11-242861

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

FILED
AUG 10 2011
OFFICE OF STATE ADMINISTRATIVE HEARINGS

[redacted],	:	
Plaintiff,	:	
v.	:	**Docket No.**
	:	**OSAH-DOE-SE-1122183-67-KENNEDY**
GWINNETT COUNTY SCHOOL DISTRICT,	:	
Defendant.	:	

FINAL DECISION

ORDER GRANTING DEFENDANT'S MOTION FOR INVOLUNTARY DISMISSAL

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For Plaintiff:
Joyce Catrett, Esq.
The Law Office of Joyce Catrett

For Defendant:
Elizabeth F. Kinsinger, Esq.
Thompson & Sweeny, PC

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiff [redacted] is a middle school student who is eligible for services under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). On February 14, 2011, Plaintiff filed a Due Process Hearing Request ("Complaint") contending that Defendant Gwinnett County School District violated [redacted] rights under IDEA related to evaluation, educational placement and the provision of a Free Appropriate Public Education (FAPE). The Complaint was received by the District on February 18, 2011.

A hearing was held March 30, 2011, May 11, 2011 and June 15, 2011. At the conclusion of Plaintiff's presentation of evidence, Defendant filed a Motion for Involuntary Dismissal asserting that Plaintiff presented insufficient evidence to substantiate [redacted] claims. Plaintiff responded to Defendant's Motion on July 1, 2011. Defendant then filed a reply that was

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received by the court on July 11, 2011. After careful consideration of the evidence, arguments and submissions, and for the reasons set forth below, Defendant's Motion for Involuntary Dismissal is **GRANTED**. Plaintiff is directed to consent to Defendant's requested evaluation. In the alternative, Plaintiff's parent is free to decline services under IDEA rather than submit [redacted] to an evaluation by an evaluator(s) selected by Defendant.

II. FINDINGS OF FACT

1.

[redacted] is [redacted]-years-old (D.O.B. [redacted]). *Ex. J-1, J-12, J-22, J-45, J-78.*

2.

[redacted] has reported diagnoses that include Attention Deficit Hyperactivity Disorder (ADHD), a seizure disorder, a tic disorder, and Restless Leg Syndrome. *Ex. J-3, J-59.*

3.

While enrolled in the DeKalb County School System, on or about May 22, 2009, [redacted] was found eligible for special education services pursuant to the category of Other Health Impaired (OHI).[1] *Ex. J-1 through J-11.*

4.

Sometime subsequent to May 22, 2009, Plaintiff moved from DeKalb County to Gwinnett County. In August 2009, [redacted] enrolled in the sixth grade for the 2009-2010 school year at Trickum Middle School within the Gwinnett County School System. *Tr. pp. 21 to 23, 178.* The following year [redacted] re-enrolled at Trickum Middle School for the 2010-2011 school year for the seventh grade. *Ex. J-133 to J-142.*

[1] [redacted] was specifically determined to not meet criteria for the Specific Learning Disability eligibility category. *J-10.*

5.

When Plaintiff first enrolled at Trickum Middle School, Defendant requested the opportunity to perform an initial evaluation. Plaintiff's parent signed the Parental Consent for Initial Evaluation form authorizing Defendant to conduct comprehensive evaluations, and also provided consent for Defendant to obtain [redacted]'s past educational records from DeKalb County. *T-23 to 25; Ex. P-3.* For unknown reasons Defendant did not complete a comprehensive evaluation at that time. Instead, Defendant relied on the evaluation that had been completed through the DeKalb County School District just three months prior to [redacted] enrollment in Trickum. *Whole Record.*

6.

Between October 2, 2009 and November 5, 2010, approximately seven (7) Individualized Education Plan (IEP) meetings were held to discuss and revise Plaintiff's IEP based upon [redacted] present levels of performance, behaviors and responses to interventions. Plaintiff's parent was an active and informed participant in each and every IEP meeting. She attended each of the meetings, either alone or accompanied by legal counsel. During these meetings, Plaintiff's parent and/or her legal counsel had an opportunity to voice Plaintiff's concerns, including concerns regarding Plaintiff's placement in an EBD/SLD setting for 24.2 hours per week and 8.3 hours per week in general education for connections class and homeroom. In March 2010, Plaintiff's parent obtained an independent neuropsychological evaluation at Children's Healthcare of Atlanta. The evaluation recommended [redacted] "return to a regular education classroom with support and accommodations." However, the evaluation further stated that [redacted] "should be taught in settings that provide substantial structure and individualized attention, and that emphasize collaborative learning." [redacted]'s IEP team convened in June and August 2010 to update [redacted] IEP. During those two IEP meetings, modifications were made to Plaintiff's IEP. For

