BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted], [redacted], and [redacted], Plaintiffs,	:	
v.	:	Docket No.: OSAH-DOE-SE-0826892-29-Howells
CLARKE COUNTY SCHOOL DISTRICT, Defendant.	:	

FINAL DECISION
ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DETERMINATION

On May 12, 2008, Clarke County School District ("Defendant") filed a motion for summary determination, or in the alternative, a motion to dismiss, or for judgment on the pleadings. On June 6, 2008, Plaintiffs filed their response to Defendant's motion. Defendant subsequently filed a reply brief, and Plaintiffs filed a sur-reply. For the reasons stated below, summary determination in favor of Defendant is **GRANTED**.

Procedural Background

The Due Process Hearing Request or Complaint that forms the basis of this matter was filed with the Georgia Department of Education Legal Services on June 16, 2008, received by the Office of State Administrative Hearings on June 17, 2008, and docketed on June 21, 2008.

A previous Due Process Hearing Request or Complaint was filed on November 8, 2007 by Plaintiffs in [redacted] *v. Clarke County School District*, Docket No. OSAH-DOE-SE-0812310-29-Miller ("Case 1"). In that case, Plaintiffs asserted claims pursuant to the Individuals with Disabilities Education Act ("IDEA"), the Vocational Rehabilitation Act ("Rehab Act"), and the Americans with Disabilities Act ("ADA"). Specifically, Plaintiffs alleged that the actions of another student (S-1) in May 2005, and the actions and inactions of Defendant, in May 2005 and

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in 2007, created a harassing and hostile environment for [redacted]., and therefore denied [redacted]. a free and appropriate education in violation of IDEA.1 Plaintiffs also asserted that the conduct in May 2005 and in 2007 violated Plaintiffs rights under the Rehab Act and the ADA.

Administrative Law Judge ("ALJ") Kristin Miller presided over Case 1. While that case was pending, Plaintiffs sought to amend their Complaint to add claims related to the alleged harassment and retaliation of [redacted]. and his parents following the filing of the Complaint. ALJ Miller did not allow Plaintiffs to amend the Complaint to add those claims, because she found that the "allegations are too far removed from the subject matter of the original Complaint and threaten to divert the Court's attention to the obvious personal animus between attorneys involved in this case, rather than keeping the focus squarely on the child." (*See* January 9, 2008 Order Granting in Part and Denying in Part Plaintiffs' Motion to Amend).

On February 4, 2008, ALJ Miller granted summary determination in favor of Defendant dismissing all of Plaintiffs' claims. Plaintiffs' IDEA, Rehab Act, and ADA claims arising out of the actions of S-1, and the alleged action or inaction of Defendant in May 2005 were dismissed as time-barred. In determining whether one of the exceptions to the two-year statute of limitations applied, ALJ Miller found that Defendant had provided [redacted]'s parents with all the necessary and appropriate information. Specifically, she concluded that Plaintiffs did not have a right to obtain personal and confidential information about S-1 and his disabilities, which is protected by IDEA and the Family Rights and Privacy in Education Act ("FERPA"). (*See* February 4, 2008 Final Decision).

With regard to Plaintiffs' IDEA claim based on Defendant's conduct in 2007, ALJ Miller held that "the mere presence of S-1 at Clarke Middle School cannot amount to a change in

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1 In May of 2005, a disabled student, referred to as S-1, groped and squeezed [redacted]'s genitals and "humped" [redacted]., while making the associated sexual noises. Both students were clothed. (*See* February 4, 2008 Final Decision).

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[redacted]'s placement or a denial of [redacted]'s right to a free and appropriate education." Thus, considering the undisputed facts in the light most favorable to Plaintiffs, she concluded that Plaintiffs' 2007 IDEA claim failed as a matter of law. *Id.*

Finally, with regard to Plaintiffs' Rehab Act and ADA claims based on Defendant's conduct in 2007, ALJ Miller found that Plaintiffs failed to assert any facts that would support a finding of intentional discrimination. Accordingly, she concluded that Plaintiffs' Rehab Act and ADA claims premised on Defendant's conduct in 2007 failed as a matter of law. *Id.*

As noted *supra*, Plaintiffs filed the instant Due Process Hearing Request or Complaint on June 16, 2008. In response to Defendant's motion, Plaintiffs assert that they are not attempting to re-litigate the claims or causes of action from Case 1, which are currently on appeal. They insist that this matter solely asserts the harassment and retaliation claims that ALJ Miller did not allow Plaintiffs to add in Case 1. (*See* Plaintiffs' Response to Defendant's Motion for Summary Determination at pp. 1-2).

