

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA




FILED  
OSAH

OCT 22 2019

█ by and through █ :  
Petitioners, :  
v. :  
GAINESVILLE CITY SCHOOL :  
DISTRICT, :  
Respondent. :

Docket No. 2005403  
2005403-OSAH-DOE-SE-69-KENNEDY

  
Kevin Westray, Legal Assistant

**ORDER GRANTING**  
**RESPONDENT'S MOTION FOR SUMMARY DETERMINATION**

**I. INTRODUCTION**

Petitioner █ is a student in the Gainesville City School District (GCSD) and has been found eligible for special education services under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C. §§ 1400 *et seq.*

On August 19, 2019, █ mother, on his behalf and her own, filed a Due Process Hearing Request alleging issues related to Identification and the provision of a Free and Appropriate Public Education (FAPE).<sup>1</sup> GCSD filed a Response on August 23, 2019.

On September 17, 2019, Respondent filed a Motion for Summary Determination (Motion). Petitioners have not filed a response.

In its Motion, Respondent seeks dismissal of the Due Process Hearing Request based on Petitioner's mother's refusal to sign consent to receive special education services.<sup>2</sup>

<sup>1</sup> More specifically, Petitioner's mother raised a concern that Respondent is not in agreement that █ requires a one-on-one paraprofessional for prompting. She seeks to have █ "accommodated in a manner that provides him the best opportunity to maximize his potential." She further states in the Complaint that Respondent failed to identify and properly accommodate █ for a period of at least four (4) years. *See* Due Process Complaint.

<sup>2</sup> Petitioner's mother ultimately signed her consent to placement and implementation of special education services on September 13, 2019.

Having considered the pleadings and arguments set forth before the Court, and based on the undisputed material facts set forth below, Respondent's Motion for Summary Determination is **GRANTED**. Consequently the hearing scheduled for November 7, 2019 is cancelled.

## II. FINDINGS OF UNDISPUTED MATERIAL FACT

1.

█ is an 8<sup>th</sup> grade student in the gifted program at Gainesville Middle School. (Respondent's Exhibit A at ¶ 3)

2.

█ completed the 7<sup>th</sup> grade through home services due to suicidal ideations. He participated in home services after his mother filed appropriate hospital homebound paperwork with Respondent. █ returned to school at the commencement of 8<sup>th</sup> grade. (Respondent's Exhibit A at ¶¶ 4-5; Respondent's Exhibits 1, 2)

3.

At the beginning of the 2018-2019 school year, Petitioner's mother filed a complaint against Respondent with the Georgia Department of Education (DOE) alleging Respondent had violated █ rights under Child Find and Protections for children not determined for special education and related services. The DOE found Respondent was in compliance with all Federal and State laws and policies. In Spring 2019 Petitioner's mother filed a second complaint with DOE alleging Respondent violated █ rights under Child Find, Evaluations, and provision of a Free and Appropriate Public Education (FAPE). Again the DOE found Respondent had complied with all laws regarding the issues raised in the second Complaint. (Respondent's Exhibit A at ¶¶ 6, 17; Respondent's Exhibits 3, 10)

4.

During the 2017-2018 school year Petitioner's mother contacted the school repeatedly about concerns regarding her son's performance at school and receiving zeroes for assignments. The school and parent discussed strategies to address the concerns and to discover the root cause of the issues, including discussing the RTI process and [REDACTED] organizational skills. [REDACTED] was suspended twice during the school year and the second suspension resulted in a referral to juvenile court. The juvenile court ordered an evaluation of [REDACTED] which was conducted by Dr. Guy Jordan who diagnosed [REDACTED] with Autism and Intermittent Explosive Disorder and who also recommended that [REDACTED] be further evaluated for a possible math learning disability. (Respondent's Exhibits 3 and 5)

5.

At the start of the following school year, in August 2018, Respondent first learned of [REDACTED] diagnoses. Upon learning of [REDACTED] diagnoses, Respondent began its referral process for special education. On August 17, 2018, Petitioner's mother signed a parental consent for evaluation for special education services. (Respondent's Exhibit A at ¶ 8; Respondent's Exhibit 3 at ¶ 32; Respondent's Exhibit 5)

6.

Respondent completed the initial evaluation and held an eligibility meeting on September 28, 2018. During that meeting, the Individualized Education Program (IEP) team reviewed the current psychological evaluation and partial documents related to Dr. Jordan's evaluation. Respondent had only received certain pages of Dr. Jordan's report and there was no date on the document or supporting information. At the conclusion of the meeting, the IEP team found [REDACTED]

eligible for special education services under the Emotional Behavior Disorder (EBD) category. (Respondent's Exhibit A at ¶ 7; Respondent's Exhibits 4, 5)

7.

