09-110402

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],

Plaintiff,

v.

CHATHAM COUNTY SCHOOL DISTRICT,

Defendant.

Docket No.:
OSAH-DOE-SE-0904643-25-Walker

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On August 18, 2008, Plaintiff [redacted]. filed a Due Process Hearing Request ("Complaint") contending that Defendant, Chatham County School District, denied [redacted] a free appropriate public education ("FAPE") under the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* Plaintiff filed an Amendment to the Complaint on August 29, 2008. The matter is now pending before the undersigned administrative law judge of the Office of State Administrative Hearings.

On September 25, 2008, Defendant filed its Motion for Summary Determination. Plaintiff filed an Objection to Defendant's Brief in Support of Its Motion for Summary Determination and Request for Summary Determination on October 9, 2008.[1] Defendant replied on October 15, 2008.[2]

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[1] Although Plaintiff's response to Defendant's Motion for Summary Determination is styled "Plaintiff's Objection to Defendant's Brief in Support of Its Motion for Summary Determination and Request for Summary Determination," the undersigned does not construe Petitioner's filing as moving for Summary Determination. In [redacted] filing, Plaintiff simply "requests that the Motion filed by Defendant be denied and that the due process continue as

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

II. FINDINGS OF UNDISPUTED MATERIAL FACT

1.

Plaintiff is a student in the Savannah-Chatham School District eligible for special education under IDEA. (Def. Ex. A at 1). During the 2006-2007 school year, the Plaintiff was placed in the [redacted] Center ("[redacted]C"), a private school in Chatham County. (Def. Ex. C at 1).

2.

Plaintiff's 2007-2008 IEP also specified placement at the [redacted]C. (Def. Ex. D at 1). Pursuant to an agreement with the school system, [redacted]C enrolled Plaintiff as a student for the 2007-2008 school year as a student in its ADVANCE Academy. (Def. Ex. H at 2).

3.

On May 22, 2008, Ms. [redacted], [redacted], [redacted]C's Executive Director, gave notice to Dr. Mikki Garcia, the Senior Director of the Department for Exceptional Children for Savannah-Chatham County School District, that MRC would no longer be serving students placed by the District. Ms. [redacted] reasoned that the public school system's expansion of services for autistic children, coupled with its implementation of the GSNS program, made the use of [redacted]C as a service provider unnecessary. Ms. [redacted] also wrote to Petitioner's mother to inform her that [redacted]C would no longer provide services to Petitioner. (Def. Ex. H a 6; Pl. Ex. B at 1).

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scheduled." (Plaintiff's Objection to Defendant's Brief in Support of Its Motion for Summary Determination and Request for Summary Determination at p.6).

[2] This case was transferred from Administrative Law Judge Elbert Hackney to Administrative Law Judge Ronit Walker on November 4, 2008.

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4.

In addition to [redacted]C's decision to no longer serve as a special needs service provider for the District's full year students, the school's admission committee revised admissions criteria so as to make ineligible for enrollment any student whose IEP recommended a dedicated classroom support person. Plaintiff's IEP required that [redacted] have a dedicated support person and thus [redacted] could not meet [redacted]C's admissions criteria. (Def. Ex. H at 6).

5.

After receiving the May 22, 2008, notice from Ms. [redacted] that [redacted]C would no longer provide services to Plaintiff, Dr. Garcia negotiated to extend [redacted]C's services to Plaintiff through July 22, 2008. (Def. Ex. E at 1).

6.

Plaintiff's IEP team met on June 4, 2008, to discuss a transition plan for Plaintiff. (Def. Ex. K at 3, Pl. Ex. E at 1). The parties determined that services would be provided at [redacted] Elementary School commencing on September 2, 2008. (Def. Ex. K at 4; Pl. Ex. E at 1-2).

7.

Following the June 4 meeting, Plaintiff's mother requested another meeting with the IEP team. At this meeting she asked that Shenequa McKay be maintained as Plaintiff's paraprofessional during the transition. (Def. Ex. L at 1; Pl. Ex. N at 1). It was agreed that Ms. McKay could remain a part of the transition plan for nine weeks, but could not remain for the entire year. It was also explained to Plaintiff's mother that customarily, specific paraprofessionals are not included in transition plans and that the agreed-upon transition plan would continue to be implemented even if Ms. McKay discontinued her work. Id. The IEP Team met numerous

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times over the summer to develop a transition plan for Plaintiff and to address Plaintiff's mother's concerns regarding the transition. (Def. Ex. E at 3).

