FILED
NOV 21 2013

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

Kevin Westray, Legal Assistant

[redacted]

Plaintiff,

v.

GWINNETT COUNTY SCHOOL DISTRICT,

Defendant.

DOCKET NO.:
OSAH-DOE-SE-1410341-67-Baxter
14-291213

FINAL DECISION

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 to 1450, 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 **DISMISSED**.

I. PROCEDURAL HISTORY

Plaintiff initiated the above-styled action on September 19, 2013, contending that Defendant violated his rights under IDEA related to his identification, educational placement, and provision of a FAPE. Plaintiff's Complaint focuses on the particular school location for the

implementation of Plaintiff's IEP; the lack of a nurse at Plaintiff's assigned school location; and issues concerning Plaintiff's school attendance and how his absences were marked by Defendant (excused or unexcused). Following an unsuccessful mediation between the parties, a hearing on the merits was held on November 4, 2013. Plaintiff, pro se, presented testimony from his parent Y.R.N. 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.

[redacted] (D.O.B. [redacted]) is a sixteen year old student who is eligible to receive special education services from Defendant pursuant to the categories of Autism Spectrum Disorder (ASD), Other Health Impairment (OHI), and Speech Language Impairment (SLI). P. 1; T. 84-85.[1]

2.

Plaintiff relocated to Gwinnett County, Georgia from New York during the 2010-2011 school year and enrolled in Defendant's schools. T. 13-14; P. 12. Prior to relocating, Plaintiff had received special education services in New York pursuant to the eligibility category of OHI (IEP). T. 13; P. 12.

3.

Plaintiff's medical history includes diagnoses of congenital hepatic fibrosis, acromegaly with a brain tumor, reactive airway disease, attention-deficit/hyperactivity disorder (ADHD), inattentive type, and sleep apnea. P. 1, P. 12. Plaintiff was born without a gall bladder, and he

[1] Citations to the record are: "P" followed by the page number for Plaintiff's exhibits; "D" followed by the page number for Defendant's exhibits; and "T" followed by the page number for the hearing transcript.

had a liver transplant at the age of two years. P. 12; T. 15. Though Plaintiff has a significant medical history, he currently requires few accommodations at school due to his medical conditions other than a private restroom, no contact sports, rest as needed, a water bottle as needed, and an inhaler as needed for asthma. D. 214-218, D. 307-308; T. 93-94, 96-97, 98-99.

4.

Plaintiff's cognitive abilities have been assessed as falling in the borderline to low average range. He manifests characteristics of autism including difficulty with social communication with peers and adults, interacting with peers, engaging in reciprocal conversations and activities, and he exhibits rigidness in his behavior and sensory weaknesses. P.1.

5.

Prior to entering Defendant's school, Plaintiff's primary designation had been pursuant to the OHI category. P. 1; T. 13-14. However, in 2011, subsequent to Plaintiff's transfer to Defendant's schools, Plaintiff's parent began expressing significant concerns with regard to Plaintiff's social and emotional adjustment and requested that Plaintiff be screened for autism spectrum disorder. P. 12; T. 13-14, 85-86. Plaintiff was evaluated by Defendant's school psychologist in April of 2011 and the evaluation confirmed that Plaintiff exhibited behaviors consistent with ASD including limiting eye contact, difficulties relating to people, abnormal emotional response, difficulty with transitions, difficulty processing information, obsessive-compulsive tendencies, talking and laughing to self, disliking touch, sensory sensitivities, perseveration on topics, and stemming behaviors. P. 12. An additional eligibility of ASD was thereafter added to Plaintiff's existing OHI and SLI eligibilities with Plaintiff's parent's agreement in May of 2011. P. 12; T. 85-86.

6.

Plaintiff completed his eighth grade year, the 2010-2011 school year, at Sweetwater Middle School. T. 13-14. In the Spring of 2011, Plaintiff's IEP team developed an IEP which placed him in an autism class for his ninth grade year. T. 31-32, 83. Plaintiff's class was located at Parkview High School, Plaintiff's home school based upon his residency. T. 16-17, 32, 83.

7.

Plaintiff and his parent experienced a less than smooth transition to Parkview. T. 21-22. Plaintiff's parent was concerned that Parkview did not have a school nurse on staff at the school clinic to address Plaintiff's medical needs that might arise.[2] T. 14-15. Among the symptoms Plaintiff experienced at school include fatigue, periodic nosebleeds, and headaches. T. 15.

