S.C. § 1415(j). The Plaintiff's assertion of a violation of the stay-put provision is based on the same flawed premise as the alleged IDEA violation.

Essentially, the Plaintiff argues that the Defendant violated [redacted].'s right to continue with the same educational placement pending the outcome of the due process hearing by allowing S-1 to attend [redacted] School. Given that the Court has already determined that the presence of S-1 in the same school building cannot, as a matter of law, amount to a change in [redacted].'s educational placement, the Defendant is also entitled to judgment as a matter of law on the alleged stay-put violation.

D. ADA and Rehab Act Claims

Any claim that arises under the ADA or the Rehab Act, to the extent it relates to the education of a disabled child, may not be raised in the courts unless all administrative remedies have been exhausted. 20 U.S.C. § 1415(l); Babicz v. Sch. Bd. of Broward County, 135 F.3d 1420, 1421-22 (11th Cir. 1998). However, "[t]o make a claim under section 504 in the education context, something more than an IDEA violation for failure to provide a free appropriate public education in the least restrictive environment must be shown." K.C. v. Fulton County Sch. Dist., 2006 U.S. Dist. LEXIS 47652, at *53 (ND. Ga. 2006) (citing N.L. *ex rel.* Mrs. C. v. Knox County Schs., 315 F.3d 688, 695 (6th Cir. 2003); Sellers by Sellers v. School Bd. of City of Mannassas, Va., 141 F.3d 524, 529 (4th Cir. 1998); Monahan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982) (emphasis added). Essentially, the Plaintiff must prove that he was discriminated against intentionally or solely on the basis of his disability. Id. Cases interpreting the ADA and the Rehab Act are interchangeable; therefore, both issues will be addressed simultaneously. Everett v. Cobb County Sch. Dist., 138 F.3d 1407 (11th Cir. 1998).

The Plaintiff's has alleged, with respect to his ADA and Rehab Act claims, only that the Defendant created a "hostile educational environment" in violation of his rights under both Acts. (Plaintiff's Second Amended Complaint, ¶¶ 96-99.) The Plaintiff has not alleged that the Defendant's actions amounted to intentional discrimination, and certainly has not asserted any facts that would support a finding of intentional discrimination. Construing the undisputed facts in the light most favorable to the Plaintiff, his ADA and Rehab Act claims must also fail as a matter of law.[7]

E. Other Pending Motions

The Plaintiff's Motion to Strike the Defendant's Motion for Summary Determination and Answer for Improper Disclosure is **DENIED**. However, to the extent the Plaintiff wishes to request that certain records be sealed, he shall have ten days from the date of this Order to do so. Any such request shall state with specificity the record at issue and the basis on which it should be sealed.

The Plaintiff's Motion to Carry Any Factual Motions to Trial or to Permit the Provision of Records and Depositions to Allow Plaintiff to Respond is **DENIED**. The Court finds that the Plaintiff has not shown a good faith basis for disputing the material facts relied upon by the defendant in support of its Motion for Summary Determination. Therefore, no depositions are authorized, and the Plaintiff shall not be permitted to access any of the confidential educational records of S-1.

The Plaintiff's Motion for Sanctions is **DENIED**.

All other pending motions are **DENIED** as moot.

[7] In addition, the Plaintiff's 2005 claims arising under the ADA and the Rehab Act are time-barred. In Georgia, the applicable statute of limitation for Section 504 claims pursuant to the Rehab Act and the ADA is two years, and such claims of discrimination accrue when the plaintiff is informed of the alleged discriminatory act. Everett v. Cobb County Sch. Dist., 138 F.3d 1407, 1409-10 (11th Cir. 1998). Here, the Plaintiff's claims accrued when his parents

V. ORDER

For the foregoing reasons, the Defendant's Motion for Summary Determination is **GRANTED**, and summary determination is entered in favor of the Defendant with respect to all pending claims. The prehearing conference scheduled for February 5, 2008, shall be removed from the calendar.

SO ORDERED, this 4th day of February, 2008.

KRISTIN L. MILLER
Administrative Law Judge

learned of S-1's inappropriate conduct in May 2005. Accordingly, the Plaintiff's ADA and Rehab Act claims as to events occurring in 2005 are barred by Georgia's two year statute of limitations.

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