Petitioner's mother refused to consent to services under the EBD category because she believed he should qualify for services under the category of Autism based on Dr. Jordan's diagnosis. The school explained that a diagnosis does not drive eligibility under IDEA but, rather, eligibility is based on whether a student meets the eligibility criteria established by DOE for each category. Nevertheless, the IEP team agreed to complete additional assessments and reconvene in two weeks to address Petitioner's mother's concern. (Respondent's Exhibit A at ¶ 9; Respondent's Exhibit 5)

8.

Another IEP meeting was held on October 12, 2018. At this meeting, Mrs. Hickey, Respondent's psychologist, presented the results of the additional assessments to the IEP team. Based on the totality of information compiled from both meetings, the IEP team determined that [REDACTED] continued to meet the DOE eligibility criteria to receive services under the EBD category, but did not meet the DOE eligibility criteria under the Autism category. (Respondent's Exhibit A at ¶ 10; Respondent's Exhibit 5)

9.

Petitioner's mother again disagreed with the IEP team's eligibility determination that [REDACTED] did not meet the eligibility criteria under the Autism category, but she "verbally agreed to placement in the Emotional and Behavioral Disorder Program." There is no evidence that she ever signed written consent to placement or the initial provision of services at that time. However, Petitioner's mother asked Michael Enright, then Director of Special Education for GCSD, about

an Independent Educational Evaluation (IEE) because she wanted to ensure [REDACTED] was “properly evaluated.” In response, Mr. Enright explained the IEE process and he sent Petitioner’s mother notification that Respondent would pay for an IEE.<sup>3</sup> He also provided a Consent to Place form to proceed with the initial placement for services while the IEE process proceeded. The Consent to Place form was never completed, signed or returned by Petitioner’s mother at that time. (Respondent’s Exhibit A at ¶¶ 1, 11-12; Respondent’s Exhibits 5 at p. 15; Respondent’s Exhibits 6, 7, 8, 10 at ¶¶ 22, 27, 42-43)

10.

In addition to sending information about IEEs and a consent for initial placement for services, Respondent also sent prior written notice on October 19, 2018 explaining to Petitioner’s mother the consequences of refusing to consent to placement and initial services and also the basis as to why Respondent had determined that [REDACTED] did not meet the eligibility criteria under the Autism category. (Respondent’s Exhibit A at ¶ 13; Respondent’s Exhibit 8)

11.

In January 2019, the remaining pages of Dr. Jordan’s report were provided to Respondent. A third eligibility meeting was scheduled for January 25, 2019 to review the new information provided to Respondent. The record does not establish whether the meeting took place and, if so, what occurred. However, on January 29, 2019 Respondent received notice that Dennis Cormier had been retained by Petitioner as an educational advocate. (Respondent’s Exhibit A at ¶¶ 14-15; Respondent’s Exhibit 9)

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<sup>3</sup> Petitioner’s mother chose the Marcus Institute to conduct the IEE. By April 28, 2019 the IEE had not yet been completed due to a long waiting list for the Marcus Institute. (Respondent’s Exhibit 10 at ¶ 68)

12.

On May 23, 2019, the IEP team met to redetermine eligibility. At that meeting the IEP team determined that, based on new information provided to Respondent, [REDACTED] met the eligibility criteria to receive special education services under the category of Autism. (Respondent's Exhibit A at ¶ 17; Respondent's Exhibit 11)

13.

During Summer 2019, [REDACTED] teachers, Ms. Andrea Loureiro, Assistant Principal of Gainesville Middle School, and Mr. Enright met with Petitioner's mother to discuss [REDACTED] successful re-entry to school following his homebound services at the end of 7<sup>th</sup> grade. (Respondent's Exhibit A at ¶ 18)

14.

Later, on August 6, 2019, the IEP team met again to develop an IEP even though Petitioner's mother had not yet consented to initial placement. Petitioner's mother left the meeting refusing to sign consent for special education services because the IEP team did not agree that [REDACTED] required a one-on-one paraprofessional to receive FAPE. (Respondent's Exhibit A at ¶¶ 19-20; Respondent's Exhibit 12)

15.

On August 30, 2019, the IEP team met again to address Petitioner's mother's concerns and develop an IEP. Petitioner's mother once again refused to consent to initial placement for special education services. (Respondent's Exhibit A at ¶ 21; Respondent's Exhibit 13)

16.

On September 5, 2019, the IEP team met again. At the meeting Petitioner's mother refused to sign consent for initial placement for special education services. However, Petitioner's mother

later emailed an executed consent for services on September 13, 2019. Following receipt of the executed consent for services, Respondent provided notice to Petitioner of an IEP team meeting to develop an IEP. (Respondent's Exhibit A at ¶¶ 22-24; Respondent's Exhibits 14, 15)

### **III. STANDARD ON SUMMARY DETERMINATION**

Summary determination in this proceeding is governed by Office of State Administrative Hearings (OSAH) Rule 15, which provides, in relevant part:

A party may move, based on supporting affidavits or other probative evidence, for a summary determination in its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

GA. COMP. R. & REGS. 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party "is entitled to a judgment as a matter of law on the facts established." Pirkle v. Env'tl. Prot. Div., Dep't of Natural Res., OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at \*6-7 (OSAH 2004) (citing Porter v. Felker, 261 Ga. 421 (1991)); see generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2006) (noting that a summary determination is "similar to a summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by summary adjudication).

