IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

FILED
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MAY 04 2018
Kevin Westray, Legal Assistant

[redacted] BY AND THROUGH [redacted]., AND [redacted],	:	
Petitioners,	:	Docket No.: 1827027
	:	1827027-OSAH-DOE-SE-44-Walker
v.	:	
DEKALB COUNTY SCHOOL DISTRICT,	:	
Respondent.	:	

ORDER GRANTING RESPONDENT'S MOTION FOR INVOLUNTARY DISMISSAL

I. INTRODUCTION

The Petitioners filed a due process hearing request alleging that the Respondent, DeKalb County School District, (also the "District") had failed to provide [redacted] with a Free Appropriate Public Education ("FAPE") 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. As set forth in a prehearing order, the Petitioners were scheduled to present their case on April 18, 2018, and the Respondent was to present its case on April 30, 2018. The hearing commenced on April 18, 2018. The Petitioners appeared *pro se*, and Samantha Lewis, Esq., represented the District.[1]

Following the presentation of the Petitioners' evidence, the Respondent submitted a

[1] At the beginning of the due process hearing, both the Petitioners and the District complained that the other party had not complied with the prehearing order regarding exhibits. (Transcript dated April 18, 2018 (hereinafter T-) at pp. 7-10). Consequently, exhibits referenced will be referred to by the undersigned as identified by the court reporter at T-2.

Motion for Involuntary Dismissal. In response, the Petitioners filed two motions styled as follows: 1) Motion Denying Respondent['s] Motion for Involuntary Dismissal, and 2) Summary Determination.[2] Pending review of the motions, the undersigned issued an order staying the April 30, 2018 hearing date. After review of the motions and the evidence presented at the hearing, the undersigned hereby **GRANTS** the Respondent's Motion for Involuntary Dismissal.

II. INVOLUNTARY DISMISSAL

"After a party with the burden of proof has [completed the presentation of] 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." Ga. Comp. R. & Regs. 616-1-2-.35. The Georgia Civil Practice Act ("CPA") also provides for involuntary dismissal. See O.C.G.A. § 9-11-41(b). Under the case law interpreting Section 41(b) of the CPA, a court presiding in a non-jury trial is not required to construe the evidence most favorably to the Plaintiff. Alexander v. Watson, 271 Ga. App. 816, 817 (2005) (trial court is not required to construe the evidence in the plaintiff's favor because trial court acting as factfinder); see also 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") (citation omitted); cf. K.A. v. Fulton Cty. Sch. Dist., 741 F.3d 1195, 1209, (11th Cir. 2013) (summary judgment appropriate in IDEA cases even when facts are in dispute).

As the party seeking relief, the Petitioners carry the burden of proof in this matter. 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. 160-4-7-.12(3)(n) ("The party seeking relief shall bear the burden of persuasion with the evidence at the administrative hearing").

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[2] Given the instant order, the Petitioners' motion styled Summary Determination is hereby dismissed.

Although the Petitioners contend that Schaffer is not applicable to the instant proceeding, parents in Georgia challenging an IEP bear the burden of presenting a complaint, requesting a due process hearing, and proving their case. K.A., 741 F.3d at 1208.[3]

III. ANALYSIS

The Petitioner [redacted][4] is enrolled as a [redacted] grade student at [redacted] Elementary School ("[redacted] for the 2017-2018 academic year. He has been diagnosed with emotional/behavioral disorder ("EBD") and is eligible for services under IDEA.[5] [redacted] is [redacted]s mother. On January 30, 2018, the Petitioners filed a due process hearing request ("complaint"). The Petitioners grouped their allegations claims into four categories: Identification, Evaluation, Placement and FAPE. The undersigned addresses each category in turn.

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[3] Despite the Petitioners' claims of prejudice throughout the proceeding, most, if not all, of the exhibits tendered into evidence by the Petitioners were admitted. The Petitioners also asserted that the District did not produce "records and files possessed by the DeKalb County Public Safety Department." Petitioners' Motion Denying Respondent['s] Motion for Involuntary Dismissal at pp. 4-5. The DeKalb County Office of Public Safety includes the DeKalb County Police Department, DeKalb County Fire Rescue, DeKalb County Animal Services and Enforcement, DeKalb 911 Emergency Communications Center, DeKalb Emergency Management Agency, and the DeKalb County Medical Examiner's Office -- but does not include the District. See https://www.dekalbcountyga.gov/public-safety/public-safety, last visited April 30, 2018. As the DeKalb County Office of Public Safety is not a party to these proceedings, it was not required to comply with the prehearing order.

[4] To protect their privacy, the Petitioners and minor children are referred to herein only by their initials.

[5] An emotional and behavioral disorder is an emotional disability characterized by the following:

> (i) An inability to build or maintain satisfactory interpersonal relationships with peers and/or teachers. For preschool-age children, this would include other care providers.
> (ii) An inability to learn which cannot be adequately explained by intellectual, sensory or health factors.
> (iii) A consistent or chronic inappropriate type of behavior or feelings under normal conditions.
> (iv) A displayed pervasive mood of unhappiness or depression.
> (v) A displayed tendency to develop physical symptoms, pains or unreasonable fears associated with personal or school problems.

