09-104151

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Docket No.:**
	:	**OSAH-DOE-SE-0902167-106-Miller**
MUSCOGEE COUNTY SCHOOL DISTRICT,	:	
	:	
	:	
Defendant.	:	

FINAL DECISION

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DETERMINATION

For Plaintiff:
Jonathan A. Zimring, Esq.
Zimring & Associates, LLC

For Defendant:
Harold N. Eddy, Esq.
Harben, Hartley & Hawkins, LLP

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiff [redacted] is a kindergarten student who is eligible for services under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). On July 21, 2008, the Plaintiff filed a Due Process Hearing Request ("Complaint") contending that the Defendant Muscogee County School District violated his rights under IDEA.[1]

On October 28, 2008, the Defendant filed a Motion for Summary Determination. The Plaintiff responded to the Defendant's Motion on November 18, 2008.[2] After careful

[1] The Complaint was twice amended after being found insufficient; the Plaintiff's Second Amended Complaint was filed on September 25, 2008.

[2] The Plaintiff's response was due on November 17, 2008, and was therefore untimely. GA. COMP. R. & REGS. rr. 616-1-2-.05(1), 616-1-2-.15(2). However, the Court has considered the Plaintiff's Response in ruling on the Defendant's Motion.

consideration of the arguments and submissions, and for the reasons set forth below, the Defendant's Motion for Summary Determination is **GRANTED**.

II. Findings of Undisputed Material Fact

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

1.

[redacted] is a [redacted]-year-old student who is enrolled at [redacted] Elementary School in Muscogee County, Georgia. (Defendant Muscogee County School District's Brief in Support of Motion for Summary Determination ("Def.'s Br."), Undisputed Facts, ¶ 1; West Aff., ¶ 3; Plaintiffs' Response to Defendant's Alleged Statements of Material Facts ("Pl.'s Facts"), ¶ 1.)

2.

In March 2005, the Defendant performed psychological, speech, physical therapy, and occupational therapy evaluations of [redacted], who was found eligible for special education services pursuant to IDEA. (Def.'s Br., Undisputed Facts, ¶¶ 2-3; West Aff., ¶¶ 4-5; Pl.'s Facts, ¶¶ 2-3.)

3.

At an IEP meeting held on April 23, 2008, the Defendant sought the parents' consent to conduct a comprehensive triennial reevaluation of [redacted] The Defendant's proposed reevaluation would include psychological, speech/language, physical therapy, and occupational therapy evaluations. (Def.'s Br., Undisputed Facts, ¶ 20; West Aff., ¶ 17; Pl.'s Facts, ¶ 20.)

4.

The Defendant also indicated that if, during the above evaluations, additional evaluations were deemed necessary, the Defendant would seek separate consent for the additional evaluations. (Def.'s Br., Undisputed Facts, ¶ 20; West Aff., ¶ 17; Pl.'s Facts, ¶ 20.)

5.

On May 19, 2008, [redacted]'s mother, [redacted], signed a consent form agreeing that the Defendant could conduct a vision/hearing screening of [redacted]. On the consent form, [redacted] further noted that she had "refused other testing until attorney approve[s] services per IEP." (Def.'s Br., Undisputed Facts, ¶ 47; West Aff., ¶ 33 and Ex. 11.)

6.

On May 20, 2008, [redacted] signed a consent form regarding the Defendant's proposed reevaluation of [redacted]. [redacted] noted on the consent form that she did not agree to the Defendant's reevaluation, and provided the following reason: "Not approved by IEP or parents until lawyers work out guidelines. MCSD cannot evaluate [[redacted]] for anything." (Def.'s Br., Undisputed Facts, ¶ 48; West Aff., ¶ 34 and Ex. 12; Pl.'s Facts, ¶ 48.)

7.

On June 3, 2008, both of [redacted]'s parents signed another consent form regarding the Defendant's proposed reevaluation, wherein they agreed that the Defendant could evaluate [redacted] "as explained and granted in the addendum." (Def.'s Br., Undisputed Facts, ¶ 52; West Aff., ¶ 36 and Ex. 14; Pl.'s Facts, ¶ 52.)

8.