8.

Ms. McKay was offered the paraprofessional position to assist Plaintiff in his transition to [redacted] Elementary School. However, Ms. McKay declined this offer and the District determined that another individual, a trained paraprofessional who had worked with Plaintiff in the past, would assist Plaintiff in the classroom. (Def. Ex. E at 3; Pl. Ex. K at 5). Plaintiff was assigned to Dr. Harwood's classroom, which consisted of six students and three paraprofessionals. (Def. Ex. E at 3).

9.

Under Plaintiff's IEP, Plaintiff was entitled to receive Extended School Year ("ESY") speech services. At the conclusion of [redacted]C's services, the IEP team determined that ESY services would be provided at a local elementary school in the Language Enriched Alternative Program ("LEAP") classroom. (Def. Exs. K at 5, L at 1; Pl. Exs. G at 1, N at 1). Plaintiff's mother declined the District's provision of services in the LEAP classroom, and requested suspension of speech services as of June 18, 2008. (Def. Exs. L at 1, M at 2, N at 1; Pl. Ex. I at 1).

10.

On August 29, 2008, Plaintiff filed an amended due process complaint seeking [redacted] return to MRC in preparation for [redacted] transition to public school. [redacted] also requested that a support person familiar with [redacted] accompany [redacted] to the public school, and that [redacted] be awarded punitive damages. (Plaintiff's Amended Complaint at 2).

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11.

Pursuant to Plaintiff's request, Defendant agreed to extend the IEP which expired on September 14, 2008, until after the due process hearing. (Pl. Ex. M at 1). Plaintiff did not enroll at [redacted] Elementary, and [redacted] is currently being home-schooled. (Def. Ex. E at 3).

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.

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GA. COMP. R. & REGS. r. 616-1-2-.15(3). See Guy 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)).

IV. 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)(1), (7)(A). In this case, Plaintiff asserts that Defendant violated the IEP process established by IDEA by removing Plaintiff from his private school placement and developing an insufficient plan, without adequate input from his mother, for his transition to public school. Plaintiff seeks continued placement at MRC in preparation for transition to a public school, a support person who is familiar with him assigned to him in the public school, and punitive damages.

A. Private schools cannot be forced to admit students under IDEA.

Plaintiff seeks "placement back into the private school so that [P]laintiff can reach his previous level of performance and stabilize." (Amendment of Complaint filed August 29, 2008). Under IDEA, states are required to ensure that "[a] free appropriate education is available to all children with disabilities." 20 U.S.C. § 1412(a)(1)(A). In order to achieve this goal, a written IEP specifically tailored to each disabled student delineates the special education services that the student must be provided in order to receive a free and appropriate public education. 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).

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A public agency is responsible for ensuring that the rights and protections of IDEA are given to children with disabilities, even if a public agency has placed a child at a private facility. 20 U.S.C. § 1412; 34 C.F.R. §300.2(c). However, IDEA does not give public agencies regulatory authority over private schools; it does not place requirements on private schools, and this Court cannot require a private school to accept this particular student. Children with Disabilities in Private Schools Placed or Referred by Public Agencies, 71 Fed. Reg. 46598-46599 (Aug. 14, 2006) (discussing applicability of 34 C.F.R. §§ 300.146, 300.147). See also, M.E. v. Pierce County Sch. Dist., OSAH-DOE-0700975-113-Hackney (Oct. 2006) (holding that the matter was moot because a private school could not be required to accept plaintiff); R.S.E. v. Pierce County Sch. Dist., OSAH-DOE-SE-070097113-Hackney (same).

In this case, MRC's refusal to enroll Plaintiff in its ADVANCE academy does not constitute a denial of FAPE. Even if MRC had admitted Petitioner as a student, a decision regarding placement must be made by the school district and need not be based solely on the wishes of the parent. M.M. v. Sch. Bd., 437 F.3d 1085, 1102 (11th Cir. 2006) (citing Lachman v. Ill. 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")).

