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BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS

STATE OF GEORGIA

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OFFICE OF STATE ADMINISTRATIVE HEARINGS

LEGAL SERVICES
GA DEPARTMENT OF EDUCATION

██████████
Plaintiff,

:

v.

:

Docket No.:

:

OSAH-DOE-SE-0832828-33-Miller

:

COBB COUNTY SCHOOL DISTRICT,

:

:

Defendant.

:

FINAL DECISION

ORDER GRANTING PLAINTIFF'S MOTION TO AMEND COMPLAINT
ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY DETERMINATION
ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DETERMINATION

For Plaintiff:

██████████

Parent, *pro se*

For Defendant:

Aric M. Kline, Esq.
Brock, Clay, Calhoun & Rogers, P.C.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiff ██████████ is a pre-elementary school student who is eligible for services under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). On June 24, 2008, the Plaintiff filed a Due Process Hearing Request ("Complaint") contending that the Defendant Cobb County School District violated his rights under IDEA.

On July 1, 2008, the Defendant filed its Motion for Summary Determination. The Plaintiff filed three different responses to the Defendant's Motion, on July 7, 2008; July 15, 2008; and July 21, 2008. In addition, on July 16, 2008, the Plaintiff filed his own Motion for

Summary Determination. On July 21, 2008, the Plaintiff further filed a "Request for Inclusion of Additional Claims and Details to the Due Process Hearing Complaint Form Filing of June 23, 2008" (hereinafter "Motion to Amend Complaint"). The Defendant opposes the Plaintiff's Motions.

After careful consideration of the arguments and submissions of the parties, and for the reasons set forth below, the Plaintiff's Motion to Amend Complaint is **GRANTED**; the Plaintiff's Motion for Summary Determination is **DENIED**; and the Defendant's Motion for Summary Determination is **GRANTED**.

II. PLAINTIFF'S MOTION TO AMEND COMPLAINT

The Plaintiff seeks to amend his original Complaint to provide "additional and/or reworded claims and details to the Due Process Hearing Complaint Form of June 23, 2008." (Plaintiff's Motion to Amend Complaint, at 1.) Although this characterization of the proposed amendments suggests that the Plaintiff wishes to add additional claims, a close reading of the Motion reveals that the Plaintiff has attempted only to clarify and elaborate upon the allegations raised in his original Complaint. IDEA provides as follows with respect to amendments to the Complaint:

A party may amend its due process complaint notice only if—

- (I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or
- (II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

20 U.S.C. § 1415(c)(2)(E); see also 34 C.F.R. § 300.508(d)(3). Here, as the Defendant has not consented to the Plaintiff's proposed amendments, the Complaint may be amended only if the

Court grants permission. The comments accompanying the federal regulation provide some additional guidance regarding the Court's exercise of its discretion, as follows:

Comment: . . . Many commenters recommended that a hearing officer be allowed to permit a party to amend the due process complaint, unless doing so would prejudice the opposing party. The commenters stated that, at a minimum, the regulations should state that hearing officers must follow the standard that permits them to freely grant amendments, regardless of timelines, when justice so requires.

Discussion: Section 300.508(d)(3), consistent with section 615(c)(2)(E) of the Act, provides that a party may only amend its complaint in two circumstances: (1) if the other party consents in writing to the amendment and is given the opportunity to resolve the complaint in a resolution meeting convened under § 300.510, or (2) if the hearing officer grants permission for the amendment, but only at a time not later than five days before the hearing begins. Therefore, we do not believe further clarification is necessary. With regard to parents who file a due process complaint without the assistance of an attorney or for minor deficiencies or omissions in complaints, we would expect that hearing officers would exercise appropriate discretion in considering requests for amendments.

Changes: None.

71 Fed. Reg. 46,699 (Aug. 14, 2006). The hearing officer is therefore granted broad discretion in determining whether to permit the amendment of a due process complaint.

