08-072942

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted]., by and through his father, [redacted]., and his mother, [redacted].; [redacted]. and [redacted]. individually,

Plaintiffs,

v.

COBB COUNTY SCHOOL DISTRICT,

Defendant.

Administrative Action Number:
OSAH- DOE-SE-0816942-33-Gatto

MEMORANDUM OPINION AND ORDER

Appearances: Chris E. Vance, for Plaintiffs.

Christy E. Calbos, Neeru Gupta, Aric M. Kline, for Defendant.

I. INTRODUCTION

Plaintiffs [redacted]., by and through his father, [redacted]., and his mother [redacted]., and [redacted]. and [redacted]. individually, brought this action against Defendant Cobb County School District contending that Defendant violated his rights under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 *et seq.* (main ed. and Supp. 2005), and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 USCS §§ 790 *et seq.* Plaintiffs seek reimbursement for private school tuition at [redacted] Academy from January 2006 through the date of [redacted].'s graduation in May 2008. Defendant has moved for summary judgment arguing that no genuine issue as to any material fact exists and that Defendant is entitled to a judgment as a matter of law.[1] For the reasons stated below, Defendant's Motion for Summary Judgment is **GRANTED**.

[1] Both the parties' pleadings and this Court's Rule 15 refer to such motions as summary "determination" motions.

II. UNDISPUTED FACTS

[redacted].'s date of birth is [redacted]. He is currently [redacted] years old. [redacted] was never found eligible by Defendant to receive services pursuant to IDEA. Likewise, Defendant never determined that [redacted]. was eligible for any accommodations pursuant to Section 504. (Def.'s Mem. Supp. Summ. J. at 2; *see also* Shaw Aff. ¶ 5, Ex. 1; Pls.' Br. Opp'n Def.'s Summ. J. at 12 ¶.) J.K. attended Lassiter High School and withdrew from this school during his sophomore year on December 22, 2005. [redacted]. withdrew from [redacted] High School in order to attend [redacted] Academy, a private school in Fulton County, Georgia. (Def.'s Mem. Supp. Summ. J. at 2; *see also* Shaw Aff. ¶ 5, Ex. 1; Pls.' Br. Opp'n Def.'s Summ. J. at 13 ¶2; Wadel Aff. ¶ 5.)

[redacted]. and his parents filed the instant Complaint on January 2, 2008, which did not raise any issues regarding alleged IDEA or Section 504 violations by Defendant between January 2, 2006 and January 2, 2008. Although Plaintiffs Complaint raised a claim of Defendant's alleged "on-going failure", the specific claims raised in the Complaint clearly alleged past failures, see e.g. "the CCSD failed to evaluate," "the CCSD continued to fail to evaluate," "the CCSD never provided a special education placement," "the CCSD denied FAPE," the CCSD violated." (Def.'s Mem. Supp. Summ. J. at 2; *see also* Shaw Aff. ¶ 5, Ex. 1; Pls.' Br. Opp'n Def.'s Summ. J. at 13 ¶3; Compl.)

By their own admissions in their Complaint, Plaintiffs had actual knowledge of the alleged action or inaction that forms the basis of their Complaint. Specifically, in his affidavit, [redacted]. attests that "[w]hile [redacted]. was in 2nd grade in CCSD, he had difficulties with reading, completing his homework, concentrating, and he had problems with self-control, emotional distress, social difficulties, and a dislike of changes." (SK. Aff. ¶ 4). [redacted]. further attests that

"[w]e also took [redacted]. for an occupational therapy assessment in June 1998 at Scottish Rite Children's Medical Center. [redacted] was notably below average in synchronizing opposite sides of his body. He was also unable to jump up and touch his heels with his hands, and his upper-limb speed and dexterity was slow." (Id. ¶ 7). In addition, [redacted]. attests that "[w]e also took J.K. for psychological counseling periodically for over seven years for anxiety, social issues, and depression" and that Defendant was apprised of [redacted].'s disability because a copy of the report written by Dr. Brown was hand-delivered by [redacted]'s mother to Ms. McClusky (a.k.a 'Ms. Help') at [redacted].'s CCSD school.." [2] (Id. ¶ 8).

Importantly, [redacted]. further alleged and attested that "[f]rom elementary school until his first semester of 10th grade, [redacted] was earning 'A's and 'B's, but his education was being negatively impacted by his disabilities, he was struggling more and more with school tasks, he was having more and more difficulty with paying attention, his executive functioning was negatively impacting his education more and more, his social skills deficits were increasing his anxiety in the school setting....and his academic work was not at all commensurate with his IQ as reported by Dr. Ronald Brown..." (Id. ¶ 9). Paragraphs 10 through 12 of [redacted]'s affidavit contain further evidence that S.K. was well aware of the alleged action that forms the basis of Plaintiffs' due process complaint. (Id. ¶¶ 10-12).