Findings of Fact

1.

Plaintiffs' Complaint contains in excess of 70 paragraphs. Many of the allegations are similar to, or the same as, the allegations in Case 1. Plaintiffs assert that those allegations are not causes of action, but merely "facts contributing to" their harassment, retaliation, and hostile environment causes of action. (Plaintiffs' Response to Defendant's Motion for Summary Determination at p. 14). Because the Complaint in this matter includes a significant amount of the same allegations advanced in Case 1, the thrust of Plaintiffs' current Complaint is less than crystal clear.

2.

In their current Due Process Hearing Request or Complaint, Plaintiffs allege that after filing the Due Process Hearing Request in Case 1 on November 7, 2007, Defendant discriminated and retaliated against Plaintiffs in the following ways: (1) Defendant failed to provide information and records "concerning" and "relating" to [redacted].; (2) Defendant refused to meet with the parents of S-1 and ask that they agree to a change in their child's placement; (3) Defendant refused to remove S-1 from Clarke Middle School; (4) Defendant ordered and/or instructed its teachers not to discuss or address safety concerns expressed by [redacted].'s parents; (5) Defendant decided to extend S-1's school day beyond a half day; (6) Counsel for Defendant became "verbally abusive" and "aggressive in tone and demeanor" and refused to allow Defendant's staff to answer certain questions raised by Plaintiffs or their attorney; and (7) Counsel for Defendant threatened or slandered [redacted].'s mother during the resolution session and at a prehearing conference before ALJ Miller. (*See* Complaint ¶¶ 31, 35-60).

3.

Plaintiffs' affidavits do not cite a specific education record *for* [redacted] that Defendant has failed to produce.[2] Nor do they assert that the failure to produce a particular record has in any way impacted [redacted]'s education.

4.

The records that Plaintiffs sought "concerning" and "relating" to [redacted] were actually records for S-1, which may contain information about the incident between S-1 and A.B. (*See* Affidavit of R.B. at ¶¶ 15, 17; *see also* Transcript of December 11, 2007 Pre-Hearing Conference

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[2] While [redacted].'s affidavit does contain the conclusory statement that Defendant has failed to give Plaintiffs records that they have received in the past, she does not identify the name or type of record. (*See* Affidavit of [redacted]. at ¶ 18). There is a vague reference to a graph or some data in email correspondence between [redacted] and Ms. Stevenson. (See Exhibit 7, attached to Plaintiffs' Response to Defendant's Motion for Summary Determination). In the email, Ms. Stevenson states that any failure to provide the data has been due to an oversight on her part. *Id.*

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at pp. 33-34, attached as Exhibit 5 to Plaintiffs' Response to Defendant's Motion for Summary Determination). Defendant has refused to provide Plaintiffs with confidential information or records pertaining to S-1. Defendant refused to provide the information and records because it believes that it is prohibited from doing so under the law. (*See* Exhibits attached to Affidavit of Harold Eddy; *see also* November 29, 2007 letter, attached as Exhibit 7 to Defendant's Answer).

5.

Plaintiffs assert that Defendant has refused to talk to the parents of S-1 and request that they agree to change S-1's placement. (Affidavit of R.B. at ¶ 17). Defendant has taken the position that it will not discuss whether it has or has not approached the family of S-1 about moving him to another school. (*See* Transcript of Resolution Session, attached as Exhibit 3 to Affidavit of Harold Eddy, at pp. 44, 64, 65).

6.

Counsel for Defendant, Harold Eddy, and counsel for Plaintiffs, Jonathan Zimring, attended a resolution session in Case 1 on November 28, 2007. Plaintiffs' counsel brought a court reporter to the resolution session. Defendant's counsel instructed one of Defendant's staff to refrain from answering a question concerning the definition of "sexual abuse" or what Defendant considers sexual abuse such that Defendant would be required to report it.[3] Plaintiffs' counsel asked Mr. Eddy to lower his voice on more than one occasion during the resolution session. Plaintiffs' counsel also resorted to raising his voice. (*See* Transcript of Resolution Session, attached as Exhibit 3 to Affidavit of Harold Eddy; *see also* Affidavit of L.B. at ¶ 8).

[3] This is the only conduct Plaintiffs cite in support of their allegation that Defendant ordered and/or instructed teachers not to discuss or address safety concerns expressed by A.B.'s parents. (*See* Affidavit of [redacted] at ¶ 10).

7.