example, for the 2010-2011 school year, the Plaintiff was served in the EBD/SLD classroom only for Math, Affective Skills, and Social Studies. [redacted] moved into an interrelated resource setting for Language Arts and into a collaborative setting (general education) for Science. [redacted] continued to be in the general education setting for connections and homeroom. *Tr. p. 185, 388; Ex. J-67 to J-77, J-84, J-86 to J-198.* Despite these changes, Plaintiff's parent continued to request, and desire, that [redacted] be moved out of the EBD/SLD class setting entirely. *Tr. p. 339 – 341; Ex. J-138 and J-176.*

7.

On or about April 21, 2010, Plaintiff's parent filed a complaint with the State Department of Education (DOE) raising many of the allegations raised in the instant due process complaint including allegations of inappropriate placement in an EBD classroom, failure to create an appropriate IEP unique to Plaintiff's needs, taking inappropriate disciplinary action against Plaintiff including using in-school-suspension (ISS) and out-of-school suspension (OSS) inappropriately, and developing an inappropriate Functional Behavioral Analysis (FBA). After considering the parent's allegations, the school's response, and conducting telephone interviews with school representatives and Plaintiff's parent, on June 11, 2010, the DOE issued 52 detailed Findings of Fact and determined Defendant was in compliance with IDEA as it pertained to each of the parent's allegations. *Tr. p. 350; Ex. D-633 to D-639.*

8.

At an IEP meeting held shortly after the Department of Education's findings were issued, Defendant requested Plaintiff's parent's consent to conduct a comprehensive psycho-educational evaluation. Plaintiff's parent advised Defendant that she would take the Consent for Evaluation form home and consider their request. She subsequently returned the form to Defendant with

certain portions redacted. Specifically, Plaintiff's parent altered the consent form to indicate that she only authorized an Assistive Technology and Occupational Therapy evaluation. She redacted any portion of the consent form that referred to a comprehensive evaluation. Additionally, Plaintiff's parent refused to provide Defendant access to Plaintiff's medical providers and records. [redacted]'s parent informed Defendant that if they required information and/or documentation that they could request such information/documentation through her and that she would provide it to the school. By doing so, Plaintiff's parent effectively mandated that she be allowed to control the information made available to Defendant regarding Plaintiff's disability and medical conditions that could, and do, impede [redacted] ability to succeed in school. *Tr. pp. 63,*[2] *212 to 215,*[3] *266-7,*[4] *272 to 274*[5]*, 393 to 395, 398*[6]*; Ex. J-112, J-142 and D-568*[7].

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2 Q: Did you give consent in 2010:
A: For 2010, no.
(Tr. p. 63 lines 4-5)

3 Q: You testified that when you got the neuropsych consult in the summer of 2009 that you wanted an update, and [redacted] had just had a neuropsych in 2008. So you wanted current information, yet you will not allow the school district to obtain current information; correct?
A: That is correct, based on what I just explained.
(Tr. p. 212 lines 20 to 25)
Q: School personnel requested a full educational psychological, and parent chose to take permission form home to evaluate that decision. Medical release was refused. Do you see that?
A: Yes
Q: Is that accurate?
A: Yes it is.
(Tr. pp. 213 lines 20 to 25 and 214 line 1)
Q: An you asked the school to contact you to get whatever information they need, but you would not agree to let them evaluate the student themselves or consult with his medical providers; correct?
A: That's correct.
(Tr. p. 214 lines 2 – 6)
Q: And the places that are redacted are places that you redacted; is that correct?
A: That's correct.
(Tr. pp. 214 lines 24 to 25 and 215 line 1)

4 Q: Have you provided to the school district a report from a physician that diagnoses [redacted] with panic attacks?
A: I have documentation to support it, but I did not send it to the school.
(Tr. p. 266 lines 21 – 25)

5 Q: So you won't let the school contact the physician?
A: Correct.
(Tr. p. 273 lines 20 to 22)

6 The Court: But did you agree to the request for a full educational psych that was asked for in August 2010?
The Witness: No.
(Tr. p. 398 lines 15 to 18)

9.