The addendum contained the following restrictions on the parents' consent to the proposed reevaluation:

> (1) the terms, scope, and usage of the evaluation shall be as identified for the purposes of this consent as the IEP meeting concerning [[redacted]], held on 4-23-08 only;
>
> (2) the evaluation shall be conducted by Dr. [redacted];
>
> (3) the evaluation shall be conducted pursuant to the ethical standards of the American Psychological Association and, if different, also pursuant to the

standards and ethical and rules [sic] of the Georgia State Composite Board for applied licensed psychologists;

(4) the evaluation shall include an initial meeting with the parents prior to the evaluation to discuss all aspects of the evaluation and their consent, including the identification of the time and location of the evaluation, and it shall not be considered complete until the evaluator affords the parents the opportunity at a mutually convenient time and place to meet to discuss the evaluation and its results prior to its submission to or use by the IEP team;

(5) this consent is based upon the information provided to the parent(s) at the IEP meeting or in any prior written notice and granted in reliance upon such information and these terms. Any changes requested by the evaluator or to the evaluator or the System shall invalidate this consent and require additional notice and subsequent consent. The parents do not agree that the "Examples of Assessment Instruments" attached to the evaluation consent form is an adequate notice for the purposes of obtaining consent;

(6) the evaluation shall be maintained as confidential and shall not be used or distributed in any personal identifying fashion by any third party, person or entity without prior notice and written consent; and

(7) this consent is not a waiver of any rights or actions not explicitly identified, nor should any implied waiver be presumed.

(Def.'s Br., Undisputed Facts, ¶ 52; West Aff., ¶ 36 and Ex. 14; Pl.'s Facts, ¶ 52.)

9.

On June 5, 2008, [redacted] notified the Defendant in writing that "no testing, evaluations or anything may be done outside my presence." (Def.'s Br., Undisputed Facts, ¶ 60; West. Aff., ¶ 42 and Ex. 15.)

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.

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. 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)); 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 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

The Plaintiff, in his Second Amended Complaint, alleges numerous procedural and substantive violations of IDEA and seeks various forms of relief, including a private residential placement at public expense, compensatory education, and attorney's fees.[3] However, the

[3] The Plaintiff has also requested many other forms of relief, in the form of fifteen enumerated paragraphs, for which he has cited no authority under IDEA (i.e., an order requiring IEP meetings to be held at locations that are not

Plaintiff is not entitled to proceed on any of his claims because the Defendant is no longer obligated to provide special education services to him under IDEA. Here, the Plaintiff's parents have effectively refused to consent to the Defendant's IDEA-mandated triennial reevaluation. As a consequence of this refusal, the Plaintiff is not entitled to receive special education services from the Defendant; and, since the Defendant is not required to provide services, this Court is unable to grant any of the relief sought by the Plaintiff. Accordingly, summary determination in favor of the Defendant must be granted.

A. THE PLAINTIFF'S PARENTS REFUSED TO CONSENT TO HIS REEVALUATION.

In order for a child with a disability to receive services under IDEA, a school district must conduct an initial evaluation of the child. 20 U.S.C. § 1414(a)(1)(A). Thereafter, the school district must conduct a reevaluation of the child "at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary." 20 U.S.C. § 1414(a)(2)(B)(ii); see also 34 C.F.R. § 300.303(b)(2); GA. COMP. R. & REGS. r. 160-4-7-.04(3)(a), (b). However, before a school district can conduct its revaluation, it "must provide notice to the parents of a child with a disability . . . that describes any evaluation procedures the agency proposes to conduct." 34 C.F.R. § 300.304(a). The district "[m]ust obtain informed parental consent . . . prior to conducting any reevaluation of a child with a disability." 34 C.F.R. § 300.300(c)(i). In this case, the Defendant was unable to reevaluate [redacted] because his parents failed to provide the requisite consent.

Although the Plaintiff's parents ultimately signed the consent form for the reevaluation, they imposed so many conditions on their consent that it was effectively no consent at all. The Plaintiff's parents placed numerous unilateral restrictions on the proposed reevaluation,

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owned by the Defendant, an order requiring the Defendant to prepare verbatim transcripts of IEP meetings, etc.). (Plaintiff's Second Amended Complaint, at 53-59.)

including the following: (1) that only a specified expert, Dr. [redacted], could conduct the reevaluation; (2) that the Defendant was required to identify each evaluation method in advance for pre-approval by the parents; (3) that [redacted] must be present during all testing; and (4) that the reevaluation was authorized only for the purpose of [redacted].'s IEP meeting, and could not be disclosed to any third party without prior written consent (including, presumably, this Court in the context of an IDEA due process proceeding).[4]