In this case, the Plaintiff is represented by his father, who is proceeding *pro se* in this matter. The Plaintiff's Motion to Amend Complaint was filed more than five days in advance of the hearing,¹ and the proposed amendments do not raise any claims that have not already been addressed by the Defendant in its Motion for Summary Determination. Under these circumstances, the Plaintiff's Motion to Amend Complaint is **GRANTED**, and his Complaint is amended to incorporate the allegations set forth in his Motion.

¹ Under 20 U.S.C. § 1415(c)(2)(E), the Defendant would be entitled to a continuance of the hearing, given that this Court has approved the amendments less than five days in advance of the scheduled hearing. However, because the Court has also granted the Defendant's Motion for Summary Determination, as set forth below, no hearing or continuance thereof is necessary.

III. PLAINTIFF'S MOTION FOR SUMMARY DETERMINATION

The Plaintiff moved for summary determination on the basis of alleged defects in the Prior Written Notice provided to him by the Defendant following the filing of his Complaint. However, the Plaintiff failed to properly support his motion or to amend his Complaint to include the allegations raised in his Motion. Therefore, his Motion must be denied.

The requirements for filing a Motion for Summary Determination are set forth in GA. COMP. R. & REGS. § 616-1-2-.15 (cited hereinafter as "OSAH Rule 15"). The Rule provides:

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). Here, the Plaintiff's Motion does not include any affidavits or other probative evidence. Furthermore, the Plaintiff's original Complaint did not raise any issues regarding the content of the Prior Written Notice, and he has not sought to amend his Complaint to add such allegations. The Plaintiff cannot be entitled to summary determination on matters that are not at issue in this proceeding, and his Motion is accordingly denied.

IV. DEFENDANT'S MOTION FOR SUMMARY DETERMINATION

The Defendant has moved for summary determination on the grounds that the Plaintiff's Complaint fails to set forth a claim that may be adjudicated under IDEA. The Plaintiff has challenged his assignment to a pre-elementary school classroom where the lead teacher is expected to be on maternity leave for three months during the fall of 2008. The Plaintiff seeks assignment to a different school in a classroom where the lead teacher is not expected to take an extended leave, or, alternatively, a guarantee that the supply teacher who replaces the teacher on maternity leave will be licensed in special education. However, because the selection of

personnel and the location where services are to be provided are matters within the sole discretion of the school district, the Plaintiff has failed to state a claim within the purview of IDEA, and the Defendant is entitled to judgment as a matter of law.

A. FINDINGS OF UNDISPUTED MATERIAL FACT

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

1.

The Plaintiff is a pre-elementary school student residing within the Cobb County School District who is eligible to receive special education services pursuant to IDEA. The Defendant has decided to provide these special education services to the Plaintiff for the 2008-2009 school year at [REDACTED] Elementary School. (Complaint; Def. Response to Pl.'s Compl. ("Answer"), ¶¶ 1-4; Def. Mot. for Summ. Determination, Undisputed Facts, ¶¶ 1-3.)

2.

Upon learning that the Plaintiff's assigned teacher at [REDACTED] Elementary School is expected to be on maternity leave from October 2008 through December 2008, the Plaintiff requested that he be reassigned to a different teacher and a different school, preferably [REDACTED] Elementary School. In the alternative, the Plaintiff seeks a guarantee that the supply teacher who replaces his teacher during her maternity leave will be licensed in special education. (Complaint; Answer, ¶¶ 5-6; Def. Mot. for Summ. Determination, Undisputed Facts, ¶¶ 4-6.)

3.

In support of his request for reassignment of school location and personnel, the Plaintiff asserts that the multiple transitions for his assigned teacher at [REDACTED] Elementary

School will adversely affect him and interfere with his learning abilities. (Complaint; Answer, ¶ 6; Pl.'s Answer to Def's Mot. for Summ. Determination (July 21, 2008), ¶¶ 3-7.)

4.

The Defendant has denied the Plaintiff's requests. (Complaint; Answer, ¶ 4; Def. Mot. for Summ. Determination, Undisputed Facts, ¶ 3.)

B. 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.

GA. COMP. R. & REGS. r. 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. Env'tl. 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)); see generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2006) (noting 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:

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.

