08 088885

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],	)	
	)	
Petitioner[1],	)	DOCKET NO.:
	)	OSAH-DOE-SE-0829022-67-Hackney
v.	)	
	)	
GWINNETT COUNTY SCHOOL DISTRICT,	)	
	)	
	)	
Respondent.	)	

FINAL DECISION

Petitioner [redacted] ("Petitioner"), by and through his parents [redacted] and [redacted], filed a due process request pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* against Respondent Gwinnett County School District ("Respondent.") alleging that Petitioner's May 2007 Individualized Education Program ("IEP") did not provide a free appropriate public education ("FAPE") and seeking reimbursement for private placement at public expense. Plaintiff's parents appeared pro se. Attorney Victoria Sweeny represented Respondent. For the reasons indicated below, the relief requested by Plaintiff is DENIED.

FINDINGS OF FACT

1.

Petitioner is a [redacted] year old student (D.O.B. [redacted]) who resides within the territorial boundaries of the Gwinnett County School District and is eligible to receive a free appropriate public education ("FAPE") from Respondent pursuant to the IDEA. Petitioner's ("P's") Exhibit ("Ex.") 21.

[1] "Petitioner" and "Respondent" reflect "Plaintiff" and "Defendant," respectively. Although this Court has previously designated the parties as "Plaintiff" and "Defendant", the parties used the terms interchangeably during the course of the hearing.

2.

At the time of the hearing Petitioner was eligible for special education services under the IDEA under the category of other health impaired ("OHI.") Transcript ("T.") 112; P's Ex. 21.

3.

Petitioner has high average intelligence and has previously been diagnosed with attention deficit hyperactivity disorder ("ADHD"), pervasive development disorder not otherwise specified, executive dysfunction, and clinical depression. Pervasive developmental disorder not otherwise specified is one of the autism spectrum disorders. T. 20, 23; P's Ex. 1, 25.

4.

Petitioner attended a private school located in Fulton County, Georgia, [redacted], during the 2006-2007 school year. P's Ex. 7, 13-18, 21. Petitioner had difficulty with work completion, self-advocacy, study skills, and organization while at [redacted]. T. 194, 256-7, 269, 301; P's Ex. 10, 13-17, 21.

5.

Prior to the May 10, 2007 IEP meeting, two representatives from the School District, Ms. Keysha DuPont, Coordinator for the School District's Other Health Impaired program, and Lewis Holbrook, a behavior support teacher, observed Petitioner in his placement at [redacted]. T. 78, 121, 253. Ms. DuPont and Mr. Holbrook prepared a report of their observation. T. 87, 134; P's Ex. 10.

6.

Respondent also received written reports from Petitioner's teachers at [redacted], regarding Petitioner's educational progress. P's Ex. 13-17. This information was reviewed by Respondent prior to the May 10, 2008 meeting. T. 83-93.

7.

In May of 2007 Respondent convened an individual education program ("IEP") committee to create an IEP for the upcoming 2007-2008 school year. R's Ex. 5-8. The meeting began on May 10, 2007. T. 310, but as the committee did not complete Petitioner's IEP on that date, the committee reconvened on May 21, 2007. R's Ex. 6-8; T. 311.

8.

Petitioner's mother [redacted]. received and signed notices inviting her to the May 10 and May 21 IEP meetings, and she attended both meetings. R's Ex. 5-8; T. 193, 225-227. Both meetings were recorded by [redacted]. and [redacted] prepared transcripts from the audio of the meetings. T. 186-7, 311; R's Ex. 2, 4.

9.

Petitioner's teachers at [redacted] were also invited to both the May 10 and May 21 IEP meetings. R's Ex. 5-8. Although [redacted] initially indicated that it would be difficult to send a teacher to attend the meeting, [redacted] agreed to have several of Petitioner's teachers participate in the IEP meeting via conference call. T. 128; P's Ex. 11. The [redacted] administrative staff limited the teachers' participation to approximately fifteen (15) minutes of the IEP meeting on May 10, 2007. T. 91, 125-8; P's Ex. 2, 11. Petitioner's mother excused Petitioner's teachers from attending the May 21, 2007 meeting. R's Ex. 1; T. 133-4, 97.

