09-109723

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Docket No.:**
	:	**OSAH-DOE-SE-0904041-60-WALKER**
FULTON COUNTY SCHOOL DISTRICT,	:	
	:	
	:	
Defendant.	:	

FINAL DECISION

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DETERMINATION

I. PROCEDURAL BACKGROUND

On August 8, 2008, Plaintiff [redacted] filed a Due Process Complaint ("Complaint") contending that Defendant denied him a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. As a result of this alleged denial, Plaintiff seeks private school tuition reimbursement from Defendant. The matter is now pending before the undersigned administrative law judge of the Office of State Administrative Hearings.

On August 22, 2008, the parties met for an early resolution session but were unable to resolve the matter. On September 3, 2008, Defendant filed a Motion for Summary Determination. On September 22, 2008, Plaintiff submitted a brief opposing Defendant's Motion. Defendant submitted a Reply in support of its Motion for Summary Determination on September 25, 2008. For the reasons stated, Defendant's Motion for Summary Determination is hereby **GRANTED**.

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II. FINDINGS OF UNDISPUTED MATERIAL FACT

1.

[redacted] was born on [redacted] and was a special education student in Defendant school district during the 2004-05 and 2005-06 school years. (Complaint; Defendant Fulton County School District's Motion for Summary Determination ("Def.'s Mot."), at 1; Plaintiffs' Brief in Opposition to Motion for Summary Determination ("Pls.' Response"), at 2.)

2.

[redacted]'s Individualized Education Program "IEP" for Extended School Year ("ESY") services and for the 2006-2007 school year was developed over a series of meetings and finalized on May 10, 2006. (Def.'s Mot., Ware Aff., ¶ 5, Ex. 1.)

3.

At the May 10, 2006 IEP meeting, [redacted]'s parents submitted a written statement ("May 2006 Memo") to Defendant in opposition to Defendant's offer of programming for [redacted] for ESY services and the 2006-2007 school year IEP. (Def.'s Mot., at 2, Ware Aff., ¶ 5, Ex. 1, at May 10, 2006 Memo to [redacted]'s IEP Team ("May 2006 Memo")); Pls.' Response, at 2.)

4.

In the May 2006 Memo, [redacted]'s parents stated that "[o]ur concerns with [redacted]'s education program are 1) overall level and amount of one on one intensive special education and related services offered to date, 2) ESY, and 3) the upcoming 2006-2007 IEP." (Def.'s Mot., Ex. 1, at May 2006 Memo.) [redacted]'s parents added that they had requested various data and records from Defendant but that Defendant had failed to provide such documentation to Plaintiffs. (Id.)

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5.

Plaintiff's attorney stated to Defendant at the May 10, 2006 IEP meeting that "I can assure you we will follow-up with due process before the school year begins." (Def.'s Mot., Ware Aff., Ex. 1, at 43.)

6.

On July 24, 2006, Plaintiff provided Defendant with written notice of intent to privately place [redacted] at public expense. (Complaint; Def.'s Mot., at 2; Pls.' Response, at 2.)

7.

Plaintiff did not enroll in Defendant school district for the 2006-2007 school year, which began on August 14, 2006. (Def.'s Mot., at 2, Ware Aff., ¶¶ 3, 8, Ex. 3; Pls.' Mot., at 3.)

8.

The last service Defendant provided to Plaintiff was an ESY speech therapy session on August 3, 2006. (Def.'s Mot., at 2, Ware Aff., Ex. 2; Pls.' Response, at 3.)

9.

Plaintiff did not file this Complaint until August 8, 2008. (Complaint; Def.'s Mot., at 3; Pls.' Mot., at 3.)

III. STANDARDS OF LAW

Summary determination in this proceeding is governed by 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. § 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., No. 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(3):

> 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.

OSAH Rule 616-1-2-.15(3). See Guy Lockhart v. Dir., Envtl. Prot. Div., Dep't of Natural Res., No. 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)).

IV. CONCLUSIONS OF LAW

Statutes of limitations create specified time limitations for the filing of legal claims. See Burnett v. N.Y. Cent. R. R., 380 U.S. 424, 428 (1965). Defendant maintains that Plaintiff's claims are barred by IDEA's two-year statute of limitations, and thus it is entitled to summary determination in its favor. (Def.'s Br., at 1.)