GA. COMP. R. & REGS. r. 616-1-2-.15(3). See Guy Lockhart v. Dir., Env'tl. 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)).

C. CONCLUSIONS OF LAW

IDEA enables a parent to bring challenges to the “identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to the child” by filing a due process complaint. 20 U.S.C. § 1415(b)(7)(A), (c)(2)(A). In this case, the Plaintiff’s Complaint presents two issues: first, whether the Plaintiff has the right to be assigned to a school facility and personnel of his own choosing; and second, whether the Defendant is required to provide a licensed special education teacher as a substitute during his assigned teacher’s maternity leave. Because the Court concludes, as a matter of law, that neither issue relates to the identification, evaluation, educational placement, or provision of a free appropriate education to the Plaintiff, the Defendant is entitled to summary determination in its favor.

1. Choice of Personnel and School Facility

The Plaintiff asserts that he will not receive a free appropriate public education (“FAPE”) in the least restrictive environment if he is required to attend ██████████ Elementary. In support of this legal conclusion, the Plaintiff’s only factual allegation is that the multiple transitions caused by his assigned teacher’s maternity leave will negatively impact his ability to learn. However, because the Plaintiff is not entitled to choose his teacher and/or the location of his school, the Defendant did not violate IDEA by assigning the Plaintiff to a classroom with a lead teacher who is expected to take a maternity leave.

Under IDEA, states are required to ensure that “[a] free appropriate public education is available to all children with disabilities.” 20 U.S.C. § 1412(a)(1)(A). In order to achieve this

goal, a written Individualized Education Plan (“IEP”) specifically tailored to each disabled student delineates the special education services that the student must receive in order to receive a FAPE. See 20 U.S.C. § 1414(d)(1)(A). The school district must implement the student’s IEP in the least restrictive environment possible by educating the student “to the maximum extent appropriate” among non-disabled students. 20 U.S.C. § 1412(a)(5)(A).²

In this case, the Plaintiff disagrees with the Defendant’s selection of his lead teacher because the teacher is expected to take a maternity leave during the school year. The Plaintiff would prefer that he be assigned to a teacher who is not scheduled for an extended leave because he is concerned about the adverse impact of multiple transitions on his educational progress.

The Defendant’s selection of personnel and the physical location of his school, however, are simply not components of the Plaintiff’s identification, evaluation, or educational placement and do not impact the Defendant’s provision of a FAPE to him. The Office of Special Education Programs (“OSEP”), which provides federal policy guidance regarding the provision of special education services under IDEA, considered a similar situation in Letter to Fisher, 21 IDELR 992 (OSEP July 6, 1994). There, OSEP advised that a change in the physical location of the facility where services would be provided did not amount to a change in a student’s educational placement. Id.; see also Letter to Veazey, 37 IDELR 10 (OSEP Nov. 26, 2001) (“the assignment of a particular school or classroom may be an administrative determination”); White v. Ascension Parish Sch. Bd., 343 F.3d 373 (5th Cir. 2003) (“‘educational placement’ as used in the IDEA means educational program – not the particular institution where the program is

² As noted supra, the sole basis for the Plaintiff’s contention that the Defendant has failed to provide him with a FAPE in the least restrictive environment is the Defendant’s failure to accommodate his request for changes in his assigned teacher and school facility. The Plaintiff’s intonation of statutory language is simply insufficient to support a claim under IDEA, inasmuch as he has neither alleged nor presented any probative evidence that the Defendant has refused to educate him “to the maximum extent possible” among non-disabled students. See 20 U.S.C. § 1412(a)(5)(A).

implemented”). Similarly, a change in the personnel providing services to a student is not tantamount to a change in educational placement. Slama by Slama v. Indep. Sch. Dist. No. 2580, 259 F. Supp. 2d 880, 889-890 (D. Minn. 2003); B.F. v. Fulton County School District, OSAH-DOE-SE-0415315-60-Gatto, 106 LRP 20640, at 18 (OSAH 2004) (“selection of a student’s teacher or case manager is solely with[in] the authority of [a school district]”).