Ga. Comp. R. & Regs. 160-4-7-.05(Appendix d) citing 34 C.F.R. § 300.8(c)(4)(i)(A - E).

A. Identification

The Petitioners allege that [redacted]s special education and general education teachers failed to collect behavioral data after he demonstrated increasing behavioral difficulties. They claim that [redacted]s teachers did not convey information about the escalating behaviors to K[redacted] W[redacted], [redacted]s lead teacher for special education ("LTSE"). The Petitioners also maintain that [redacted]s Individualized Education Program ("IEP") lacked behavioral goals that appropriately aligned with his identified disability.

The Petitioners failed to present evidence that [redacted]s teachers did not collect behavioral data regarding his behavior, did not communicate with the LTSE, or that his behavioral goals did not align with his disability. [redacted]s initial IEP, dated August 28, 2017, identified staying on task as a behavioral goal. (T-33, 37). In November 2017 [redacted]s teachers observed that [redacted]s behaviors had "escalated." Accordingly, they collected behavioral data, and reported this information to Ms. K[redacted] W[redacted] [redacted] LTSE. (T-61, 71-72). After learning about the escalating behaviors in late November 2017, Ms. W[redacted] determined that an IEP meeting should be scheduled. (T-13, 26, 72).

On December 1, 2017, while at school, [redacted] put his face in sink of water, saying he wanted to commit suicide. He also held scissors near his body, indicating that he wished to harm himself. (T-171). On December 7, 2017, [redacted] engaged in another attempt to harm himself. (T-88). Coupled with the reports of [redacted]s escalating behaviors, these incidents prompted the IEP team to develop a plan that would ensure [redacted]s safety. (T-88). Subsequently, an IEP meeting was held on December 14, 2017 to discuss the safety plan. (T-89).

During the December 14, 2017, IEP meeting, [redacted] appeared to be in agreement with the IEP team's safety plan. (T-90). She did not request that [redacted] IEP reflect any additional

behavioral goals; however, [redacted] did ask that the school perform a Functional Behavioral Assessment ("FBA"). (T-82). The FBA commenced on December 14, 2017, following the receipt of K.W.'s consent form. (T-69, 82-83).

B. Evaluation

The Petitioners next allege that they have received inconsistent reports as to whether the District had begun an FBA. The District began an FBA on December 14, 2017, the day [redacted]s mother signed and returned to the District the consent form for the FBA. (T-69, 82). The FBA has been completed. (T-82).

The Petitioners also claim that documentation regarding a previous FBA has not been provided by the District. In August 2017 [redacted] consented to special-education services for [redacted] (T-42). An initial IEP meeting was held on August 28, 2017. The August 28, 2017 IEP included a Behavioral Intervention Plan, and although it indicated that an FBA had been completed at another elementary school [redacted] had attended, Ms. W[redacted] did not provide an FBA. (Exhibit P-8). [redacted] participated in the meeting, and the IEP meeting notes indicate that she "shared her concerns regarding [redacted]s education and they were added to the IEP." (Exhibit P-8). Progress report dated October 2017, November 2017, and January 2017 indicate that [redacted] has made substantial progress towards a majority of his educational goals. (T-226-229). The Petitioners did not establish that the District denied [redacted] FAPE on this basis.

C. Placement

The Petitioners next allege that the District failed to place [redacted] in a safe and appropriate learning environment. At the beginning of the academic year, [redacted] was a student in J[redacted] H[redacted] class. Ms. H[redacted] classroom had one teacher and twenty children. (T-86-87).

Following the incidents that occurred on December 1, 2017, [redacted] was placed in J[redacted]

H[redacted] class. Ms. H[redacted] classroom had a teacher, two paraprofessionals and five to six children. Ms. W[redacted] testified that both she and [redacted] had agreed that [redacted] would be best served in Ms. H[redacted] classroom setting due to his need for additional monitoring. (T-85-86). Subsequently, at [redacted] request, [redacted] transferred from Ms. H[redacted] class to Ms. T[redacted] class. (T-56-57, 242).[6] Any changes made to [redacted]s learning environment have been made with [redacted] consent or at her request. Cf. Doe v. Defendant *I*, 898 F.2d 1186, 1189 n.1 (6th Cir. 1990) (parent cannot complain that school district failed to complete a timely IEP when parents requested student relinquish services.)

The Petitioners also alleged that [redacted] was forced to attend certain classes or "specials" without headphones. At the December 14, 2017 IEP meeting, the IEP team amended [redacted]s IEP to allow him access to headphones while he attended specials. Shortly thereafter, the school ordered the headphones for [redacted] nonetheless, [redacted] refuses to wear the headphone or attend specials. The District has not and will not force [redacted] to wear the headphones, or attend specials. (T-91, 211, 245). As such, the Petitioners failed to establish that the District denied [redacted] FAPE on this basis.

D. FAPE

The Petitioners allege that Ms. H[redacted] behaved negligently before and during [redacted]s suicide attempt. Additionally, they claim that the District failed to report incidents of sexual assault and bullying.