During the December 11, 2007 Pre-Hearing Conference before ALJ Miller, Defendant's counsel stated that Defendant had concerns about the confidentiality of S-1's records, because Defendant had reason to believe that Plaintiffs' mother had disclosed information about another child in her capacity as a sexual abuse lay investigator. (*See* Transcript of Pre-Hearing Conference at pp. 42-43, attached as Exhibit 5 to Plaintiffs Response to Defendant's Motion for Summary Determination).[4]

8.

Defendant refused to unilaterally move S-1 to another school because it felt it was prohibited from doing so under the law. (*See* Transcript of Resolution Session, attached as Exhibit 3 to Affidavit of Harold Eddy).

9.

In January 2008, S-1's schedule was modified by his IEP team, such that he would attend school longer than a half day. (*See* Stevenson Affidavit at ¶ 12; *see also* Plaintiffs' Exhibit 6).

Conclusions of Law

1.

On motion for summary determination, the moving party must show by supporting affidavits or other probative evidence that there is no genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(1). When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials, but must show by supporting affidavit or other probative evidence that there is a genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-

[4] Plaintiffs present no other specific evidence of the alleged "threats" or "slander" engaged in by Defendant's counsel.

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.15(3). As set forth below, this Tribunal concludes that no genuine issue of material fact remains for determination.

2.

To the extent Plaintiffs are attempting to re-litigate causes of action that were asserted in Case 1 and are currently on appeal, this Tribunal concludes that any such causes of action are barred. O.C.G.A. § 9-2-5(a) ("No plaintiff may prosecute two actions in the courts at the same time for the same cause of action and against the same party. . . . If two such actions are commenced at different times, the pendency of the former shall be a good defense to the later"); O.C.G.A. § 9-2-44(a) ("[T]he pendency of a former action for the same cause of action between the same parties in the same or any other court having jurisdiction shall be a good cause of abatement.") Claims barred by Section 9-2-5(a) are properly dismissed on a motion for summary determination or a motion to dismiss. *See Stagl v. Assurance Co. of Am.*, 245 Ga. App. 8 (2000); *see also Coastal Water & Sewerage Co. v. Effingham County Indus. Dev. Auth.*, 288 Ga. App. 422 (2007). Accordingly, Defendant's motion for summary determination is granted as to any causes of action stated in the current complaint that were also asserted in Case 1.

3.

Furthermore, any causes of action that are technically disparate, but which arise out of the same transaction and would resolve the same issues as the first pending action, are also barred. *Atlanta Airmotive, Inc. v. Newnan-Coweta Airport Authority*, 208 Ga. App. 906, 906-07 (1993). To the extent that Plaintiffs allege that Defendant retaliated or discriminated against Plaintiffs when Defendant refused to move S-1 to another school, refused to provide personal or confidential information about S-1 to Plaintiffs, and allowed S-1 to attend Clarke Middle School for more than a half day, those causes of action are also barred. A resolution of those claims

would necessarily require the undersigned to resolve some of the same issues in Case 1, such as whether the presence of S-1 in Clarke Middle School amounted to a change in A.B.'s placement or a denial of a free and appropriate public education. Accordingly, those claims are abated and dismissed.

Plaintiffs' Harassment and Hostile Environment Claims

4.

Section 504 of the Rehab Act 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.S. § 794(a). The ADA similarly states: "[N]o 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.S. § 12131. These provisions of the Rehab Act and the ADA are considered largely "identical anti-discrimination statutes prohibiting federally funded bodies from denying disabled individuals access to benefits." *K.C. v. Fulton County School District*, 2006 U.S. Dist. LEXIS 47652, at *52 (N.D. Ga. June, 28, 2006). Thus, interpretations of the one act apply to the other. *Id.*; *Waddell v. Valley Forge Dental Assocs., Inc.*, 276 F.3d 1275, 1280 (11th Cir. 2001).

5.

"To 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.*, 2006 U.S. Dist. LEXIS 47652, at *53. Under section 504 or the ADA, Plaintiffs must establish "intentional discrimination" or "bad faith." Furthermore,

Plaintiffs must show that the disabled individual was excluded from participation in or denied the benefits of his education, or subjected to discrimination solely on the basis of his disability. 29 U.S.C.S. § 794(a); 42 U.S.C.S. § 12132; *See Manecke v. School Board*, 762 F.2d 912, 922-23 (11th Cir. 1985). Plaintiffs have failed to assert any facts that would support a finding that Defendant's actions, after the filing of the Complaint in Case 1, caused [redacted] to be excluded from participation in or denied benefits of his education, or subjected to discrimination solely on the basis of his disability. Accordingly, Plaintiffs' "harassment" and "hostile education environment" claims pursuant to section 504 of the Rehab Act and the ADA fail as a matter of law.