Plaintiffs also allege that it is undisputed that Defendant "never even provided [redacted].'s parents with their procedural rights" and that Defendant "informed [redacted].'s parents that a child cannot receive an IEP until he fails. This is a misrepresentation to [redacted].'s parents that the issue of

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[2] Plaintiffs attached to the Affidavit of [redacted]. the results of a psychological evaluation of [redacted] (hereinafter "Psychological Evaluation"), purportedly performed and created by a psychologist, Ronald T. Brown, PhD., on November 1, 1997, to the Affidavit of [redacted]. However, it is axiomatic that "[t]he admissibility of evidence on a motion for summary judgment. . . is subject to the rules relating to the admissibility of evidence generally, so that evidence inadmissible on a hearing of a case is generally inadmissible on a motion for summary judgment'." *Baker v. Simon Property Group, et al.*, 273 Ga. App. 406, 407 (2005).

their son's need for special help is resolved, given [redacted] was not failing...It is also undisputed that because of this misrepresentation, [redacted].'s parents did not request a hearing, as they did not know they had anything to contest. " (Pls.' Br. Opp'n Def.'s Summ. J. at 2, 3; see also S.K. Aff." ¶¶ 3, 13, 15, 19, 21, 22.) Specifically, Plaintiffs argue that Defendant's employees advised them that [redacted]. would not be eligible for services pursuant to IDEA 2004 unless he was failing. (Pls.' Br. Opp'n Def.'s Summ. J. at 21-22; S.K Aff.. ¶¶ 3, 13, 15, 19, 21, 23). The Court agrees with Defendant that Plaintiffs' allegations do not and cannot establish that Defendant represented to the Plaintiffs that the issue of their Complaint had been resolved since Defendant never represented to Plaintiffs that [redacted] was eligible for and should receive special education services, the issue raised in Plaintiffs' Complaint.[3]

III. STANDARD OF LAW

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." Fed. R. Civ. P. 56(e)(2). Furthermore, "summary judgment [in IDEA cases] has been deemed appropriate even when facts are in dispute, and is based on a preponderance of the evidence." *Loren F. v. Atlanta Indep. Sch.*

[3] Plaintiffs also contend that Defendant has violated its continuing "child find" obligation with respect to [redacted] pursuant to 20 U.S.C. § 1412(a)(10)(A)(ii)(I). (Pls.' Br. Opp'n Def.'s Summ. J. at 17-18.)

Sys., 349 F.3d 1309, 1313 (11th Cir. 2003) (quoting *Beth B. v. Van Clay*, 282 F.3d 493, 496 n.2 (7th Cir. 2002).

IV. ANALYSIS

A. Plaintiffs' IDEA claims.

Congress has created a two year statute of limitation for parties to file due process complaints under IDEA. 20 U.S.C. § 1415(f)(3)(C).[4] Specifically, a parent or agency may file a complaint "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 [to file due process complaints] under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows." *Id.*[5] Here, Plaintiffs did not present the instant Complaint alleging an IDEA violation until January 2, 2008, more than two years after [redacted] withdrew from [redacted] High School. Significantly, Plaintiffs' Complaint makes no mention of any alleged action or inaction by Defendant during the applicable two year statute of limitation period.

By Plaintiffs' own admission, information was allegedly provided to Defendant by [redacted]'s parents over a decade ago indicating that [redacted] was a child with a disability eligible for IDEA services. Furthermore, Plaintiffs' due process Complaint indicates that [redacted]'s parents, pursuant to an independent evaluation of him in 2005, were aware that he was allegedly entitled to services under IDEA. Therefore, Plaintiffs had actual knowledge of the alleged IDEA violation over a decade ago. To the extent that Plaintiffs now assert that the statute of limitation was not triggered more than two years from the date of Plaintiffs' Complaint, the Court concludes that such arguments are without merit.

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[4] Defendant incorrectly cited, 20 U.S.C. § 1415(b)(6)(B), which requires the establishment and maintenance of due process procedures that include an opportunity for any party to present a complaint. However, 20 U.S.C. § 1415(f)(3)(C) is the statutory provision that actually established the two year statute of limitation.

[5] Georgia has an identical provision. *See* Ga. Comp. R. & Regs. r. 160-4-7-.12(3)(j).

However, the statute of limitation regarding IDEA claims may be tolled if a party can show that a school district provided misrepresentations that the issue which is the subject of the due process action was properly resolved or if the school district failed to provide him/her with procedural safeguards. 20 U.S.C. § 1415(f)(3)(D). In order to properly assert such an argument, Plaintiffs must show that (1) they were prevented from filing the Complaint due to "specific misrepresentations by [Defendant] that it had resolved the problem forming the basis of the complaint" or (2) "[Defendant'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).[6]

Plaintiffs allege that it is undisputed that Defendant "informed [redacted]'s parents that a child cannot receive an IEP until he fails. This is a misrepresentation to [redacted]'s parents that the issue of their son's need for special help is resolved, given [redacted] was not failing." Even assuming, *arguendo*, that this allegation is true, it nonetheless does not establish that Plaintiffs were prevented from filing the Complaint due to "specific misrepresentations by [Defendant] that it had resolved the problem forming the basis of the complaint" since Defendant never represented to Plaintiffs that [redacted] was ever eligible for and should receive special education services. Therefore, Defendant could not have misrepresented to Plaintiffs that it had resolved the problem forming the basis of Plaintiffs' Complaint, to wit, that [redacted] was a child with a disability requiring special education and related services.