The Defendant's selection of the facility where the IEP will be implemented is not necessarily a component of the Plaintiff's identification, evaluation, or educational placement. White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 (5th Cir. 2003) ("'educational placement' as used in the IDEA means educational program - not the particular institution where the program is implemented."). While parents are permitted and encouraged to participate in education decisions affecting a disabled student, "the school board is not required to follow [the]

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parents' wishes at every 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); cf. M.M., 437 F.3d 1085, 1102 ("[U]nder IDEA there is no entitlement to the 'best' program."). In this case, there has been no showing that Plaintiff's placement at [redacted] Elementary School fails to provide [redacted] with FAPE.

Despite Plaintiff's assertions to the contrary, [redacted]C has made clear that it will not accept Plaintiff as a student. No section of the IDEA or its corresponding regulations authorizes placement of a child at a private school without that school's consent. See P.N. ex rel. J.N. v. Greco, 37 ID LER 255 (Sept. 30, 2002). As the undersigned has no authority to order placement of Plaintiff at a private school that declines to admit [redacted], the relief [redacted] seeks cannot be granted and [redacted] claim must fail.

B. Students cannot demand the school district make particular personnel decisions.

Plaintiff also requests that an individual familiar with Plaintiff be hired to help ease the transition from [redacted]C to the public school setting. The selection of personnel and the location where services are provided are matters within the sole discretion of the school district. 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 206040, at 18 (OSAH 2004). The United States Department of Education has further articulated that once a decision in rendered on which facility will implement a student's IEP, the assignment of a particular teacher can be an administrative determination, provided that the determination is consistent with the team's placement decision. Letter to Fisher, 21 IDELR 992 (OSEP 1994).

In the instant case, Defendant sought to work with Plaintiff by first offering a position to Ms. McKay, and then to another individual familiar with Plaintiff. "The core of [IDEA] . . . is

the cooperative process that it establishes between parents and schools." Schaffer v. Weast, 546 U.S. 49, 52 (2005). The parental right to participate in the development of an appropriate educational program for the child does not mean that parents may dictate the staff members assigned to implement the IEP. Cf. Ms. S. ex rel. G v. Vashon Island Sch. Dist., 337 F.3d 1115, 1131 (9th Cir. 2003) (noting that a school district "has no obligation to grant [parents] a veto over any individual IEP provision"); Fitzgerald v. Fairfax County Sch. Bd., 556 F. Supp. 2d 543, 551 (E.D. Va. 2008) (noting that parental right to participate does not equate to a parental "veto" power in disagreements with a school district); White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380 (5th Cir. 2003) ("The right to provide meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such"); Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657 (8th Cir. 1999) ("IDEA does not require school districts simply to accede to parents' demands without considering any suitable alternatives").

Defendant seriously considered the parent input in this case. At Plaintiff's request, Defendant attempted to hire Ms. McKay as Plaintiff's paraprofessional; however, she declined the offer. After Ms. McKay's rejected Defendant's offer, Defendant hired a paraprofessional who previously worked with Plaintiff. (Pl. Ex. K at 5-6.) Nonetheless, Plaintiff is dissatisfied with Defendant's actions and has filed a due process complaint. As Plaintiff cannot demand the hiring of certain individuals, Plaintiff has failed to state a claim within the purview of the IDEA, and the Defendant is entitled to judgment as a matter of law.

C. Plaintiff is not entitled to Punitive Damages under IDEA.

IDEA was enacted, in part, to "ensure that children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). Punitive damages are

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not permitted under the IDEA scheme. Hiedemann v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996) (holding that "general and punitive damages for the types of injuries alleged by plaintiffs are not available under the IDEA."). Although IDEA is silent regarding the availability of punitive damages, 'tort-like damages are simply inconsistent with IDEA's statutory scheme' Ortega v. Bibb County Sch. Dist., 397 F.3d 1321, 1325 (11th Cir. 2005) (citations omitted); Charlie F. by Neil F. v. Bd. of Educ., 98 F.3d 989, 991 (7th Cir. 1996) ("damages are not 'relief that is available' under the IDEA...."). Plaintiff has failed to assert a basis, other than IDEA, for [redacted] claim for punitive damages. Since a punitive damages claim cannot be adjudicated by this court, the claim must be dismissed as a matter of law.

V. ORDER

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

SO ORDERED, this 3rd **day of December, 2008.**

Ronit Walker
Administrative Law Judge

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