Following Plaintiff's request for a Due Process Hearing, Defendant again requested the opportunity to conduct a full comprehensive evaluation in March 2011. *Ex. D-669 to D-671.* Plaintiff refuses to provide consent to Defendant to perform any type of evaluation other than AT and OT because, according to [redacted]'s parent, (1) she has concerns given all that has transpired between herself and the school, (2) she has concerns as to who the school will select to perform the neuropsychological evaluation, and (3) she believes the school has been provided sufficient documentation to be able to manage [redacted] effectively and address [redacted] academic needs based, in part, on the testing completed by DeKalb County School System in May 2009. Plaintiff's parent feels it is not necessary to expose [redacted] to additional testing. *Tr. pp. 63, 212 to 215, 393 to 395, 398 to 399; Ex. D-568.*

III. STANDARD ON INVOLUNTARY DISMISSAL

1.

Involuntary Dismissal in this proceeding is governed by Office of State Administrative Hearings ("OSAH") Rule 616-1-2.35, which provides, in relevant part:

> After a party with the burden of proof has presented its evidence, any other party may move for dismissal on the ground that the party that presented its evidence has failed to carry its burden. The Administrative Law Judge may determine the facts and render an Initial or Final Decision against the party that has presented its evidence as to any or all issues.

GA. COMP. R. & REGS. r. 616-1-2-.35.

[7] Consent for Evaluation form altered by Plaintiff's parent to redact portion referring to comprehensive evaluation and indicating only AT and OT evaluation is authorized.

2.

Plaintiff, as the party seeking relief under the IDEA, bears the burden of proof. GA. COMP. R. & REGS. r. 160-4-7.12(3)(1). At the conclusion of Plaintiff's case, Defendant moved for involuntary dismissal.

IV. CONCLUSIONS OF LAW

1.

The Plaintiff, in [redacted] 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.[8]

2.

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 may conduct a reevaluation of the child not more than once a year if the school district determines that the educational or related service needs of the child warrants a reevaluation. 20 U.S.C. § 1414(a)(2)(B)(i); 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 reevaluation, 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). Additionally, the district "[m]ust obtain informed parental consent . . . prior to conducting any evaluation of a child with a disability." 34 C.F.R. § 300.300(c)(1)(i). In this case, when it became apparent in the Spring/Summer of 2010 that the Defendant needed additional information to develop an appropriate IEP based on the concerns raised by Plaintiff's parent and by an independent evaluation obtained by the parent in March

[8] The Plaintiff has also requested many other forms of relief, for which [redacted] has cited no authority under IDEA (i.e., expungement of [redacted] disciplinary record).

2010 and presented to the Defendant as a basis for requesting a change of [redacted] placement, the Defendant requested Plaintiff's consent to a reevaluation.

The Plaintiff's parent refused to allow a comprehensive evaluation requested by the Defendant.[9]

3.

Judicial and administrative decisions have widely held that restrictions on consent 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");[10] 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"). Although Plaintiff's parent genuinely believes that additional testing is not necessary, that Defendant has sufficient information to develop and implement an appropriate IEP and has developed a distrust of the Defendant's staff based on interactions with certain school officials, "there is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student's eligibility under IDEA." Andress v. Cleveland Indep. Sch. Dist., 64 F.3d 176, 179 (5th Cir. 1995).

4.

In this case, [redacted]'s parent refused to consent to Defendant's request to conduct a comprehensive psycho-educational evaluation of Plaintiff for the purposes of developing and updating Plaintiff's

[9] If a parent refuses to consent to a reevaluation the school may, but is not required to, pursue the reevaluation by using the consent override procedures, including mediation procedures or due process procedures. However, the school does not violate its obligations if it declines to pursue the reevalutation. 34 C.F.R. 300.300(c)(1)(ii).

