BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] **BY AND THROUGH** [redacted]
Petitioners,

v.

INTERNATIONAL CHARTER SCHOOL OF ATLANTA,
Respondent.

Docket No.: 1715738
1715738-OSAH-DOE-SE-60-Miller

Agency Reference No.: 1715738

FILED
OSAH
MAR 02 2017
Kevin Westray, Legal Assistant

For Petitioners:
[redacted]
Parent, *pro se*

For Respondent:
Daniel R. Murphy, Esq.
Lewis & Murphy, LLP

FINAL DECISION
ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DETERMINATION

I. SUMMARY OF PROCEEDINGS

[redacted] is a student with a disability who is eligible for special education services under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). On November 18, 2016, the Petitioners, [redacted] and his mother, [redacted] filed a due process hearing request ("Complaint") against the Respondent, the International Charter School of Atlanta ("ICSA"). The parties initially attempted to resolve the dispute through an IDEA-mandated resolution meeting, which took place on December 8, 2016, but they were unable to do so. A mediation session held on December 21, 2016, was similarly unsuccessful.

When mediation failed, the Court ordered the parties to appear for a prehearing conference on January 11, 2017, for the purpose of clarifying the issues to be litigated at the hearing and to address other procedural matters. ICSA was present at the conference; however, the Petitioners failed to appear. Subsequently, at ICSA's request, the prehearing conference was rescheduled

for January 23, 2017. ICSA was again present; the Petitioners failed to appear for the second time.[1]

On January 24, 2017, ICSA filed a Motion for Summary Determination, arguing that the undisputed material facts show that it is entitled to judgment as a matter of law. In support of its Motion, ICSA filed sworn affidavits and authenticated exhibits, as required by the Administrative Rules of Procedure. Ga. Comp. R. & Regs. 616-1-2-.15(1). The Petitioners have not filed a response.[2]

After careful consideration of ICSA's arguments and submissions, and for the reasons stated herein, ICSA's motion for summary determination is **GRANTED**.

II. STANDARD ON SUMMARY DETERMINATION

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

> A party may move, based on supporting affidavits or other probative evidence, for summary determination in its favor on 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); see also G.J. v. Muscogee County Sch. Dist., 704 F. Supp. 2d 1299, 1304-05 (M.D. Ga. 2010) (stating that summary determination under Rule 15 "is similar to a motion for summary judgment"). 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 fact established." Pirkle v. Envtl. 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)).

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[1] Instead, forty-eight minutes after the prehearing conference was to have begun, the calendar clerk received an email from [redacted] stating that she was in the lobby. See Court file. At that point, ICSA's counsel and representatives had already been released.

[2] Pursuant to the Scheduling Order entered on January 17, 2017, the Petitioners' response was due on or before February 3, 2017. See Court file.

Further, pursuant to Rule 15:

> When a motion for summary determination is 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.

Ga. Comp. R. & Regs. 616-1-2-.15(3); G.J., 704 F. Supp. 2d at 1305; see also Lockhart v. Dir. Envtl. 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 Mut. Auto Ins. Co., 186 Ga. App. 854 (1988)).

When all factual issues are decided on summary determination, no evidentiary hearing is required. Ga. Comp. R. & Regs. 616-1-2-.15(7); G.J., 704 F. Supp. 2d at 1305; see also O.C.G.A. § 50-13-41(e)(3); 34 C.F.R. § 300.514(a); Ga. Comp. R. & Regs. 160-4-7-.12(3)(s).

III. FINDINGS OF UNDISPUTED MATERIAL FACT

Viewing the evidence in the light most favorable to the Petitioners, the following facts are undisputed:[3]

1.

[redacted] age [redacted], was enrolled in ICSA by his parents on or about April 26, 2016. Prior to his enrollment at ICSA, [redacted] had attended [redacted] School ("N[redacted]P[redacted]") in the Fulton County School District. (Affidavit of Tanya Parker ["Parker Aff."] ¶ 6 & Ex. A at unnumbered pp. 1, 2.)