This Court is not aware of any provision under IDEA or its implementing regulations that authorizes parents to impose such conditions on a school district's reevaluation. On the contrary, judicial and administrative decisions have widely held that restrictions on consent similar to those imposed by the Plaintiff's parents are invalid. See M.T.V. v. Dekalb County Sch. Dist., 446 F.3d 1153, 1160 (11th Cir. 2006) (holding that a school district is "entitled to reevaluate [a student] by an expert of its choice"); Andress v. Cleveland Indep. Sch. Dist., 64 F.3d 176, 179 (5th Cir. 1995) ("A parent who desires for her child to receive special education must allow the school district to reevaluate the child using its own personnel"); Shelby S. v. Conroe Indep. Sch. Dist., 454 F.3d 450 (5th Cir. 2006) (finding that a parent may not limit a school district's right to obtain information from a child's medical providers that is necessary to complete a reevaluation); G.B. v. San Ramon Valley Unified Sch. Dist., 2008 U.S. Dist. LEXIS 70248, at *16 (N.D. Cal. 2008) (upholding an administrative law judge's findings that that a school district "has the right to evaluate . . . using its own personnel" and that the district's staff "should use their professional judgment in determining which tests to give"); Federal Way School District, 107 LRP 11238 (WSEA 2007) (finding that parents' refusal to provide unconditional consent to

[4] Although the Plaintiff contends that the Defendant agreed to some or all of these conditions during the IEP meeting on April 23, 2008, the record demonstrates that the parties did not have a meeting of the minds with respect to all of the restrictions set forth in the addendum. (West Aff., ¶¶ 17-31; Pl.'s Facts, ¶¶ 17-31.) Since there was no meeting of the minds, the Defendant had no obligation to abide by conditions that were not required under IDEA.

a legitimate reevaluation proposed by a school district was unreasonable, and that their restrictions – such as insisting on being present for the evaluations – constituted a refusal to consent to the reevaluation).

In this case, [redacted]'s parents, by placing impermissible restrictions on their consent, effectively refused to consent to the Defendant's IDEA-mandated triennial reevaluation. The parents' failure to consent, in turn, prevented the Defendant from performing the reevaluation.

B. THE DEFENDANT IS NO LONGER REQUIRED TO PROVIDE SERVICES TO THE PLAINTIFF.

As a direct consequence of the Plaintiff's parents' failure to consent to the Defendant's proposed reevaluation, the Defendant is no longer required to provide special education services to him under IDEA. "[I]f a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student." M.T.V. v. Dekalb County Sch. Dist., 446 F.3d at 1160 (citations omitted); see also Andress v. Cleveland Indep. Sch. Dist., 64 F.3d at 179 (holding that when a student's parents refuse to allow a school district to reevaluate the student, the student is not eligible for special education services after the date his reevaluation was due); Shelby S. v. Conroe Indep. Sch. Dist., 454 F.3d at 454 (a child "is free to decline services under IDEA rather than submit to [the district's] medical evaluation"); Ron J. v. McKinney Indep. Sch. Dist., 2006 U.S. Dist. LEXIS 76455, *15 ("nor can the District be compelled to provide services to a child whose parents refuse to have him evaluated").

C. THE PLAINTIFF IS NOT ENTITLED TO ANY RELIEF.

Because the Plaintiff has forfeited his right to special education services provided by the Defendant, there is no remedy available to him under IDEA. This Court simply does not have jurisdiction to grant the Plaintiff the remedies he seeks – such as modification of his IEP, reimbursement for private placement, or compensatory education – where he is not entitled to

receive services from the Defendant.[5] See Andress, 64 F.3d, at 179 (finding that where the child's parents had refused to consent to reevaluation, the school district was not required to provide special education services after the date his reevaluation was due or to provide reimbursement for the costs of private placement); Moseley v. Bd. of Educ. of Albuquerque Pub. Schs., 483 F.3d 689, 693 (10th Cir. 2007) (finding that a student was not entitled to services under IDEA following his graduation from high school, such that no equitable remedy was available to him and all claims asserted in his complaint were moot); Doe v. Eagle-Union Cmty. Sch. Corp., 2 Fed. Appx. 567, 568 (7th Cir. 2001) (finding no jurisdiction to consider the merits of the student's claims when the student had moved out of the school district and was no longer entitled to services there). Here, since the refusal of the Plaintiff's parents to consent to his reevaluation leaves him without a right to special education services provided by the Defendant, he is not entitled to relief under IDEA. Summary determination is therefore entered in favor of the Defendant.

V. ORDER

For the foregoing reasons, the Defendant's Motion for Summary Determination is **GRANTED**. Inasmuch as this Order resolves all issues in this matter, all other pending motions are denied as moot, and the case is removed from the Court's calendar for November 24-26, 2008.

SO ORDERED, this 19th day of November, 2008.

KRISTIN L. MILLER
Administrative Law Judge

[5] In addition, under IDEA, the Plaintiff may be awarded attorney's fees in federal district court only if he has prevailed on his claims. 20 U.S.C. § 1415(i)(3)(B).