10.

The information provided by Petitioner's teachers through the conference call, through the written information shared with Respondent prior to the meeting, and through information obtained during Respondent's observation of Petitioner were considered by the IEP committee and incorporated throughout the IEP. T. 99-101, 118, 269-77, 300-01.

11.

Petitioner's "present levels of performance" section of the IEP contains information provided directly from [redacted] teachers and parent report. P's Ex. 21, p. 32-2; T. 193, 266-272.

12.

Under the "social/emotional skills" portion of the IEP, the IEP committee incorporated information provided by both [redacted] and the parent report, including the parent input that Petitioner "appears to be happy and a typical teenager." P's Ex. 21, p. 33. T. 273-274.

13.

The "written expression, oral expression and listening comprehension" section of Petitioner's IEP includes information obtained from [redacted] teachers, Respondent's observation of Petitioner at [redacted], and the parent report. P's Ex. 21, p. 33; T. 274.

14.

The "motor skills" section of the IEP similarly includes information obtained from [redacted] teachers and Petitioner's parent. P's Ex. 21, p. 33-4; T. 275.

15.

The section of Petitioner's IEP reflecting "self help/daily living skills" contains information provided by the parent, namely, that "parent notes that self help skills are age appropriate." P's Ex. 21, p. 34; T. 275-6.

16.

The information noted under the "significant physical and/or medical considerations" portion of the IEP was derived directly from Petitioner's parent. P's Ex. 21, p. 34; T. 276.

17.

Similarly, the parent provided the information noted under the "visual acuity level" of the IEP; that is, that vision is not a concern. Id.

18.

The "communication" section of the IEP reflects information provided by [redacted] teachers. Petitioner's mother agreed with this portion of the IEP. P's Ex. 21, p. 35; T. 276-7.

19.

The "summary of strengths" and "summary of work areas" noted in the IEP contained information provided by the parent and [redacted] teachers. P's Ex. 21, p. 35; T. 277. Petitioner's mother agreed with this portion of the IEP. T. 277.

20.

The special considerations section of Petitioner's IEP was reviewed with Petitioner's parent, and she did not express any concerns. P's Ex. 21, p. 35-6; T. 278.

21.

The "parent concerns" section of the IEP reflects the parent's concerns that "the staff needs "F.A.T. City" training[2], an understanding of ADHD and executive functioning." P's Ex. 21, p. 36. In response to the parent's concern, the administrator present at the IEP meeting from Petitioner's home school – [redacted] High School – stated that the video is available in her school and offered to have all of Petitioner's teachers at [redacted] view the video. R's Ex. 2, p. 235-6; T. 198-9, 278-80.

---

[2] As described by Ms. DuPont, "F.A.T. City" is a video which simulates a day in the life of a learning-disabled student. T. 278-9. Both [redacted] High School and the District's Department of Special Education have the video. T. 278-80. Petitioner's parent explained at the IEP meeting that the [redacted] staff has watched the video. R's Ex. 2, p. 235.

22.

The "parent concerns" portion of the IEP also notes that separate statements prepared by Petitioner and by the parent would be attached to the IEP. P's Ex. 21, p. 36. These letters were attached to and made a part of the IEP. Copies were also circulated to the IEP committee members. P's Ex. 20, 23; T. 150-1, 287-8.

23.

The "assistive technology" portion of the IEP reflects that Petitioner would be referred for an assistive technology evaluation. P's Ex. 21, p. 36. This referral was made in response to the parent's report that all students at [redacted], including Petitioner, use a laptop[3].

24.

The IEP also reflects that a behavior intervention plan, or "BIP", is not required for Petitioner. P's Ex. 21, p. 36. Petitioner's parent agreed that a BIP was not necessary as long as staff was trained on Petitioner's disability. T. 196-197, 290-1; R's Ex. 4, p. 244. In response to this concern, the IEP notes, in addition to the "F.A.T. City" video, that "articles on executive functioning and ADHD will be provided to case manager and [Petitioner's] teachers." T. 197-8; P's Ex. 21, p. 35.