8.

Plaintiff had a Health Management Plan at Parkview High School during the 2011-2012 school year. T. 98-99; D. 307-308. Pursuant to the Health Management Plan, Plaintiff required rest periods as needed, no contact sports, a water bottle as needed, frequent bathroom trips, and private bathroom privileges. D. 307-308. Plaintiff's parent admits that Parkview accommodated Plaintiff's need for a private bathroom. D. 24-25, 93-94.[3]

9.

Another issue of concern to Plaintiff's parent was the manner in which Parkview marked Plaintiff's absences from school, that is, whether absences were considered excused or unexcused. T. 22, 102, 112. Plaintiff experienced frequent absences during the 2011-2012

[2] Parkview's clinic is staffed by a clinic worker who is not a nurse. T. 24.
[3] Plaintiff's parent also grew concerned because Plaintiff was failing some of his classes in ninth grade. T. 25-26. After Plaintiff's parent contacted the school, Plaintiff's grades quickly turned around. T. 26.

school year.[4] P. 2, 3, 6, 8. In response to Plaintiff's absences, a meeting was convened in October of 2011 to discuss implementing intermittent hospital/homebound services. T. 102-103. With this plan, Plaintiff could receive special education services in the home setting if he had three consecutive absences from school, and he would not be marked as absent. T. 102-103. After Plaintiff produced the necessary medical documentation in January of 2012, an IEP meeting was held and intermittent hospital/homebound was made part of Plaintiff's IEP. T. 102-103, 110.

10.

To document Plaintiff's absences, in January of 2012 Defendant provided Plaintiff's parent with a form letter Plaintiff's doctor could sign and return to the school each time Plaintiff was absent from school indicating the reason for his absence. T. 107-110. Plaintiff's parent and doctor found this process to be burdensome and declined using the form created by the IEP team to document Plaintiff's absences.[5] T. 111, 113-116. Defendant explained to Plaintiff's parent that the school was required to follow state rules regarding requiring verification of the reason for Plaintiff's absences, and that the form was created to assist Plaintiff's parent in providing documentation to excuse Plaintiff's absences. P. 3; T. 111-112.

11.

Plaintiff completed his ninth grade year at Parkview in the autism class. T. 17, 31-32, 83. In May of 2012, Plaintiff's IEP team met again and developed an IEP for the upcoming 2012-2013 school year. T. 109-110. Plaintiff's parent signed Plaintiff's IEP developed in May; however, she testified at the hearing that she did not agree with it.

[4] Plaintiff was absent 44 school days during the 2011-2012 school year. P. 2.
[5] Instead, the doctor gave Plaintiff's parent copies of a form with his name stamped on it for Plaintiff's parent to select the reason for Plaintiff's absences and submit to the school. T. 116-117.

12.

Plaintiff's parent opted to home-school Plaintiff for his tenth grade year rather than send Plaintiff back to Parkview.[6] T. 83. According to Plaintiff's mother, Plaintiff was not comfortable at Parkview and was not interested in returning. T. 27-28, 31.

13.

At the start of the 2013-2014 school year, Plaintiff indicated that he wished to return to school; however, he did not want to return to Parkview. T. 18. Thus, Plaintiff's mother sought and received a permissive transfer so that Plaintiff could attend another school, Berkmar High School. T. 18-19. Plaintiff began attending Berkmar at the start of the school year. T. 18. Though Plaintiff had previously attended an autism class at his home school Parkview, his IEP had expired during the time of Plaintiff's withdrawal from Defendant's schools during the 2012-2013 school year. T. 51. Plaintiff was placed in a class for students with mild intellectual disabilities (mild-ID) while at Berkmar with his parent's agreement and was reevaluated.[7] T. 33-34.

14.

Plaintiff's parent testified that Plaintiff was comfortable at Berkmar. T. 46, 56. Berkmar had familiar faces to Plaintiff as some of his classmates from Sweetwater Middle School were in his class at Berkmar. T. 34. Additionally, Plaintiff liked that Berkmar's school clinic was staffed by a school nurse. T. 46. Plaintiff again had a Health Management Plan. According to Plaintiff's parent, the medically related services Plaintiff requires during the 2013-2014 school

[6] When Plaintiff's mother withdrew Plaintiff from Parkview in August of 2012, she indicated that the reason for withdrawal was "medical" as Plaintiff had broken his foot. T. 83-84.
[7] Berkmar does not have an autism class. T. 33-34. Parkview, Plaintiff's home school, has both a mild ID class and an autism class. T. 52-53.

year are easy access to a private bathroom as needed, no contact sports, and two medications (asthma medication and cyclosporine) from the clinic. T. 95-97; D. 214-218; P. 9.[8]

15.

