FILED
OSAH
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Kevin Westray, Legal Assistant

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted]

Plaintiff,

v.

GWINNETT COUNTY SCHOOL DISTRICT,

Defendant.

DOCKET NO.:
OSAH-DOE-SE-1415178-67-Baxter

14-291549

FINAL ORDER

This action came before the Court pursuant to a complaint filed by [redacted] Plaintiff, against Gwinnett County School District, Defendant, alleging that the Defendant had failed to provide Plaintiff with a free appropriate public education (FAPE) as required under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*, and its implementing regulations, 34 C.F.R. Part 300. After Plaintiff completed the presentation of his evidence, Defendant moved for an involuntary dismissal pursuant to the Administrative Rules of Procedure due to Plaintiff's failure to carry the burden of proof. After careful consideration of the evidence and arguments, and for the reasons set forth below, this Court finds that Defendant's motion for involuntary dismissal is **GRANTED** and Plaintiff's claims for relief are **DENIED**.

I. PROCEDURAL HISTORY

Plaintiff initiated the above-styled action on October 18, 2013, contending that Defendant violated his rights under IDEA related to his identification, evaluation, and provision of a FAPE. Plaintiff's complaints concerned his special education services for math; occupational therapy; his teacher's treatment of him; and bullying from other students. Following an unsuccessful

resolution conference between the parties, a hearing on the merits was convened on December 2, 2013 and January 27, 2014.[1] Plaintiff, pro se, presented testimony from his parent [redacted] in his case in chief. After Plaintiff's presentation of evidence, Defendant moved for an involuntary dismissal on the grounds that Plaintiff presented insufficient evidence of a violation of the IDEA and thus failed to meet his burden of proof. This Court finds as follows:

II. FINDINGS OF FACT

1.

Plaintiff [redacted] (D.O.B. [redacted]) is a [redacted] year old first grade student who is eligible to receive special education services from Defendant pursuant to the category of Other Health Impairment (OHI). D. 3-22.[2] Specifically, Plaintiff has a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). T. 16-17, 76-77; D. 8. He is a "very active" student who sometimes has difficulty keeping his hands to himself and expressing his wants and needs appropriately. D. 5; T. 77. As a result, Plaintiff benefits from extra support and small group instruction in some content areas including reading and writing. D. 9.

2.

Plaintiff enrolled in the Gwinnett County School District in September of 2013 upon moving to the area from Fulton County, Georgia. T. 16, 119-120; D. 4. Plaintiff has attended at least four or five different schools in his short educational career. T. 30, 76-77. Plaintiff's parent [redacted] relocated to Defendant's schools in part because of Plaintiff's difficulties in other schools and the "great" things she had heard about Defendant's schools. T. 30, 76-78. Upon his

[1] The hearing was reconvened for a second day on January 27, 2014 after Plaintiff's parent became ill on December 2, 2013.

[2] Citations to the record are: "D" followed by the page number for Defendant's exhibits and "T" followed by the page number for the hearing transcript. Plaintiff did not present any exhibits as part of his case-in-chief.

enrollment, Plaintiff was assigned to Benefield Elementary, his home school based upon his residency. D. 3.

3.

At the time of Plaintiff's enrollment in Defendant's schools, the 2013-2014 school year had already begun, and Plaintiff had a current IEP from Fulton County, Georgia. D. 4, 31; T. 17, 120. Plaintiff's current Fulton County IEP was substantially implemented by Defendant until an IEP meeting could be scheduled. T. 120.

4.

An IEP meeting for Plaintiff was convened on October 4, 2013. D. 3; T. T-120-121. Plaintiff's parent [redacted] attended the meeting. T. 120-121. Following a review of Plaintiff's present levels of performance and progress since entering Benefield Elementary, as well as his psychological evaluations and diagnosis of ADHD, the consensus of the IEP team recommended Plaintiff continue to receive pull-out services for language arts/reading and writing in a separate classroom as well as behavior intervention support in a separate classroom.[3] D. 3-22, 31-34; T. 123.

5.

Plaintiff's IEP team also recommended that Plaintiff receive his math instruction in a collaborative classroom, a general education classroom in which a special education teacher provides Plaintiff support. D. 3-22, 31-34; T. 124-125. While Plaintiff's parent [redacted] consented to Plaintiff's placement as eligible for special education services under the category of OHI, she did not sign the IEP. D. 3-22; T. 128-129. Specifically, [redacted] was concerned that Plaintiff would not be receiving pull-out support for math instruction as he did in Fulton County School District

[3] The IEP team additionally developed a Behavioral Intervention Plan (BIP) to address Plaintiff's behaviors about which Plaintiff's parents had concerns. D. 17-21

but rather would receive his special education services within the general education math classroom. T. 18-19.[4]

6.

Assistant Principal Kristopher Kasler met with Plaintiff's parent following the IEP meeting and answered her questions regarding the IEP. T. 130. As [redacted] continued to decline to sign the IEP, Defendant issued prior written notice to her. D. 31-34.

7.

