IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],

Plaintiff,

v.

DECATUR CITY SCHOOLS,

Defendant.

10-166724

Docket No.: OSAH-DOE-SE-1016314-43-Schroer

FINAL DECISION

ORDER GRANTING DEFENDANT'S MOTION FOR INVOLUNTARY DISMISSAL

I. INTRODUCTION

This matter originated with [redacted].'s initial, expedited due process hearing request filed on December 21, 2009, challenging the manifestation determination and disciplinary removal by Defendant Decatur City Schools (hereinafter "District" or "Defendant"). Before the case came before the Court for hearing, [redacted]. filed two amended complaints, which were the subject of a number of pre-hearing motions filed by the District. The complete procedural background of this case is set out in the Court's May 10, 2010 *Memorandum Opinion and Order Granting in Part and Denying in Part Defendant's Motion for Summary Determination*, which is incorporated herein by reference ("Summary Determination Order"). In the Summary Determination Order, the Court limited the issues for adjudication at the due process hearing to the following: 1) Whether Plaintiff's right to a free appropriate public education ("FAPE") was violated because of

Defendant's determination of the interim alternative educational setting, and 2) Whether Plaintiff's parents failed to provide the requisite notice of private placement. [1]

With the issues narrowly defined, the hearing commenced on May 14, 2010, with Plaintiff presenting her case. At the conclusion of Plaintiff's case, Defendant made an oral motion for involuntary dismissal on the grounds that Plaintiff failed to meet her burden of proof. After both parties made oral arguments, Plaintiff offered to brief the issues. The Court gave leave for both parties to submit briefs on Defendant's Motion for Involuntary Dismissal. After review of the briefs and the evidence at the hearing, the Court hereby **GRANTS** the motion for involuntary dismissal.

II. STANDARDS FOR INVOLUNTARY DISMISSAL

Plaintiff, as the party seeking relief, carries the burden of proof in this matter. Schaffer ex rel Schaffer v. Weast, 546 U.S. 49, 57-58, 62 (2005); accord Devine v. Indian River Sch. Bd., 249 F.3d 1289, 1291 (11th Cir. 2001); Ga. Comp. R. & Regs. r. 160-4-7-.12(3)(k)(l). OSAH Rule 35 provides that after a party with the burden of proof has completed the presentation of its evidence, any other party, without waiving its rights to offer evidence in the event the motion is not granted, may move for dismissal on the ground that the party that has presented its evidence has failed to carry its burden so as to demonstrate its right to some or all of the determinations sought by that party.

OSAH Rule 35 is similar to the involuntary dismissal provision in the Georgia Civil Practices Act ("CPA"). See O.C.G.A. § 9-11-41(b). Under the case law

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[1] The Court need not reach the issue of the sufficiency of the parents' notice of private placement unless the Court were to deny Defendant's Motion for Involuntary Dismissal and find that the District denied R.P. FAPE as defined by IDEA's discipline provisions in 20 U.S.C. § 1415(k)(1)(E).

interpreting Section 41(b) of the CPA, the Court is not required to construe the evidence most favorably to the Plaintiff. See Ivey v. Ivey, 266 Ga. 143, 144 (1996).

> "'Since the [trial] court determines the facts as well as the law, it necessarily follows that the motion may be sustained even though plaintiff may have established a prima facie case.' [Cit.]" *Chamlee v. Dept. of Transp.*, 189 Ga. App. 334, 335 (1988). At a bench trial, the trial court "can determine when essential facts have not been proved." *Comtrol, Inc. v. H-K Corp.*, 134 Ga. App. 349, 352 (1975).

Id.

III. ANALYSIS

This matter arose out of a behavioral incident that occurred on November 23, 2009, when Plaintiff was found in possession of marijuana. Because Plaintiff is a student with a disability as defined by IDEA, she is entitled to certain protections under IDEA if the District seeks to discipline her for code of conduct violations. One such protection is that "[t]he child's IEP Team[2] determines the interim alternative educational setting for services" if the student is suspended from school for disciplinary reasons. 34 C.F.R. § 300.531. See also 20 U.S.C. § 1415(k)(2). On December 4, 2009, a hearing officer for the District conducted a disciplinary tribunal, during which Plaintiff did not contest her guilt. The hearing officer ordered that [redacted] be suspended through the first quarter of the spring semester and that she enroll in the DeKalb Alternative School or another

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[2] Individualized education program team or "IEP Team" means a group of individuals that are responsible for developing and revising an IEP for a child with a disability. The IEP Team must include the parents of the child, at least one regular education teacher and one special education teacher, and a representative of the public agency. See 34 C.F.R. §§ 300.23, 300.321.

alternative placement approved by Decatur High School's principal, Lauri McKain-Fernandez. (Summary Determination Order) [3]

[redacted]. appealed the hearing officer's decision and the Board of Education affirmed his decision on January 7, 2010. Sometime thereafter, Ms. McKain-Fernandez discussed other interim alternative educational settings with [redacted].'s parents, including the DeKalb Alternative School and a computer-based curriculum with special education support through the "Georgia Virtual School." Plaintiff's parents rejected these options and enrolled [redacted]. in a private school affiliated with their church. The District offered to provide [redacted]. special education support while she was enrolled in the private school, but her parents declined. (Summary Determination Order; Tr. 182)