Plaintiffs' also claim that Defendant withheld information from the parents that it was required to provide under IDEA. Procedural safeguards must be provided by Defendant when one of the following circumstances exists: (1) "[u]pon initial referral or parent request for evaluation", (2) "[u]pon receipt of the first State complaint under 34 C.F.R. § 300.151 through

[6] Georgia has an identical provision. *See also* Ga. Comp. R. & Regs. r. 160-4-7-.12(3)(j)(1).

34 C.F.R. § 300.153 and upon receipt of the first due process complaint under 34 C.F.R. § 300.507"; (3) [i]n accordance with the discipline procedures in 34 C.F.R. § 300.530(h); and (4) "[u]pon request by a parent." 34 C.F.R. § 300.504(a)(1)-(4). Plaintiffs do not contend that they requested Defendant to perform an evaluation of [redacted]. Thus, Plaintiffs do not contend that Defendant was obligated to provide the procedural safeguards pursuant to 34 C.F.R. § 300.504(a)(1). In addition, Plaintiffs do not contend that they previously filed an IDEA due process action or state complaint on behalf of [redacted] before filing the instant action on January 2, 2008. Therefore, Plaintiffs have not shown an obligation for Defendant to provide them with parent rights pursuant to 34 C.F.R. § 300.504(a)(2). Likewise, Plaintiffs do not contend that they were entitled to receive procedural safeguards pursuant to 34 C.F.R. § 300.504 (a)(3) with respect to any instances wherein [redacted] was disciplined by Defendant. Finally, Plaintiffs do not contend that they ever requested that Defendant provide them with procedural safeguards. Therefore, Plaintiffs were not entitled to receive these procedural safeguards pursuant to 34 C.F.R. § 300.504(a)(4). Thus, the 20 U.S.C. § 1415(f)(3)(D) exception is inapplicable and Plaintiffs' IDEA claims are time barred.

Plaintiffs also contend that Defendant has violated its continuing "child find" obligation with respect to [redacted] Thus, Plaintiffs argue that because of this alleged ongoing/continuing violation, the IDEA 2004 statute of limitation has not yet expired. (*Id.*) The Court does not agree. Pursuant to 34 C.F.R. § 300.131(a),

> Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary school *located in the school district served by the LEA*, in accordance with paragraphs(b) through (e) of this section...

34 C.F.R. § 300.131(a) (emphasis added). Thus, the plain language of this regulation indicates that LEAs have a continuing "child-find" obligation with respect to students who are

enrolled in private schools *within* the boundaries of the LEA. In this case, [redacted]. enrolled in and currently attends [redacted]s Academy, a private school within the boundaries of the Fulton County School District. Because [redacted]. did not enroll in a private school within the District, Defendant had no "child find" obligations with respect to [redacted] after he withdrew from [redacted] High School on December 22, 2005. Therefore, Plaintiffs' arguments that the statute of limitation has not expired are therefore without merit.

B. Plaintiffs' Section 504 claims.

In Georgia, the applicable statute of limitation for Section 504 claims is two years, and such claims of discrimination accrue when the plaintiff is informed of the discriminatory act. *See Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1409-10 (11th Cir. Ga. 1998).[7] Again, by their own admissions, Plaintiffs had actual knowledge of the alleged the discriminatory acts over a decade ago. And Plaintiff's Complaint makes no mention of any action or inaction of by Defendant after January 2, 2006, the applicable two-year statute of limitation period for the Section 504 claims. Therefore, Plaintiff's Section 504 claims are also time barred. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Plaintiffs' IDEA and Section 504 claims were time barred, Defendant's motion for summary judgment is therefore **GRANTED**, and Plaintiffs' Complaint is **DISMISSED.**

SO ORDERED THIS 6th day of March, 2008.

John B. Gatto

JOHN B. GATTO, Judge

[7] The Court notes that Defendant incorrectly cited (N.D. Ga. 1996) in its Motion for Summary Judgment.

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ORDER DENYING DEFENDANT'S MOTION TO STRIKE

ORDER DENYING PLAINTIFFS' MOTION TO STRIKE

Defendant's motion to strike and Plaintiffs' motion to strike having been read and considered, the same are **DENIED.**

SO ORDERED THIS 5th day of March, 2008.

John B. Gatto

JOHN B. GATTO, Judge