Further, pursuant to OSAH Rule 15:

When a motion for summary determination is made and supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination in the hearing.

GA. COMP. R. & REGS. 616-1-2-.15(3). See Lockhart v. Dir., Env'tl. Prot. Div., Dep't of Natural Res., OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at \*3 (OSAH 2007) (citing Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)).

#### IV. CONCLUSIONS OF LAW

Petitioners assert that Respondent violated its “Child Find” obligation by failing to identify [REDACTED] as a student in need of special education, related aids and services, and by further failing to properly evaluate him in all areas of need or suspected need.

Under IDEA, its implementing regulations, and the Georgia Department of Education rules, school districts have an obligation to identify, locate, and assess all children who are suspected of having a disability and who may need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(1)(i); and Ga. R. & Regs. 160-4-7.03.

A school district’s “Child Find” obligation is triggered when there is reason to suspect a disability and that special education services may be needed to address the disability, and to allow students to progress through the curriculum satisfactorily. Department of Education v. Cari Rae S., 158 F. Supp. 2d 1190 (D. Haw. 2001). In order to establish that a school violated its obligation to identify a child with a disability under IDEA, a party “must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate.” Clay t. v. Walton Cty. Sch. Dist., 952 F.Supp. 817 (M.D. Ga. 1997), cited by Bd. Of Educ. v. L.M., 478 F.3d 307, 313 (6<sup>th</sup> Cir. 2007) (adopting Clay T. standard); J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d. 635, 661 (S.D.N.Y. 2011) (same).

Given that Petitioners did not file a response to the Motion for Summary Determination, the Court is limited in the information it has before it to reach a determination. There is insufficient evidence in the record to suggest that Respondent had any reason to suspect that [REDACTED] had a disability prior to August 2018. The actions referred to during the 2017-2018 school year were not so significant as to raise an alarm or concern that there may be an undiagnosed



disability. [REDACTED] was suspended twice and he struggled to complete work but there are many reasons those behaviors could occur including an undiagnosed disability. Thus it was appropriate for the school to discuss with Petitioner's mother her concerns and to consider the RTI process. Later, when Respondent first learned that [REDACTED] had a disability and/or suspected disability in August 2018, a referral was made in a timely manner and Respondent proceeded with conducting an initial evaluation and obtaining information to determine eligibility for special education and related services as required under IDEA's child find obligations. 20 U.S.C. § 1414(a)(1)(C)(i)(1); 34 C.F.R. § 300.301(c)(1)(i); Ga. R. & Regs. 160-4-7-.04. Moreover, Respondent agreed to conduct additional assessments and reconvene to further discuss eligibility for special education and related services after Petitioner's mother raised concerns at the first eligibility meeting held in September 2018. After Petitioner's mother continued to raise concerns at the second eligibility meeting held in October 2018, Respondent agreed to publicly fund an IEE to address Petitioner's concern that [REDACTED] had not been properly evaluated. Based on the undisputed material facts, the Court concludes that Respondent did not violate its Child Find obligations.


Having been determined eligible for special education services, [REDACTED] is entitled to a FAPE. 20 U.S.C. § 1400(d)(1)(A); 34 C.F.R. § 300.101(a). FAPE is achieved through the timely and consistent implementation of an IEP tailored to meet the needs of each particular child. Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309 (11<sup>th</sup> Cir. 2003). "Each IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide." Schaffer v. Weast, 546 U.S. 49 (2005); 42 U.S.C. § 1414(d)(1)(A). Petitioners have not presented any evidence that [REDACTED] requires a one-on-one paraprofessional other than to state in

the Due Process Complaint that he has received many zeroes on his schoolwork despite teacher promptings to complete and/or turn in work. However, the Court cannot even reach the issue of whether Respondent's developed an IEP that offered [REDACTED] FAPE because Petitioner's mother consistently refused to sign consent to placement and receipt of initial services. Under IDEA, if a parent of a child refuses to consent to the initial provision of special education and related services a School District will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to provide consent. Furthermore, Respondent is not required to convene an IEP team meeting or develop an IEP under §§ 300.320 and 300.324 for the child if the parent of the child has refused to consent to the initial provision of special education and related services. 34 C.F.R. § 300.300(b)(3).

**V. ORDER**

For the foregoing reasons, Respondent's Motion for Summary Determination is hereby **GRANTED**. Respondent's request for dismissal of the Child Find and FAPE issues raised in the Due Process Complaint filed on August 19, 2019 is hereby **GRANTED**. The Complaint is **DIMISSED without prejudice**. Consequently, the hearing scheduled for November 7, 2019 is hereby cancelled.

**SO ORDERED, this 22<sup>nd</sup> day of October, 2019.**

  
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Ana Kennedy  
Administrative Law Judge