In August of 2013, Plaintiff was reevaluated at Berkmar and his parent attended a reevaluation conference on August 30, 2013. P. 1; T. 86. For Plaintiff's medical status, the revaluation conference review form notes that "Plaintiff gets headaches sometimes. He is currently prescribed transplant medications, Vitamin D and GI meds. He also uses an asthma pump, as needed. In addition, [Plaintiff] has seasonal allergies. He also receives a MRI once a year to monitor him." P. 1. At the close of the reevaluation meeting, the reevaluation team noted that Plaintiff continues to be a child with disabilities in the program areas of autism spectrum disorder, other health impairment, and speech/language impairment. P. 1. Plaintiff's parent agreed with the recommendations of the reevaluation committee. P. 1; T. 86.

16.

Shortly after the eligibility meeting, on September 6, 2013, Plaintiff's IEP team convened at Berkmar High School to develop an IEP. T. 88. Plaintiff's mother, Plaintiff, and three other individuals attended the meeting on Plaintiff's behalf. T. 88-89, 121-122. The meeting lasted approximately five (5) hours. T. 30, 88-89, 121-122. Plaintiff's parent asked questions at the meeting, shared concerns, and generally participated in the meeting. T. 89-90, 120-122. Plaintiff's IEP team addressed Plaintiff's needs to improve his interpersonal skills, his communication skills, and his ability to stay on task, among other needs. T. 124-126. At the end of the IEP meeting, the IEP team recommended that Plaintiff attend an autism class, in part to address Plaintiff's social needs. T. 30, 32, 132. The class is located at Parkview High School,

[8] Plaintiff's mother presented a hospital/homebound request form for intermittent services signed by Plaintiff's physician on August 21, 2013, which provides one accommodation for Plaintiff at school: easy access to restroom facilities. P. 9.

Plaintiff's home school. T. 30, 131-132. Plaintiff's mother disagreed with the recommendation as she did not wish for Plaintiff to return to Parkview or for his placement at Berkmar to be disrupted. T. 131-132. On September 18, 2013, Plaintiff filed the above-styled due process complaint alleging that the recommended school location was inappropriate as it failed to have a clinic nurse to address Plaintiff's needs "if a situation arises," ignored Plaintiff's medical status, and considered his absences "illegal."

17.

A hearing convened on November 4, 2013. One witness, Plaintiff's mother, testified on Plaintiff's behalf. 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 instructions 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.

Decisions such as the location of the school, the selection of personnel, and the choice of educational methodology are left to the purview of the local educational agency. "Once Rowley compliance is established, the school system has considerable latitude in choosing a location for the provision of services." Marietta City School System, 34 IDELR 280 (SEA GA April 30, 2001); Flour Bluff Independent Sch. Dist. v. Katherine M., 91 F.3d 689 (5th Cir. 1996); Kevin G. v. Cranston School Comm., 130 F.3d 481 (1st Cir 1997).

7.

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[9] set forth in the Act and (2) whether the IEP is reasonably calculated to enable the child to receive educational benefit in the least restrictive environment. Rowley, 458 U.S. at 206-7.

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

8.

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 his 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).

9.

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.

Access to a Nurse / Nursing Services

10.

Plaintiff complained that his IEP was deficient because it did not include nursing services, and the school where his IEP was to be implemented did not have a nurse. Nursing services are a related service under IDEA and are "health services that are designed to enable a

child with a disability to receive FAPE as described in the child's IEP." 34 C.F.R § 300.34(c)(13).

11.

Related services must be included in an IEP when such services are required to assist a child with a disability to benefit from special education. 34 C.F.R § 300.34(a). The United States Supreme Court has interpreted the phrase related services as including "services that enable the child to reach, enter, or exit the school" or that "permit a child to remain at school during the day." Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891 (1984). "[O]nly those services necessary to aid a handicapped child to benefit from special education must be provided." Id. at 895. See also Petit v. U.S. Dep't of Educ., 675 F.3d 769 (D.C. Cir. 2012) (recognizing that related services are services that are necessary for student to receive "floor of opportunity.")

12.