[3] In response to the parent's concern that Petitioner needed a laptop, Ms. DuPont explained that an assistive technology evaluation would be completed at the beginning of the school year to assess the extent of Petitioner's need for assistive technology, and that Petitioner would be provided a laptop if appropriate. T. 288-90; R's Ex. 4, p. 244-5. It was also explained that in the interim, prior to the completion of the assistive technology evaluation, Petitioner could bring his own laptop to school and that he would have access to the computer in each classroom and the computer labs. Id. Further, when Petitioner's parent mentioned the type of software that Petitioner used at [redacted], the IEP committee members explained that each computer in all of Respondent's schools contain this type of software. Id.

25.

The IEP further notes that extended school year, or "ESY", was considered but not recommended. Petitioner's parent agreed with this determination. P's Ex. 21, p. 36; R's Ex. 4, p. 245; T. 291

26.

In drafting Petitioner's goals and objectives, information from [redacted] was considered as well as input from Petitioner's mother. T. 101, 298-301. Per teacher and parent reports, Petitioner struggled with self-advocacy and study skills; hence, goals and objectives addressing these areas were drafted. Petitioner's parent agreed with each goal and objective. T. 194, 298-301. Every goal or objective that Petitioner's parent suggested was made a part of the IEP. T. 218.

27.

Respondent's representatives at the IEP meeting also recommended that Petitioner attend a study skills class, which he took at [redacted], to address his weakness in that area. T. 171-2, 205. Petitioner's parent rejected this option, however, stating that Petitioner's issues regarding studying were those of a "typical teenager" and that he would not attend that class. R's Ex. 2, p. 227; R's Ex. 4, p. 256-7, p. 261-2. The IEP team deferred to Petitioner's parent's wishes and Petitioner's IEP does not include a study skills class. P's Ex. 21; T. 205, 219.

28.

Petitioner's IEP also contains modifications and interventions. P's Ex. 21, p. 42. Petitioner's mother was likewise involved in drafting the interventions. T. 197-201, 220, 302-305; R's Ex. 4, p. 246-255. The IEP transcript and Petitioner's mother's testimony at the hearing

reflect that most, if not all, of the interventions Petitioner's mother suggested were incorporated into the IEP, and none of her suggested interventions were excluded. Id.

29.

A transition plan was also developed with the parent's input. P's Ex. 21, p. 44. Transition questionnaires submitted by both Petitioner and his mother were consulted in drafting the plan. Petitioner was invited to meet with the transition coordinator to discuss the plan. T. 305-8; R's Ex. 4, p.180-183. The plan was signed by Petitioner's mother. P's Ex. 21, p. 44.

30.

Information regarding Petitioner's participation in state and countywide standardized testing was also incorporated into the IEP, again incorporating the suggestions made by Petitioner's mother. Petitioner's parent agreed to and signed the test participation portion of the IEP. P's Ex. 22, p. 58; T. 308-309.

31.

Finally, Petitioner's IEP committee addressed placement. As noted above, while Respondent's representatives at the meeting recommended a study skills class, Petitioner's mother rejected this option. T. 171-2, 205; 219; R's Ex. 2, p. 227; R's Ex. 4, p. 256-7, p. 261-2. Respondent also suggested resource classes for Petitioner, which contain eight (8) to ten (10) students but follow the general education curriculum and allow students to obtain a college preparatory diploma. T. 171, 204-5, 296-7; R's Ex. 4, p. 258, 272. Petitioner's parent rejected this option. Id. In light of Petitioner's parent's input, the IEP committee ultimately recommended a collaborative math class for Petitioner, which is in the general education setting but is jointly taught by both a regular education and a special education teacher. T. 171-2, 293, 295-6; R's Ex. 4, p. 272-3.

32.