Since enrolling within Defendant's school system, Plaintiff's behavior has, by [redacted]s own admission, "dramatically changed" for the better. T. 103:1-2, T. 102-103. Plaintiff "really loves" his teacher. T. 108:17-18, 109:7. When Plaintiff's parent has observed him in class, he has been working quietly or receiving one-on-one assistance from the teacher. T. 85-86, 104-105. Plaintiff has also made "really good grades" on his report card and is meeting grade level expectations.[5] T. 98:4, D. 236.

8.

Plaintiff's parent continued, however, to express concerns regarding Plaintiff's education. Plaintiff's primary concerns included the lack of pull-out support for math instruction,[6] purported bullying of Plaintiff by his peers, and what [redacted] believed was mistreatment of Plaintiff by his teacher.[7] T. 17-18, 25, 31, 54. On October 18, 2013, two weeks following the IEP meeting,

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[4] [redacted] explained at the hearing that she believed that Defendant should duplicate whatever services were in place when Plaintiff attended Fulton County School District. T. 25. However, [redacted] withdrew Plaintiff from his previous school districts due to her concerns regarding Plaintiff's grades and behavior. T. 76-77

[5] In fact, Plaintiff earned third place, out of a total of twenty four (24) students, in a math bee in his collaborative math class. T. 134-135, D. 220.

[6] [redacted] admitted that Defendant explained to her that it was responsible for educating Plaintiff in the least restrictive environment (LRE) and that Plaintiff did not like being pulled out of the general education class. T. 82-83.

[7] Due to her concerns, Plaintiff's parent began sending Plaintiff to school with a surreptitious recording device in violation of state law and local school rules. T. 54-55, 111.

Plaintiff filed a due process complaint raising these issues as well as complaining about the amount of occupational therapy service Plaintiff receives. See Complaint.

9.

A hearing convened on December 2, 2013 and January 27, 2014. Plaintiff's parent testified at the hearing that though she filed her due process complaint complaining about the lack of a separate class for math, she no longer wanted Plaintiff pulled out of the general education setting but preferred a teacher go into the class to assist Plaintiff as needed. T. 84-85, 124-125. Plaintiff presently receives this type of instruction in a collaborative math class under his current IEP. D. 3-22.

10.

Plaintiff's parent [redacted] also admitted that Assistant Principal Kasler "is really doing an awesome job" in addressing her bullying concerns and the concerns she had about Plaintiff's teacher. T. 100:8-9. [redacted] testified that she has developed a good relationship with Mr. Kasler, who is "very responsive" to her. T. 87:11. In fact, according to [redacted] Mr. Kasler performed an investigation and resolved the bullying issues she has presented to him. T. 35-36, 38. Documentary evidence introduced at the hearing similarly demonstrated that other administrators and Plaintiff's teacher have been responsive in addressing Plaintiff's concerns. D. 173, 209, 218, 220-222.

11.

Plaintiff's parent [redacted] rested her case following the conclusion of her testimony on January 27, 2014. At the close of Plaintiff's evidence, Defendant moved for an involuntary dismissal on grounds that Plaintiff failed to meet his burden of proof.

III. CONCLUSIONS OF LAW

1.

Plaintiff bears the burden of proof in this matter. Ga. Comp. R. & Regs. 160-4-7-.12(3)(n) ("The party seeking relief shall bear the burden of persuasion with the evidence at the administrative hearing."); Shaffer v. Weast, 546 U.S. 49, 62 (2005). The IDEA "creates a presumption in favor of the educational placement established by [a child's] IEP, and the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate." Devine v. Indian River Co. Sch. Bd., 249 F.3d 1289, 1291-1292 (11th Cir. 2001). The standard of proof on all issues is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4). Thus, Plaintiff bore the burden of showing by a preponderance of the evidence that Defendant failed to offer him a FAPE.

2.

The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for future education, employment, and independent living . . . ." 20 U.S.C. § 1400(d)(1)(A).

3.

The IDEA requires school districts to provide to a student eligible for special education services a free appropriate public education ("FAPE") in the least restrictive environment ("LRE"). 20 U.S.C. § 1412; 34 C.F.R. §§ 300.17, 300.114 – 300.118.

4.

The IDEA is designed to open the door of public education to children with disabilities but it does not guarantee any particular level of education once inside those doors. Bd. of Educ.

of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 191 (1982); JSK. v. Hendry Co. Sch. Bd., 941 F.2d 1563 (11th Cir. 1991). The Eleventh Circuit has determined that when measuring whether a handicapped child has received educational benefits from an IEP and related instruction and services, courts must only determine whether the child has received the "basic floor of opportunity." JSK, 941 F.2d at 1572-3.

5.

The "IDEA requires school districts to develop an IEP for each child with a disability, with parents playing a 'significant role' in this process." Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524 (2007) (internal citations omitted). While the parents' concerns must be considered by the IEP team, the parents are not entitled to the placement they prefer. M.M. v. Sch. Bd. of Miami-Dade Co. Fla., 437 F.3d 1085, 1102 (11th Cir. 2006); see also Heather S. v. State of Wisconsin, 125 F.3d 1045, 1057 (7th Cir. 1997). "The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child." Rowley, 458 U.S. at 207. Thus, the educators who develop a child's IEP are entitled to "great deference." Todd D. v. Andrews, 933 F.2d 1576, 1581 (11th Cir. 1991).