[3] The facts set forth in ICSA's Motion, to the extent properly supported by affidavit or other evidence, are deemed established. As the Petitioners have not filed a response, they have failed to demonstrate, by affidavit or other probative evidence, that a genuine issue of material fact exists. See Ga. Comp. R. & Regs. 616-1-2-.15(3); Ellis v. England, 432 F.3d 1321, 1325-26 (11th Cir. 2005).

2.

ICSA is a state charter school focusing on dual language immersion. It has approximately twenty students enrolled. The charter for ICSA was approved by the Georgia State Board of Education in August 2014. (Parker Aff. ¶¶ 1, 5; Affidavit of Roberta Young ["Young Aff."] ¶ 5.)

3.

[redacted]s initial enrollment documentation for ICSA identified him as a special education student with an existing individualized education program ("IEP"). The Petitioners did not disclose at enrollment that [redacted]s current IEP placed him in the GNETS therapeutic program at N[redacted] P[redacted] nor did they provide ICSA with a copy of his existing IEP or Behavior Intervention Plan ("BIP"). (Parker Aff. ¶¶ 6-8 & Ex. A at unnumbered p. 5).

4.

As the school year started in August 2016, [redacted] began demonstrating numerous behavior difficulties, including banging his head against the wall, screaming at classmates, threatening to stab other students, repeatedly refusing to follow directions, wandering around the classroom, talking without permission, and destroying personal and school property. This behavior continued throughout the fall semester and significantly interfered with his learning, as well as the learning of other students. (Affidavit of Kunyang "Emma" Gou ["Gou Aff."] ¶¶ 4-6 & Exs. A, B; Young Aff. ¶ 6; Parker Aff. ¶ 9.)

5.

ICSA requested a copy of the existing IEP from [redacted]s parents in August 2016 during a meeting to discuss [redacted]s behavior problems. [redacted]s parents assured the staff throughout the

month of August that they would provide a copy to the school, yet they did not do so. (Affidavit of Laura Mason ["Mason Aff."] ¶ 7 & Ex. A; Young Aff. ¶ 7; Parker Aff. ¶ 10.)

6.

On or about September 8, 2016, ICSA staff received a copy of [redacted]s existing IEP from the Fulton County School System, which had been implemented in September 17, 2015, and was set to expire September 15, 2016. The plan referred to [redacted]s "delays in personal social skills, self-control, impulse control, fine motor skills, communication, and weaknesses in sequential and quantitative reasoning skills." It also included the results from several evaluations performed from August to October 2014.[4] [redacted]s educational placement was set in a special education setting—specifically, the GNETS program at N[redacted] P[redacted] (Parker Aff. ¶¶ 12, 13; Young Aff. ¶¶ 8, 10; Mason Aff. ¶ 9 & Ex. B.)

7.

On or about September 19, 2016, an IEP meeting took place at ICSA in order to address [redacted]'s recently expired IEP. In attendance at this meeting were [redacted]'s parents and several ICSA staff members, including Roberta Young, the lead special education teacher. As a result of this meeting, [redacted] continued to be and remained identified as a student with a disability, and his IEP placement continued to be in the GNETS program at N[redacted] P[redacted] Ms. Young, in particular, had been concerned that [redacted] could not be appropriately served at ICSA, based upon the school's program and mission in comparison to GNETS. [redacted]s parents did not agree with this placement, however, and refused to sign a form listing the placement. (Young Aff. ¶¶ 1, 10-12 & Ex. A.)

[4] These evaluations covered the following subjects: psychological; academic; communication/speech language; sensory/motor; emotional/social/behavioral; and intellectual/cognitive. (Mason Aff., Ex. B.)

8.