When Petitioner's mother expressed concern about the placement including the large size of the regular education classes, Respondent's representatives reminded her that resource classes were an option. R's Ex. 4, p. 272-3; T. 204-5, 296-7. Petitioner's mother expressed concerns about bullying that she thought might occur if Petitioner attended his home school, [redacted] High. P's Ex. 28. Petitioner's mother also expressed concern about the lack of a block schedule, which [redacted] utilizes. R's Ex. 4, p. 272-3. In response, Respondent offered a permissive transfer to two high schools within the District to address Petitioner's mother's concerns about bullying and which also utilize block schedules. Petitioner's parent rejected each of these options. T. 172-4, 212-16; P's Ex. 28, 30; R's Ex. 12.

33.

Petitioner's parent ultimately rejected the May 2007 IEP and unilaterally placed Petitioner in [redacted] for the 2007-2008 school year[4]. P's Ex. 29.

34.

Petitioner filed a due process complaint on May 12, 2008 seeking reimbursement for Petitioner's unilateral placement at [redacted] for the 2007-2008 school year.

35.

Dr. [redacted] was qualified as an expert in the evaluation of Petitioner. T. 19. Dr. [redacted] testified as to a neuropsychological evaluation of Petitioner he conducted in spring of 2004. Dr. [redacted] also testified as to his familiarity with [redacted], which he described as an

[4] The parties entered into a settlement agreement in August of 2006 to resolve a previous due process complaint initiated by the parent. P's Ex. 32. Pursuant to this agreement, Petitioner's "stay put" placement in the event of a disagreement regarding the IEP developed for the 2007-2008 school year would be the placement offered in the June 2005 IEP, which contemplated placement in the autism program. Id. Despite this agreement, Petitioner's parents opted instead to place Petitioner unilaterally at [redacted] for the 2007-2008 school year.

"intensive special education environment." T. 37. Dr. [redacted] believed that, based upon his evaluation of Petitioner, Petitioner requires an IEP that addresses his weaknesses in organizational skills, work completion, and self-advocacy. T. 41

36.

Keysha DuPont, special education coordinator for the District, was qualified as an expert in programming for children with disabilities and including them in environments with typical peers. T. 124-5. Ms. DuPont testified that in her professional and expert opinion, the IEP developed for Petitioner was appropriate, would confer educational benefit and would provide him with an education in the least restrictive environment. T. 313.

37.

Lewis Holbrook, a behavior support teacher employed by Respondent, was qualified as an expert in educational planning and programming for students with executive function disorder, ADHD, organizational issues, and students who have characteristics of autism. T. 252. Mr. Holbrook observed Petitioner on two occasions: in 2005 while Petitioner was enrolled in Respondent's District at [redacted] Middle School, and in 2007 at [redacted]. T. 252-3; P's Ex. 6, 10. Mr. Holbrook testified that he did not observe any differences in Petitioner's behavior based upon his observations in 2005 and in 2007. T. 254. Mr. Holbrook attended both the May 10 and May 21, 2007 IEP meetings. T. 254. In Mr. Holbrook's expert opinion, the IEP and placement therein developed at those meetings were designed to provide Petitioner educational benefit in the least restrictive environment. T. 257-8. Mr. Holbrook testified that the IEP addressed Petitioner's needs while keeping him in the mainstream environment. T. 258.

CONCLUSIONS OF LAW

1.

In an administrative hearing challenging an IEP, the burden of proof is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49, 62, 126 S. Ct. 528, 537 (2005). In this matter Petitioner challenges the IEP and therefore bears the burden of proof.

2.

Under the Individuals with Disabilities Education Act ("IDEA") students with disabilities are entitled to a free appropriate public education ("FAPE"). 20 U.S.C. § 1412(a)(1); 34 CFR §§ 300.1, 300.101.

3.

IDEA charges the school district with providing FAPE in the "least restrictive environment." 20 U.S.C. § 1412(a)(5)(A). This means that "[t]o the maximum extent appropriate" the school district must educate disabled children with their non-disabled peers. Id.; 34 C.F.R. § 300.114.