6.

The United States Supreme Court established a two part test to determine the sufficiency of an IEP in Rowley, which has been adopted by the Eleventh Circuit. See JSK, 941 F.2d 1563. Under the Rowley standard, a court must consider whether (1) there has been compliance with the procedures[8] set forth in the Act and (2) whether the IEP is reasonably calculated to enable the

[8] The Act's procedural safeguards are specifically enumerated in 20 U.S.C. § 1415.

child to receive educational benefit in the least restrictive environment. Rowley, 458 U.S. at 206-7.

7.

The first prong of the two-part test examines whether any harm has resulted from a technical violation of the procedural requirements set forth in the IDEA. As a rule of law, procedural violations are not a per se denial of FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513. That is, a violation of the procedural safeguards will not automatically constitute a denial of FAPE. Rather, a plaintiff must show that any alleged procedural inadequacies in her IEP (i) impeded his right to a FAPE; (ii) significantly impeded his parent's opportunity to participate in the decision-making process regarding the provision of a FAPE; or (iii) caused a deprivation of educational benefit. Id. The Eleventh Circuit has held that plaintiffs must show actual harm as a result of a procedural violation in order to be entitled to relief. See Weiss v. School Bd. of Hillsborough County, 141 F.3d. 990 (11th Cir. 1998); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). In the present case, Plaintiff has not alleged any procedural violations of IDEA.

8.

The second prong of the FAPE analysis under Rowley assesses whether students have been provided with educational programs reasonably calculated to enable them to receive educational benefit in the least restrictive environment. Rowley, 458 U.S. 176; JSK, 941 F.2d 1563.

Math Services

9.

The least restrictive environment (LRE) provision of the IDEA states that schools must establish procedures to assure that: "To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . ." 20 U.S.C. § 1412(a)(5).

10.

In the present case, the IEP team recommended that Plaintiff be educated for much of his school day, including math, in the general education setting with children who are not disabled. To provide additional support for math, the IEP team recommended that Plaintiff receive special education support from a special education teacher in a collaborative setting where he can continue to be educated with his general education peers. Despite the concerns she raised in the due process complaint, Plaintiff's parent agreed at the hearing that the collaborative setting is appropriate for Plaintiff and the type of support she believes Plaintiff needs. T. 84-85, 125. Indeed, Plaintiff is doing well in this setting, earning an "S" on his report card in math. D. 236.

11.

Having failed to present any evidence that Plaintiff requires a more restrictive setting for math, Defendant has complied with the LRE mandate. Plaintiff has failed to meet his burden and show that Plaintiff is not receiving a FAPE. His complaints concerning math are accordingly dismissed.

Bullying from Peers and Treatment from Teacher

12.

Plaintiff also alleged in his complaint that he received differential treatment from his teacher and was bullied by peers.[9] Plaintiff, however, failed to present any evidence whatsoever that any actions or treatment from others infringed upon his ability to receive FAPE. To the contrary, the evidence Plaintiff presented showed that he "really loves" his teacher and the Assistant Principal is "doing an awesome job" in dealing with the concerns [redacted] has raised about bullying. T. 108:17-18, 100:8-9. Certainly Plaintiff's purported treatment from either his teacher or his peers is not infringing on his ability to benefit from his education or receive a FAPE, as [redacted] admits that she is very happy with Plaintiff's grades and his behaviors have dramatically improved since entering Defendant's schools. T. 98, 103. Plaintiff's complaints are accordingly dismissed.

Occupational Therapy

13.

Occupational therapy is a type of related service which includes services which improve a student's ability to perform tasks for independent functioning if functioning is impaired. 34 CFR § 300.34(c)(6). School districts are required under IDEA to provide related services when required to assist a disabled student to benefit from special education. 34 CFR § 300.34(a).

14.

In the present case, Plaintiff complained about a purported decrease in his occupational therapy services under his new IEP. However, other than this allegation set forth in the Due Process Complaint, no evidence whatsoever regarding occupational therapy was presented at the

[9] Plaintiff did not allege any claims under Section 504 of the Rehabilitation Act or Title II of the American with Disabilities Act.

hearing. Having failed to present evidence at the hearing that his occupational therapy services were not appropriate, and having failed to show that he required more occupational therapy in order to receive a FAPE, the Court deems these claims abandoned. Moreover, that evidence which was put forth by Plaintiff shows that Plaintiff is in fact thriving with the special education and related services being provided to him by Defendant. Plaintiff has failed to meet his burden and establish that his IEP fails to offer him a FAPE in the LRE.

IV. ORDER

Based on the foregoing, Plaintiff's request for relief is **DENIED** and Defendant's motion for involuntary dismissal is **GRANTED.**

SO ORDERED this 24th day of February, 2014.

AMANDA C. BAXTER
ADMINISTRATIVE LAW JUDGE

ORDER PREPARED BY:
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