ICSA arranged for a second IEP team meeting to take place on October 20, 2016, so as to more fully examine the issue of [redacted]s educational placement. [redacted]s parents and several ICSA staff members attended the meeting, which resulted in a new IEP that would be effective until October 19, 2017. Once again, the school's members of the IEP team concluded that [redacted]s appropriate educational placement remained in the GNETS program at N[redacted] P[redacted] [redacted]s mother, [redacted] maintained her disagreement with the GNETS placement but wanted [redacted] to stay in special education. (Parker Aff. ¶ 16; Young Aff. ¶ 12 & Ex. B; Mason Aff. ¶ 10; Gou Aff. ¶ 7.)

9.

During the October 2016 IEP team meeting, the participants discussed "classroom testing." However, no requests for further evaluations came out of that meeting. Furthermore, the Petitioners did not request any educational evaluation of [redacted] throughout his enrollment at ICSA. Instead, Petitioner's parents repeatedly represented that they were having [redacted] examined by their own doctor or therapist and would provide the results of this examination to the school. ICSA never received any results or documentation of such evaluations. (Young Aff. ¶ 14 & Ex. B.)

10.

[redacted]s last day of attendance at ICSA was January 4, 2017. On January 10, 2017, [redacted] voluntarily withdrew him from the school.[5] On the withdrawal form, [redacted] noted that [redacted] would attend "another charter school/virtual charter school," and identified the [redacted] ("[redacted]") in Roswell, Georgia. (Parker Aff. ¶ 20 & Ex. B; Gou Aff. ¶ 8.)

[5] Regardless of the second IEP's placement, [redacted] was allowed to remain at ICSA during the pendency of these proceedings, up until the date of his withdrawal. (Parker Aff. ¶ 19.)

IV. CONCLUSIONS OF LAW

The case at bar is governed by IDEA, 20 U.S.C. § 1400, et seq.; its implementing federal regulations, 34 C.F.R. § 300.01, et seq.; and the Rules of the Georgia Department of Education, Ga. Comp. R. & Regs. 160-4-7-.01, et seq. The overriding purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education ["FAPE"] that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). To facilitate compliance with this mandate, IDEA offers procedural safeguards that allow a parent to request a due process hearing regarding the "identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6)(A).

In this case, the Petitioners explicitly identified "[i]dentification (related to the identification of the child's disability)" and "[e]valuation (process of assessment/testing the child)" as their grounds for seeking relief under IDEA. However, the Petitioners offered no factual allegations to support these claims. Instead, the factual allegations of the Complaint appear to focus on [redacted]s educational placement, rather than on issues of identification or evaluation.[6] The factual allegations are, in their entirety:

> [redacted]s father and I decided that the Gnects Program offered great assistances to [redacted] However we strongerly believe [redacted] needed to be challenged beyond the comfort zones of Gnects. [redacted] also mimicked severe behaviors of other children that we felt were inappropriate. Currently we're still waiting for test results from certified doctors that can diagnosis and penpoint [redacted]s specific conditions. Currently in the last two weeks we have seen [redacted] rise to the occasion of trying to completely follow instructions and cooperate in a more constructive way. We do plan to resume any therapy and counselling after test and evaluations are completed.

[6] Despite the confusing nature of the Petitioners' Complaint, ICSA did not file a timely challenge to its sufficiency, as authorized by 20 U.S.C. § 1415(c)(2) and 34 C.F.R. § 300.508(d).

(All errors in original.) The relief requested by the Petitioners also relates to [redacted]s educational placement, as follows:

> My husband and I agree that a better learning environment for [redacted] would be in a smaller classroom, with assistances of a paraprofessional, in a hands on school that focus on stem learning verses traditional learning. A school that affords him the ability to move around. Science Math, Reading School is a huge area of interest for [redacted] He's a brilliant child with a great deals of skills that needs the right school that caters to his ability to explore and invent things. (Science & Technology) My husband believe that when we locate the school that his behavior will change due to the level of excitement for learning in the way that best fits him. During the process of pulling [redacted] out of the Gnects we have learned a great deal, from ICSA teachers and the change of environment. We believe that it would do great harm to place him back in the Gnects environment because it had become to much of a comfortable place rather a place that stretches the talents and abilities we know is capable of now.