Plaintiffs' Retaliation Claims

6.

To establish a prima facie claim of retaliation Plaintiffs must show that: "(1) they engaged in a protected activity; (2) the defendant[] knew they were involved in the protected activity; (3) an adverse action was taken against them; and (4) a causal connection exists between the protected activity and the adverse action." *Alex G. v. Bd. of Trustees*, 387 F. Supp. 2d 1119, 1128 (E.D. Cal. 2006); *Weixel v. Bd. of Educ.*, 287 F.3d 138, 148 (2d Cir. 2002); *Lauren W. v. Deflaminis*, 480 F.3d 259, 267 (3d Cir. 2007). If the plaintiffs are able to establish a prima facie case, the burden shifts to the defendant to show a legitimate, non-retaliatory purpose for its acts. *Alex G.*, 387 F. Supp. 2d at 1128. Once the defendant has articulated a legitimate, non-retaliatory reason for its acts, the burden shifts back to the plaintiffs to show that the proffered reason was pretextual. *Id.* Plaintiffs may show pretext "'either directly by persuading the court that a discriminatory reason more likely motivated the [school district] or indirectly by showing that the [school district's] proffered explanation is unworthy of

credence.'" *Id.*, quoting *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002).

7.

Assuming for the purposes of this motion that filing a Due Process Hearing Request is engaging in a protected activity, Plaintiffs can establish that they engaged in a protected activity and that Defendant knew that they were engaged in a protected activity. Notwithstanding, Plaintiffs have failed to establish that they have suffered an adverse action. This Tribunal concludes that neither the raised voice or aggressive demeanor of an attorney in a resolution session where the opposing party is represented, nor the argument of an attorney in a pre-hearing conference, amount to adverse actions sufficient to support a retaliation claim.[5] These actions occurred in the context of ongoing contentious litigation, while both sides were represented by counsel. Furthermore, subsequent to Defendant's counsel raising his voice at the resolution session, Plaintiffs' counsel resorted to the same behavior, thereby perpetuating the problem. With regard to Plaintiffs' allegations of other adverse actions (i.e., Defendant's refusal to speak to S-1's parents and Defendant's refusal to answer questions about the definition of sexual abuse and mandatory reporting requirements), this Tribunal concludes that Defendant's refusal to take actions which it believes are not required by or supported by the law do not amount to retaliatory "adverse actions."

8.

Nevertheless, even if Plaintiffs' allegations and affidavits did establish adverse actions by Defendant, this Tribunal concludes that Plaintiffs have failed to show a causal connection between the alleged adverse actions and the protected activity. They have not shown that

[5] While this Tribunal does not condone anything less than civilized advocacy, and does not see the need to raise one's voice while in the company of civilized men and women, this Tribunal does not find that such actions, under the facts of this case, rise to the level of an "adverse action."

Defendant's refusal to provide information about S-1, Defendant's refusal to talk to S-1's parents, and Defendant's refusal, on the advice of counsel, to give legal definitions of sexual abuse or describe its mandatory reporting duties, were taken *in response* to protected activity. *See Bradley v. Arkansas Dept. of Ed.*, 443 F.3d 965, 977 (8th Cir. 2006). Plaintiffs' allegations "amount[] to nothing more than an assertion that a party to a controversy that resists demands against it is engaging in retaliatory conduct by doing so." *Lauren W. v. Deflaminis*, 480 F.3d 259, 269 (3d Cir. 2007).

9.

Finally, even if Plaintiffs' allegations and affidavits could be construed to establish a prima facie case of retaliation, which this Tribunal does not find, Plaintiffs fail to present any evidence rebutting Defendant's legitimate, nondiscriminatory reasons for taking each of these actions. *See Alex G.*, 387 F. Supp. 2d at 1129. In other words, Plaintiffs failed to present any evidence to support a finding that Defendant's proffered reasons for taking these actions was pretextual. Accordingly, Plaintiffs' retaliation claims pursuant to IDEA, the Rehab Act, and the ADA fail as a matter of law.

Order

For the foregoing reasons, Defendant's motion for summary determination is **GRANTED**, and all of Plaintiffs' claims are hereby **DISMISSED**.

SO ORDERED this 10th **day of** July **, 2008.**

Stephanie M. Howells

STEPHANIE M. HOWELLS
Administrative Law Judge

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