Practical considerations also support this interpretation of IDEA. For example, even if the Plaintiff were assigned to a different teacher, there is no assurance that this teacher would not also have to take extended leave due to unforeseen circumstances, such as illness or accident. In the case of such unforeseen circumstances, any adverse impact experienced by the Plaintiff would likely be more severe because preparations for the transition would necessarily be rushed or nonexistent.

Even if a change in teacher or facility could amount to a change in educational placement or otherwise affect the provision of FAPE, “under the IDEA there is no entitlement to the ‘best’ program.” M.M. v. Sch. Bd., 437 F.3d 1085, 1102 (11th Cir. 2006) (citing Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988) (“parents, no matter how well-motivated, do not have a right under the [statute] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child”). While parents are permitted and encouraged to participate in education decisions affecting a disabled student, “the school board is not required to follow [the] parents wishes at ever step, so long as [the student] is receiving a FAPE in the least restrictive means possible.” L.G. ex rel. B.G. v. Sch. Bd., 512 F. Supp. 2d 1240, 1250 (S.D. Fla. 2007).

The Defendant, therefore, has the discretion to select the school and personnel within the district that will provide the Plaintiff with special education services. Accordingly, the Defendant is entitled to judgment as a matter of law with respect to this issue.

2. Qualifications of the Substitute Teacher

The Plaintiff asserts that the Defendant has violated IDEA because it refuses to guarantee that the substitute teacher in place during his primary teacher's maternity leave will be a licensed special education teacher.³ (Complaint.) However, because IDEA does not provide a cause of action on this ground, the Defendant is entitled to summary determination in its favor.

In its provision defining highly qualified special education teachers, IDEA provides as follows:

Rule of construction. Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this section or part shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular State educational agency or local educational agency employee to be highly qualified.

20 U.S.C. § 1401(10)(E). See 34 C.F.R. 300.18(f). The provision of IDEA addressing personnel qualification standards contains a similar rule of construction that bars a right of action that is based on the allegation that an educational agency employee is not highly qualified. 20 U.S.C. § 1412(a)(14)(E); see 34 C.F.R. 300.156(e).

Therefore, a claim that a teacher is not highly qualified does not serve as a basis for relief for a disabled student (or his parents) in a due process hearing. See D.C. v. Douglas County School District, OSAH-DOE-SE-0805567-48-Schroer (OSAH 2007) (order denying motion to dismiss). For parents that are concerned about the qualifications of a particular teacher, their

³ The Plaintiff's Complaint refers to a "licensed" special education teacher, and the Plaintiff has provided no citations to legal authority on this issue. However, the Court reads his Complaint in the light most favorable to him and presumes that he is challenging the Defendant's refusal to provide a "highly qualified" teacher as that term is defined under IDEA.

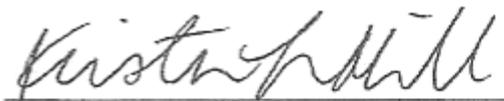
recourse is to file a complaint regarding that teacher's qualifications with the state's educational agency. See 34 CFR § 300.18(f); 34 C.F.R. §§ 300.151-153 (complaint review procedure); MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 19.5 at n.61 (LRP, 2nd Ed. 2008).

Accordingly, because there is no basis in IDEA for the Plaintiff's claim that his substitute teacher must be highly qualified as a special education teacher, the Defendant is entitled to judgment as a matter of law.

ORDER

For the foregoing reasons, the Plaintiff's Motion to Amend Complaint is **GRANTED**; the Plaintiff's Motion for Summary Determination is **DENIED**; and the Defendant's Motion for Summary Determination is **GRANTED**. Inasmuch as this Order resolves all pending issues in this matter, the hearing scheduled for August 4, 2008, is hereby removed from the Court's calendar, and all other pending motions are denied as moot.

SO ORDERED, this 1st day of August, 2008.



KRISTIN L. MILLER
Administrative Law Judge