Though Plaintiff presented evidence that he is perhaps more comfortable at a school where the clinic is staffed by a school nurse rather than a clinic worker, no evidence was presented that his medical needs require access to a school nurse or that the provision of nursing services as part of his IEP is necessary in order for Plaintiff to receive a FAPE. Instead, the evidence suggests that Plaintiff's medical needs at school are currently fairly minimal; that is, he requires access to a private bathroom, rest as needed, a water bottle as needed, and no contact sports. These needs have been addressed and managed through a health management plan. Having failed to present any evidence that Plaintiff requires nursing services as a related service in order to benefit from special education, the Court does not find that Plaintiff met his burden of proof and show that his IEP fails to offer him a FAPE.

Attendance

13.

Plaintiff also complained that his previous school location, Parkview High School, considered Plaintiff's absences from school due to his medical needs as "illegal" and imposed an undue burden on Plaintiff by requiring certain documentation from Plaintiff's physician when Plaintiff was absent. However, this Court's review is limited to issues related to the identification; evaluation; placement; and provision of a free appropriate public education under IDEA. 20 U.S.C. 1415(b); 34 C.F.R. § 300.511. This Court is not vested with authority to review Plaintiff's compliance with state law or regulations concerning compulsory school attendance. See O.C.G.A. § 20-2-690.1; Ga. Comp. R. & Regs. 160-5-1-.10.

14.

Further, to the extent Plaintiff implied that his absences due to health issues interfered with his receipt of a FAPE, the evidence showed that Defendant responded to Plaintiff's frequent absences by amending his IEP to include intermittent hospital/homebound services. No evidence was presented that these services were inappropriate or were not reasonably calculated to offer him a FAPE. Plaintiff's claims related to his school attendance are necessarily dismissed.

Placement

15.

Plaintiff's primary complaint at the hearing and the crux of his case focused not on Plaintiff's placement[10] or the substance of his IEP but rather on the location in which Plaintiff's

[10] In considering the least restrictive environment appropriate for a student, the IEP team must consider the continuum of placement options. 34 C.F.R. § 300.115; Ga. Comp. R. & Regs. 160-4-7-.07. The placement options for school-age children include the general classroom; instruction outside the general classroom; a separate day school or program; home-based instruction; residential placement; and hospital/homebound instruction. Id. These

IEP is to be implemented; that is, Parkview High School rather than Plaintiff's preferred location of Berkmar High School.

16.

A parent, no matter how well intentioned, is not entitled to dictate the location of services. White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 (5th Cir. 2003) (holding that school district was entitled to deny parents' transfer request to student's home school reasoning that "educational placement" means educational program and not the institution where program was implemented); Flour Bluff Indep. Sch. Dist. v. Katherine M., 91 F.3d 689 (5th Cir. 1996). Instead, the determination of where special education services will be provided is an administrative decision left to schools. White, 343 F.3d 373, 379; Veazey v. Ascension Parish Sch. Bd., 121 Fed. Appx. 552, 553 (5th Cir. 2005) (unpublished); C.R.R. v. Water Valley Sch. Dist., 2008 WL 723842 at * 4 (N.D. Miss. 2008) (unpublished) (finding that because IDEA does not specifically require parental participation in site selection, location decision "does not implicate the procedural safeguards embodied in the IDEA."); Sherri A. D. v. Kirby, 975 F.2d 193 (5th Cir. 1992); Weil v. Board of Elem. & Secondary Educ., 931 F.2d 1069 (5th Cir. 1991).

17.

Defendant is under an obligation to educate Plaintiff in the school he would attend if he were not disabled. 34 C.F.R. § 300.116(d). In this case, Defendant has, with Plaintiff's parent's participation, developed an IEP which addresses Plaintiff's needs and which can be implemented at the school Plaintiff would attend if he were non-disabled, Parkview High School. The evidence shows that the IEP is reasonably calculated to offer Plaintiff educational benefit by

options reflect the amount of time the student will spend outside of the general education environment. A specific location of services is not part of the continuum of placement options.

addressing Plaintiff's needs as a student with autism.[11] Plaintiff failed to meet his burden and establish that this IEP failed 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 21st day of November, 2013.

AMANDA C. BAXTER
ADMINISTRATIVE LAW JUDGE

[11] Plaintiff's social needs have admittedly been a concern of Plaintiff's mother for a number of years, and she agrees with his autism eligibility. T. 13-14, 85-86.