A. IDEA 2004 Statute of Limitations

The IDEA contains an express statute of limitations:

> Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing 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 for requesting such a hearing under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows.

20 U.S.C. § 1415(f)(3)(C).

Under 20 U.S.C. § 1415(f)(3)(C) a party must request a hearing within two years of the date the party knew or should have known about the alleged action that forms the basis of the complaint. In May of 2006, the parties held an IEP meeting during which a proposed educational plan for [redacted] for the 2006-2007 school year was discussed in detail by the parties. Plaintiff's attorney explicitly stated during this meeting that she would be filing a Due Process Complaint before the 2006-2007 school year began.

On July 24, 2006, Plaintiff, through his attorney, notified Defendant of his intent to privately place at public expense, and he did not enroll as a student in the District for the 2006-2007 school year. Although in May of 2006 Plaintiff's attorney expressed her dissatisfaction with the proposed IEP and indicated that she would file a Due Process Complaint prior to the beginning of the 2006-2007 school year, Plaintiff did not file the instant Complaint until August 8, 2008, over two years after both the May 2006 IEP meeting and the July 2006 notification of private placement. Plaintiff's Due Process Complaint indicates that Defendant's failure to provide FAPE resulted in his parents seeking a private school placement. Plaintiff clearly knew about the action or inaction that Plaintiff maintains forms the basis for his Complaint more than two years prior to the filing of Due Process Complaint.

To the extent that Plaintiff argues that somehow his failure to file a Due Process Complaint within the two year time period is excused because Defendant's action or inaction was "ongoing," Plaintiff misapprehends the clear directive of 20 U.S.C. § 1415(f)(3)(C). See

P.P. v. W. Chester Area Sch. Dist., 557 F. Supp. 2d 648, 661-62 (E.D. Pa. 2008) (holding that the statute of limitations is not tolled for ongoing violations of IDEA); J.L. v. Ambridge Area Sch. Dist., 2008 U.S. Dist. LEXIS 13451, at *27-29 (W.D. Pa. 2008) (elaborating that the only exceptions to the statute of limitations are those specifically provided by IDEA – and no exception is provided for continuing violations). It is not whether the action was "ongoing" that is at inquiry – but the earliest date that Petitioner knew or should have known about the alleged action that forms the basis of the complaint.[1]

The facts are undisputed that Plaintiff had knowledge of Defendant's alleged action or inaction in May and July of 2006. Further, even if the undersigned were to credit Plaintiff's legal argument, Plaintiff has provided no affidavit or otherwise probative evidence to support **any** of its allegations of Defendant's actions or inactions between August 8, 2006 and August 8, 2008.[2] As Plaintiff has failed to establish, by affidavit or other probative evidence, any action or inaction by Defendant from August 8, 2006 to August 8, 2008 that could potentially constitute an IDEA violation, his claims are barred by the applicable statute of limitation.[3]

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[1] Plaintiff has not asserted any statutory exception to the Statute of Limitations. See 20 U.S.C. § 1415(f)(3)(D).

[2] Plaintiff argues in his brief Opposing Summary Determination that the Complaint alleges several "ongoing" issues; however, Plaintiff fails to offer any evidentiary support for these allegations as required by OSAH Rule 15(3). Rule 15(3) states that a party opposing the Motion for Summary Determination 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. Notwithstanding the clear directive of Rule 15(3), Plaintiff did not submit a single affidavit, or any other probative evidence, to rebut Defendant's Motion for Summary Determination.

[3] Plaintiff's suggestion that Defendant was obligated to submit its statute of limitations defense as a notice of deficiency within ten days of receipt of his complaint is unavailing. Section 1415(b)(7)(B) of IDEA only requires parents or their attorney to provide the child's school with the following information: (i) the name of the child, the address of the residence of the child, and the name of the school the child is attending; (ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and (iii) a proposed resolution of the problem to the extent known and available to the parents at the time. See 20 U.S.C. § 1415(b)(7)(A)-(B).

VI. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Determination is **GRANTED** and Plaintiff's Complaint is **DISMISSED**.

SO ORDERED, this 26th **day of September, 2008.**

RONIT WALKER
Administrative Law Judge

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