The Petitioners failed to demonstrate that Ms. H[redacted] was negligent. On December 1,

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[6] The Petitioners maintain that they requested placement in Ms. T[redacted] class because he was in fear of another student that had sexually assaulted him. However, as discussed, infra, the Petitioners did not demonstrate that [redacted] had been sexually assaulted. Cf. Doe v. Defendant *I*, 898 F.2d 1186, 1189 n.1 (6th Cir. 1990) (parent could not be heard to complain that school district failed to complete a timely IEP when IEP's non-completion was attributable to parent's request.)

2017, [redacted] made a statement about killing himself, went to a sink in Ms. H[redacted] class, turned on the water and put his face in the sink. (T-230). In response, Ms. H[redacted] turned off the water, and removed the spigot from the basin. (T-230-231). She immediately took [redacted] to the counselor, and a referral to the Department of Family and Childrens Services ("DFCS") was made. (T-231-232).

The Petitioners also did not demonstrate that the District "failed to report" an incident of sexual assault. On several occasions, [redacted] has stated that a girl in his class, [redacted] touched his "wee wee" or "no no." (T-109, 283). After investigating the report, the school principal, S[redacted] N[redacted] learned that [redacted] had been having a "bad day" and during a tantrum she had hit every student in the classroom. There was no indication that [redacted] targeted [redacted] or intentionally touched his genitals. Accordingly, Ms. N[redacted] determined that [redacted] had not been sexually assaulted. (T-80-81, 161-162).

Unsatisfied with the school's finding, [redacted] contacted law enforcement and reported that [redacted] had been the victim of a sexual assault and a simple battery. (T-108). After an investigation, Dekalb County Police Officer G[redacted] S[redacted] determined that law enforcement would not pursue the case. (T-108, 131, 138, 141). During her testimony, Officer S[redacted] noted that DFCS also had opened an investigation into the Petitioners' allegations, and, after review, closed the case. (T-116).

The Petitioners also claim that the District failed to follow appropriate procedures regarding student bullying. In November 2017, [redacted] contacted [redacted]'s teachers and told them that [redacted] was being bullied. (T-151).[7] In response to her report, [redacted]s teacher asked [redacted] who

[7] At the hearing, [redacted] gave contradictory testimony on the subject, first indicating he had told Ms. H[redacted] he was being bullied on December 1, 2017, and then stating he had told her in November 2017. [redacted] did not indicate that he had identified the person bullying him to Ms. H[redacted] or to any other school personnel. (T-284-285).

was bullying him and he said "no one." (T-151-152). [redacted] vice-principal, Ms. D[redacted], asked [redacted] if he had been bullied. [redacted] again asserted that no one had bullied him. (T-152, 160).

Dr. S[redacted] N[redacted] is [redacted] principal. (T-148). Dr. N[redacted] also met with [redacted] and [redacted]. During the meeting [redacted] repeatedly asked [redacted] to tell Ms. N[redacted] who was bothering him; [redacted] did not identify anyone who was bothering or bullying him to Dr. N[redacted] (T-164-165). Accordingly, the Petitioners did not demonstrate that [redacted] has experienced harassment so "severe, pervasive and objectively offensive" that it would deny him FAPE. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999).

IV. CONCLUSION

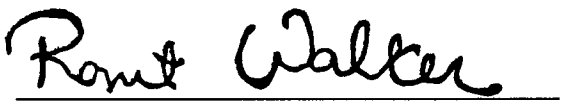
The purpose of the IDEA is "'to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living . . . .'" C.P. v. Leon County Sch. Bd., 483 F.3d 1151 (11th Cir. 2007), quoting 20 U.S.C. § 1400(d)(1)(A). At the IDEA's core "is the cooperative process that it establishes between parents and schools . . . ." Schaffer, 546 U.S. at 53.

The parties have expended substantial time and effort during this proceeding. While it is understandable that a parent's highest priority would be to secure a free and appropriate education for her child, as Schaffer teaches, and the undersigned concurs, a cooperative, rather than an antagonistic, relationship between a parent and a school district is more likely to achieve this goal. Violation of any of the procedures of the IDEA is not a *per se* violation of the Act, nor is every disagreement between the parties an actionable claim. See K.A., 741 F.3d at 1199.

The Petitioners bear the burden of proof in this matter. Schaffer, 546 U.S. at 49; Ga. Comp. R. & Regs 160-4-7-.12(3)(l) and 616-1-2-.07(1). Accordingly, it is not the District's

burden to prove that it has acted in accordance with the IDEA; it is the Petitioners' burden to prove the claimed violations. Once the Petitioners have completed their presentation of evidence, the other party may move for dismissal on the grounds that the Petitioners failed to carry their burden so as to demonstrate their right to some or all of the determinations sought by the Petitioners. The Petitioners failed to offer any probative evidence to support their allegations that the District violated the IDEA. Accordingly, the District's Motion for Involuntary Dismissal is **GRANTED** and this matter is **DISMISSED.**

SO ORDERED, this May 3, 2018.



RONIT WALKER, ALJ
Administrative Law Judge