09-114718

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted].,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Docket No.:**
	:	**OSAH-DOE-IEE-0908379-106-Miller**
MUSCOGEE COUNTY SCHOOL DISTRICT,	:	
	:	
	:	
Defendant.	:	

FINAL DECISION

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DETERMINATION
ORDER DENYING PLAINTIFF'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 September 25, 2008, the Plaintiff filed a Due Process Hearing Request ("Complaint") contending that the Defendant Muscogee County School District violated his rights under IDEA.

On October 23, 2008, the Plaintiff moved for summary determination in his favor. Subsequently, on October 28, 2008, the Defendant filed its own Motion for Summary

Determination. The Defendant responded to the Plaintiff's Motion on November 14, 2008, and the Plaintiff filed his response to Defendant's Motion on November 18, 2008.[1]

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

II. DEFENDANT'S MOTION FOR SUMMARY DETERMINATION

The Defendant has moved for summary determination on the grounds that the Plaintiff's claims are barred due to his parents' refusal to allow the Defendant to perform a triennial reevaluation of [redacted]. Because the Plaintiff does not have a right to an Independent Expert Evaluation ("IEE") when he has failed to consent to the Defendant's reevaluation, 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.

[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.)

[1] 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.

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.)

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. 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 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)). In this case, as set forth below, the Court concludes that no genuine issue of material fact remains for determination.

C. CONCLUSIONS OF LAW

The Plaintiff contends that he has a right to an Independent Educational Evaluation ("IEE"), and he seeks the enforcement of his right in this proceeding. However, the Plaintiff's right to an IEE, whether publicly or privately funded, arises only if the school district has performed an evaluation or reevaluation with which the Plaintiff disagrees. Here, because the Plaintiff's parents have effectively refused to consent to the Defendant's proposed reevaluation, the Plaintiff is not entitled to an IEE as a matter of law. Summary determination is therefore granted in favor of the Defendant.

1. The Plaintiff's Parents Failed 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, 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).[2]

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. Tex. 1995) ("A parent who desires for her child to receive special education must allow

[2] 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.

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 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.

2. The Plaintiff Is Not Entitled to a Publicly Funded IEE.

The Plaintiff asserts that he is entitled to an IEE at public expense. Indeed, IDEA regulations give parents the right to a publicly funded IEE upon request, unless a school district brings a due process complaint to establish that its evaluation was appropriate. 34 C.F.R. § 300.502(b). However, this right only accrues "if the parent disagrees with an evaluation obtained by the public agency." 34 C.F.R. § 300.502(b)(1); G.B. v. San Ramon Valley Unified Sch. Dist., 2008 U.S. Dist. LEXIS 70248, at *19-20; Krista P. v. Manhattan Sch. Dist.; 255 F. Supp.2d 873, 889 (N.D. Ill. 2003).

In this case, the Defendant was prevented from performing a reevaluation because the Plaintiff's parents refused to provide their consent. Therefore, they have forfeited their right to a publicly funded IEE at this time,[3] and the Defendant is entitled to judgment as a matter of law with respect to this issue.

3. The Plaintiff Is Not Entitled to a Privately Funded IEE.

The Plaintiff asserts that even if he is not entitled to an IEE at public expense, he is authorized to conduct a privately funded IEE. However, the legal authority cited by Plaintiff does not establish a right to a privately funded IEE under these circumstances, and the Court is unaware of any provision of the IDEA or its implementing regulations that confers such a right. The Plaintiff cites 34 C.F.R. § 300.502(b)(3) for the proposition that a privately funded IEE is a parental "right." (Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Determination, at 15.) The regulation provides, "If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense." 34 C.F.R. 300.502(b)(3). Clearly, the parental right to a privately funded IEE, like the right to a publicly funded IEE, is contingent on the parents' consent to an evaluation by the school district.[4] See 34 C.F.R. § 300.502(b)(1).

Here, the Defendant has been unable to complete its triennial reevaluation of [redacted] because his parents have refused to consent. Accordingly, because there is no school district evaluation

[3] This is not to say that the Plaintiff's parents might not have the right to a publicly funded IEE in the future, after they have consented to the triennial reevaluation by the Defendant. See 34 C.F.R. § 300.502(b).

[4] An IEE, whether funded privately or publicly, requires consultation with and cooperation by the school district. However, [redacted]'s parents may still obtain, at their own expense, private evaluations by the experts of their choice.

with which the Plaintiff's parents can disagree, they do not have a right to an IEE, even one that is privately funded. The Defendant is therefore entitled to judgment as a matter of law.

III. Plaintiff's Motion for Summary Determination

The Plaintiff moved for summary determination on the basis that he is entitled to judgment as a matter of law on his demand for a publicly funded IEE, or, in the alternative, a privately funded IEE. However, as set forth above, the Plaintiff's parents do not have the right to an IEE at either public or private expense when they have not permitted the Defendant to perform its own evaluation. Therefore, the Plaintiff's Motion must be denied.

IV. Order

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