The District did not formally notice and convene a meeting of the full IEP Team to determine [redacted].'s interim alternative education setting. Assuming *arguendo* that the District was obligated to do so under 34 C.F.R. § 300.531, such a violation is in the nature of a procedural violation. Under IDEA, "a hearing officer may find that a child did not receive a FAPE[4] only if the procedural inadequacies – (i) impeded the child's right to a FAPE, (ii) significantly impeded the parent's opportunity to participate in the

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[3] At the beginning of the due process hearing, the parties stipulated that all the exhibits presented in connection with any pre-hearing motion, including those that lead to the issuance of the Summary Determination Order, would be admitted for purposes of the due process hearing. (Tr. 4-5) However, except in a few limited instances, those exhibits were not re-marked for identification as hearing exhibits. Consequently, where the Court relies of findings of fact that were set forth in the Summary Determination Order and were based on exhibits attached to pre-hearing pleadings, the Court will cite generally to the Summary Determination Order, rather than to the underlying exhibits and pleadings.

[4] FAPE during a disciplinary placement means that the student is able to participate in the general educational curriculum, although in a different setting, and that the student can progress toward meeting the goals in the child's IEP. 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300-530(d)(i).

decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." See 34 C.F.R. § 300.513(a)(2); 20 U.S.C. § 1415(f)(3)(E).

In this case, the Court finds that Plaintiff failed to present sufficient probative evidence to prove that the alleged procedural violation caused any of the harm enumerated in 34 C.F.R. § 300.513(a)(2). First, the Court finds that this procedural violation, which led to the District's determination of possible interim placements without the input of the full IEP Team, did not impede [redacted].'s right to a FAPE or cause a deprivation of educational benefit. Specifically, the Court finds that Plaintiff failed to prove that the interim placements offered by the District were inappropriate or would result in the denial of FAPE or lost educational benefit. Rather, Plaintiff's evidence regarding whether the proposed placements were an appropriate alternative for [redacted]. consisted mainly of her parents' insistence that she did not do anything wrong and conjecture based on the "reputation" of the DeKalb Alternative School and the Virtual School.

[redacted].'s parents described [redacted] as a "sweet and wonderful," "gentle," and "kind-hearted" child who made a "mistake." Unlike the other students who attend the DeKalb Alternative School, their daughter was not a "criminal." Rather, she merely engaged in typical "adolescent risk-taking behavior." According to [redacted].'s parents, their daughter did not belong in a school like the DeKalb Alternative School, where, her parents believed, "most of the kids ... have drug or weapons' issues. Many of them have serious behavior problems. Many of them have assaulted teachers, assaulted each other, are gang members, have a propensity to violence..." (Tr. 127-128, 133, 174, 205, 223-224, 226,

273)

However, Plaintiff's only evidence on the DeKalb Alternative School consisted of her parents' impressions of the school, which were unsupported by any reliable, probative evidence presented at the hearing. [redacted].'s mother admitted that "there were a lot of things [they] did not know" about the DeKalb Alternative School and that her understanding about the student body was based on talking to teachers and other parents, none of whom were called as witnesses in this case. [redacted].'s father testified that he did not know "what their real story is, but I know I don't like the reputation." Moreover, neither parent disputed the testimony of [redacted].'s case manager, Blair Rostolsky, that the DeKalb Alternative School was an accredited academic institution with certified special education teachers. In fact, both parents admitted that they had no personal experience with the administrators or teachers at the DeKalb Alternative School and [redacted].'s mother acknowledged that it "may have some wonderful, fabulous teachers." (Tr. 52, 82, 167, 207-208, 272)

Further, the Court gives little weight to the testimony of Dr. Sonali Bora, [redacted].'s treating psychiatrist since September 2009, regarding the appropriateness of the DeKalb Alternative School as an interim alternative placement for [redacted]. Specifically, Dr. Bora's characterization of the DeKalb Alternative School as a "harsh environment" that would be a "detrimental setting for [[redacted].'s] education" is based primarily on hearsay statements regarding "alternative schools" generally and not the DeKalb Alternative School specifically. Dr. Bora admitted that she has never been to the DeKalb Alternative School

or had any dealings with its staff.[5] (Tr. 102-106; Ex. P-6) Based on the foregoing, the Court concludes that Plaintiff failed to prove that the District's proposed interim placement at the DeKalb Alternative School would have denied [redacted]. FAPE or deprived her of educational benefit.