4.

The Supreme Court has interpreted an "appropriate" education as an education that is "sufficient to confer some educational benefit upon the …child." Board of Education v. Rowley, 458 U.S. 176, 200 (1982).

5.

"The IDEA requires school districts to develop an IEP for each child with a disability, with parents playing a 'significant role' in this process." Winkelman v Parma Cty. Sch. Dist., 127 S. Ct. 1994 (2007) (citations omitted.)

6.

"The IDEA requires school districts to develop an IEP for each child with a disability, with parents playing a 'significant role' in this process." Winkelman 127 S.Ct 1994, 2000 (citations omitted.) While the parents' concerns must be considered by the IEP team, the parents are not entitled to the placement they prefer. M.M. v. Sch. Bd. of Miami-Dade Cnty., 437 F.3d 1085, 1102 (11th Cir. 2006.); see also Heather S. v. State of Wisconsin, 125 F.3d 1045, 1057 (7th Cir. 1997.) "The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child." Rowley, 458 S.Ct. 3034, 3051 (1982.)

7.

The IDEA does not permit parents to "challenge an IEP on the grounds that it is not the best or most desirable program for their child." M. M., 437 F.3d 1085, 1103 (11th Cir. 2006.) Similarly, in determining the appropriateness of a proposed placement it is irrelevant that another placement may be appropriate. Heather S., 125 F.3d 1045, 1057 (7th Cir. 1997.)

8.

The educators who develop a child's IEP are entitled to "great deference." Todd D v. Andrews., 933 F.2d 1576, 1581 (11th Cir. 1991) "[C]ourts 'lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy."' 'Courts must be careful to avoid imposing their view of preferable educational methods on the States.'" J.S.K. v. Hendry Co. Sch. Bd., 41 F.2d 1563 (11th Cir. 1991.)(citations omitted.)

9.

Under the IDEA, a local education agency is not required to "pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility." 20 USC §1412(a)(10)(C)(i.) If, as here, parents enroll their child in a private school without the consent of the school district, a court may order the school district to reimburse the parents for the cost of the private school enrollment if the court finds that the school district failed to make a FAPE available to the student in a timely manner prior to the private school enrollment and the private placement is found to be appropriate. 20 USC §1412(a)(10)(C)(ii); 34 CFR § 300.148(c.)

10.

In order to receive tuition reimbursement of a unilateral private placement, the parent must show first that the public school placement violated the IDEA and second, that the private school placement was proper under the IDEA. See Florence Co. Sch. Dist. Four v. Carter, 510 U.S. 7, 15; Burlington Sch. Comm. v. Dep't of Educ. of Mass. 471 U.S. 359, 372.

11.

In the present case, Petitioner contends that the 2007-2008 IEP fails to offer him a FAPE and that he is henceforth entitled to reimbursement for the unilateral placement at [redacted]. The United States Supreme Court established a two part test to determine the sufficiency of an IEP in Rowley, supra., which has been adopted by the Eleventh Circuit. See, J.S.K, 941 F.2d 1563. Under the Rowley standard, a court must first consider whether there has been compliance with the procedures set forth in the Act. Second, a court must consider whether

the IEP is reasonably calculated to enable the child to receive educational benefit. Id. at 1571, citing Rowley, 458 U.S. at 206-7.

12.

The first prong of the two-part test examines whether any harm has resulted from a technical violation of the procedural requirements set forth in the IDEA.[5] While the IDEA sets forth complex procedural safeguards, the Eleventh Circuit has rejected the notion that violation of a procedural requirement is a *per se* violation of the IDEA. Rather, the Eleventh Circuit has held that a petitioner must show actual harm as a result of the procedural violation in order to be entitled to relief. See Weiss v. School Bd. of Hillsborough County, 141 F.3d. 990 (11th Cir. 1998); Doe v. Alabama Dept. of Educ., 915 F.2d 651 (11th Cir 1990).

13.