[10] Plaintiff argues that *M.T.V.* is inapplicable because *M.T.V.* involved a mandatory triennial evaluation. However, in affirming the district court, the United States Court of Appeals for the 11th Circuit noted that "[c]onditions also warranted a reevaluation because M.T.V. had made significant progress on his OHI goals." In this case, Plaintiff's concerns regarding the IEP team's decisions as to placement, as well as the independent evaluation obtained by Plaintiff's parent in March 2010, among other factors, warranted Defendant's request to conduct its own evaluation

IEP. Plaintiff is thus foreclosed from redress under the IDEA. M. T. V. v. DeKalb Co. Sch. Dist., 446 F.3d 1153 (11th Cir. 2006) ("[i]f a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation"); G.J. v. Muscogee Co. Sch. Dist., 704 F. Supp2d. 1299 (M.D. Ga. 2010); Andress v. Cleveland Indep. Sch. Dist., 64 F.3d 176, 178-179 (5th Cir. 1995); Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1315 (9th Cir. 1987). "[C]ourts reason that because the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation of the student." Johnson by Johnson v. Duneland Sch. Corp. 92 F.3d 554, 558 (7th Cir. 1996). See also Vander Malle v. Ambach, 673 F.2d 49, 53 (2d Cir. 1982) (School officials are "entitled to have [the student] examined by a qualified physician of their choosing.").

5.

As a direct consequence of the Plaintiff's parents' failure to consent to the Defendant's requested evaluation, the Defendant is no longer required to provide special education services to [redacted] 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 and they cannot force the school to rely solely on an independent evaluation." M.T.V. v. Dekalb County Sch. Dist., 446 F.3d at 1160 (citations omitted); see also Andress, 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 special education under IDEA rather than submit to [the school district's] medical evaluation"); Ron J. v. McKinney Indep. Sch. Dist.,

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that could be used to assist the IEP team in determining the appropriate services and setting that would meet Plaintiff's unique needs.

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").

6.

Because the Plaintiff has forfeited [redacted] right to special education services provided by the Defendant, there is no remedy available to [redacted] under IDEA. This Court simply does not have jurisdiction to grant the Plaintiff the remedies [redacted] seeks – such as private placement, or compensatory education – where [redacted] is not entitled to receive services from the Defendant.[11] 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).

V. ORDER

Based on the foregoing findings of fact and conclusions of law, Defendant's Motion for Involuntary Dismissal is **GRANTED**. Plaintiff is directed to consent to the comprehensive psycho-educational evaluation requested by Defendant. Otherwise Plaintiff's parent is free to decline services under IDEA. If the Plaintiff consents, then following the United States District Court for the Middle District of Georgia in *G.J. v. Muscogee Co. Sch. Dist.*, 704 F.Supp.2d 1299 (M.D. Ga. 2010), the Court places the following conditions on the evaluation:

(1) The evaluation may be used to update [redacted].'s IEP or for any other purpose permitted by IDEA.

(2) Defendant shall select the evaluator(s) to conduct the evaluation.

(3) Defendant shall consult with Plaintiff to determine a mutually agreeable date and time for the evaluation.

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

(4) Defendant shall disclose to Plaintiff, in writing, all information relevant to the evaluation including, but not limited to (a) the date and time, (b) the location, (c) the duration, and (d) the procedures, assessment tools, and strategies to be used.

(5) The evaluator shall determine if [redacted]'s parents are permitted to observe all or part of the evaluation. If Plaintiff's parent desires to observe the evaluation she shall submit her request in writing at least ten (10) calendar days prior to the evaluation date and shall be informed by the Defendant or the evaluator, in writing, of the evaluator's decision at least twenty-four (24) hours prior to the evaluation.

(6) If the evaluator determines that additional tests are necessary, then Defendant shall seek consent for those tests in accordance with applicable law.

(7) The evaluation results and reports shall not be shared with any third parties without prior written consent form [redacted]'s parents, except to the extent allowed by FERPA and IDEA.

(8) The parties shall receive the evaluation results at the same time.

(9) If [redacted]'s parents disagree with the evaluation they may request an Independent Educational Evaluation. See generally 34 C.F.R. § 300.503.

After the evaluation is completed, [redacted]'s IEP team shall schedule a mutually agreeable time to meet, within forty-five (45) calendar days following the receipt of the results for the purpose of reviewing the appropriateness of Plaintiff's IEP. The team may consider the results of the evaluation in developing an updated IEP for [redacted], but must work collaboratively, taking into consideration the information and concerns of each team member, including the reports prepared by Plaintiff's experts.

-- Signature on following page –

SO ORDERED, this 10th day of August 2011.

Ana P. Kennedy
Administrative Law Judge