The Court also finds that Plaintiff failed to establish a *prima facie* case that the Georgia Virtual School was not an appropriate interim alternative setting. There is very little evidence regarding the Georgia Virtual School in the record. However, [redacted]'s parents did not dispute that it is an accredited Georgia school, that students at the Virtual School have an opportunity to communicate with their teachers, or that the District offered special education support to supplement the Virtual School's instruction. Rather, [redacted].'s parents did not want their child to sit in front of a computer for several hours a day without frequent teacher interaction. While [redacted].'s parents' preference that their daughter have more interaction while she was suspended may be understandable, the Court finds that there was insufficient evidence in the record to find that an interim placement at the Georgia Virtual School would have denied [redacted]. her right to a FAPE or deprived her of educational benefit. (Tr. 152-153, 208, 226, 245)

Finally, the Court concludes that Plaintiff failed to prove that the alleged procedural violation significantly impeded her parents' opportunity to participate in the decision-making process. First, the record of this case shows that the first due process complaint was filed on December 19, 2009, after which time [redacted]'s parents and her

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[5] Blair Rostolsky also testified that she did not have any personal experience with the DeKalb Alternative School and that she was not concerned about [redacted] receiving appropriate academic instruction there. Ms. Rostolsky was concerned about the social or emotional impact of the placement, although she acknowledged that [redacted].'s IEP did not address social or emotional issues, only [redacted]'s learning disability in math. (Tr. 52, 75, 80)

attorney participated in a decision-making process triggered by the filing of the complaint, namely the resolution meetings required under 34 C.F.R. § 300.510.[6] Plaintiff failed to present any probative evidence that the family was denied participation in the decision-making process regarding the interim alternative placement, although such participation occurred through resolution meetings rather than a full IEP Team meeting.

Moreover, even assuming that a meeting with the entire IEP Team was required by IDEA, rather than only "relevant members" of the Team, Plaintiff has failed to prove how lack of a meeting with the full IEP Team violated Plaintiff's rights because, as discussed above, the procedural violation did not result in harm to the Plaintiff. Moreover, from the moment [redacted] was suspended by the hearing officer, the family made it very clear that they would agree to only one alternative placement: private school. Plaintiff's father even testified at the hearing that based on his "impressions" about the DeKalb Alternative School, it "was just absolutely off the table," and that Plaintiff was "not going there. Period." In fact, [redacted].'s father testified that he had made up his mind that [redacted] was not going to the DeKalb Alternative School even before the appeal of the hearing officer's decisions was concluded. (Tr. 131, 133-134, 160, 180-185)

Courts have held that school districts are not in violation of the IDEA for failing to convene an IEP Team when doing so would be futile based on the family's admitted unwillingness to consider placement options. In M.M. ex rel. D.M. v. Sch. Dist. of

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[6] Under IDEA, upon the filing of a due process complaint, the District is mandated to conduct a "Resolution Meeting" with the parents and relevant members of the IEP Team. 34 C.F.R. § 300.510. The purpose of the meeting is to allow the parents to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the District has the opportunity to resolve the dispute that is the basis for the complaint. 34 C.F.R. § 300.510(a)(2).

Greenville County, 303 F.3d 523, 535 (4th Cir. 2002), the Fourth Circuit Court of Appeals analyzed a procedural violation by a school district (failure to sign and complete an IEP) and found it significant that there was nothing in the record to indicate that the parents would have accepted any IEP that did not include reimbursement for the specific methodology and services they sought. The Court held that the child suffered no prejudice from the district's failure to agree to her parents' demands and that the procedural defect did not result in lost educational opportunity. Id. In a decision by the Seventh Circuit Court of Appeals, the Court found that parents' unwillingness to discuss any placement other than the residential placement they were seeking undermined their request for reimbursement when they later claimed that the District did not allow them to participate in the IEP development. Hjortness ex rel Hjortness v. Neenah Joint Sch. Dist., 507 F.3d 1060, 1065 (7th Cir. 2007). A family is required to "avail themselves" of the opportunity to participate in decision making and cannot simply claim they were not part of the process simply because they disagreed with the options offered. Id. at 1066. See also Systema by Systema v. Academy Sch. Dist., 538 F.3d 1306, 1314-1315 (10th Cir. 2008)(holding that the lack of a final IEP did not substantively harm a student when his family unilaterally terminated the IEP process by making its decision about placement before the District completed its offer regarding educational services).

Given Plaintiff's parents absolute rejection of the DeKalb Alternative School or any other alternative placement other than the private school, the Court concludes that holding a meeting in this matter would have been futile. (Tr. 162-163) Thus, even if convening relevant members of an IEP Team through resolution sessions instead of a full

IEP meeting was a procedural error, Plaintiff did not meet her burden of proof with regard to any resulting harm as required by 34 C.F.R. § 300.513(a)(2).

IV. CONCLUSION

Plaintiff failed to offer any probative evidence that the placement(s) offered by Defendant failed to provide Plaintiff access to the general curriculum, although in another setting, and the potential to make progress on her IEP goals. Plaintiff had the burden of proof on this issue. It is not Defendant's burden to prove that the placement offered FAPE pursuant to 20 U.S.C. § 1415(k)(1)(E): it is Plaintiff's burden to prove that it does not. Schaffer ex rel Schaffer v. Weast, 546 U.S. 49, 57-58, 62 (2005). Because Plaintiff did not prove a denial of FAPE as described above, she has failed to prove that any legal harm was suffered as a result of the alleged procedural violation. Accordingly, Defendant's motion for involuntary dismissal is GRANTED and this matter is DISMISSED.

IT IS SO ORDERED, this 1st day of July, 2010.

KIMBERLY W. SCHROER
Administrative Law Judge