Petitioner failed to present any evidence that his procedural requirements were violated. While Petitioner's mother contended that she and Petitioner's teachers at [redacted] were denied the opportunity to fully participate in Petitioner's IEP meetings, there was abundant evidence that Petitioner's mother was an active and informed participant in the May 10 and May 21 IEP meetings. Petitioner's mother's input was solicited throughout the meetings and her preferences for Petitioner's educational programming were incorporated into the IEP. R's Ex. 2, 3, 4. Additionally, written statements prepared by both Petitioner and his parents were attached to and made a part of the IEP. P's Ex. 20, 23; T. 150-1, 287-8.

14.

Petitioner also contended at the hearing that his IEP lacked a behavior intervention plan ("BIP") and specific transition goals. The evidence established, however, that the parent indicated at the

[5] The Act's procedural safeguards are specifically enumerated in 20 U.S.C. 1415(b).

IEP meeting that she did not believe a BIP was necessary – nor was there any indication from [redacted] that Petitioner required one - and that she consented to and had considerable input into the transition plan. Further, at the time the IEP was written in May of 2007, the state education regulations did not require postsecondary transition goals (see GA DOE Rule 160-4-7-.06, enacted July 1, 2007), and according to the expert in programming for children with disabilities, Ms. DuPont, the transition plan was appropriate for a [redacted] year old entering high school. T. 307. Therefore, the Court does not find that the IEP was procedurally deficient due to the lack of a BIP or specific transition goals separate from the transition plan itself.

15.

Respondent made numerous attempts to involve Petitioner's then-teachers at [redacted] in the IEP process. T. 125-9; P's Ex. 2. Petitioner's teachers in fact did attend a portion of the May 10, 2007 meeting, and their input in the form of report cards, written statements, progress reports, and contributions over the telephone were incorporated into all aspects of the IEP. Any limitations in Petitioner's teachers' involvement in the IEP process were self-imposed by [redacted] itself and not by Respondent.

16.

Having determined that Respondent complied procedurally with the IDEA, this Court moves onto the second prong of the FAPE analysis under Rowley. This prong assesses whether the student has been provided with an educational program reasonably calculated to enable him to receive educational benefit in the least restrictive environment. Rowley, supra.; J.S.K. v. Hendry County School Board, 941 F.2d 1563 (11th Cir. 1991).

17.

The evidence presented by Petitioner failed to establish that the 2007-2008 IEP would not provide him with educational benefit in the least restrictive environment; that is, a free appropriate public education. To the contrary, the overwhelming weight of the evidence established that the parent was in agreement with each and every part of the IEP but for the recommended placement and that the IEP provides Petitioner with the opportunity to receive a FAPE. The 2007-2008 IEP was tailored to meet Petitioner's individualized needs. Rowley, 458 U.S. 176; Weiss, 171 F.3d 990. It contains goals and objectives addressing Petitioner's agreed-upon weaknesses – task completion, organization, and self-advocacy – and modifications and interventions to accommodate his disabilities. P's Ex. 21.

18.

The proposed IEP also offered Petitioner an education in the least restrictive environment. At Petitioner's parent's request, Petitioner would be mainstreamed in the general education setting all day but would receive support through a collaborative math class. This setting would appear to be less restrictive than the parent's proposed placement – [redacted], which was described by one of Petitioner's witnesses as an "intensive special education environment" – where it appears that Petitioner would have little interaction with general education students. Furthermore, [redacted] is located in another county miles away from Petitioner's home and neighborhood, certainly further than any placement proposed by Respondent. The IDEA does not require Respondent to fund a private school education desired by Petitioner when Respondent has offered Petitioner a FAPE, as here.

19.

Petitioner did not prove that Respondent failed to offer a free appropriate public education. Moreover, the only expert testimony presented established that Respondent offered a free appropriate public education in the least restrictive environment. As this Court has determined that Petitioner failed to establish that his IEP was not appropriate and Respondent established that it offered a free appropriate public education, Petitioner's prayers for relief are denied.

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

ELBERT HACKNEY
Administrative Law Judge

Vol _____ Page _____