(All errors in original.) The Court will address all three potential claims in turn, as well as the remedy sought in the Complaint. ICSA is entitled to summary determination in all respects.

A. Identification

IDEA imposes on the local educational agency ("LEA") – here, ICSA[7] –an obligation to identify, locate, and evaluate all children with disabilities. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(i); Ga. Comp. R. & Regs. 160-4-7-.03(1)(a). To prevail on an identification claim, the Petitioners must show that the LEA "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 County Sch. Dist., 952 F. Supp. 817, 823 (M.D. Ga. 1997); see Bd. of Educ. v. L.M., 478 F.3d 307, 313 (6th Cir. 2007) (adopting Clay T. standard).

[7] Certain charter schools, such as ICSA, are considered LEAs under Georgia law, consistent with IDEA. O.C.G.A. §§ 20-2-2080 to -2092; 34 C.F.R. § 300.28; Ga. Comp. R. & Regs. 160-4-7-.21(28). Where a charter school is also an LEA, the "charter school is responsible for ensuring that the requirements of this part are met, unless State law assigns that responsibility to some other entity." 34 C.F.R. § 300.209(c). The "part" referred to in this provision is Subpart C of the IDEA regulations, 34 C.F.R. §§ 300.200-300.230. Under Subpart C, an LEA "must have in effect policies, procedures, and programs that are consistent with the State policies and procedures established under §§ 300.101 through 300.163, and §§ 300.165 through 300.174." 34 C.F.R. § 300.201. These State policies and procedures include IDEA's "child find" requirement, found at 34 C.F.R. § 300.111, among other mandates.

In this case, the uncontroverted evidence plainly shows that ICSA officials did not overlook evidence of [redacted]s disability. See Clay T., 952 F. Supp. at 823. Instead, throughout [redacted]s tenure at ICSA, he was recognized as a student with a disability who was subject to an IEP. At enrollment, [redacted]s application clearly noted that he had been receiving special education services at [redacted] Elementary School. Subsequently, when the school year started, ICSA staff sought to obtain his existing IEP. ICSA then obtained a copy from N[redacted] P[redacted] when his parents refused to provide one, set up an IEP team meeting upon realizing that the existing plan was expiring, and proceeded to draft a second IEP. Throughout this period, school officials monitored [redacted]'s behavioral problems and even met with his parents to discuss his behaviors. In short, nothing in the record suggests that ICSA overlooked "clear signs of disability" with regard to [redacted]

Furthermore, although ICSA did not order any new evaluations for [redacted] this decision was neither negligent nor lacking in rational justification, for two reasons. See Clay T., 952 F. Supp. at 823. First, N[redacted] P[redacted] had conducted a battery of evaluations in 2014, and those evaluations were still current under IDEA. See 34 C.F.R. 300.303 (child must be reevaluated once every three years). Second, [redacted] had informed the IEP team in October 2016 that [redacted] was being examined by independent medical experts, which the family would share with ICSA. See 34 C.F.R. § 300.502(c)(1) (school must consider results of independent educational evaluations obtained by parents "in any decision made with respect to the provision of FAPE to the child"). Therefore, as the Petitioners have come forward with no evidence that ICSA failed to identify [redacted] as a student with a disability, their identification claim fails as a matter of law.

B. Evaluation

The Petitioners' claim that ICSA violated IDEA's evaluation requirement falls similarly short. When conducting an evaluation for IDEA purposes, a school must

> use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—
>
> (i) whether the child is a child with a disability; and
>
> (ii) the content of the child's individualized education program . . . .

20 U.S.C. § 1414(b)(2)(A). As noted above, the undisputed evidence shows that [redacted] already underwent multiple evaluations in 2014, which led to his special education placement in the GNETS program at [redacted] Elementary School. As less than three years had elapsed since this testing, ICSA was not required to conduct a reevaluation unless it decided one was warranted, or his parents or teacher requested such an evaluation. See 34 C.F.R. § 300.303. Although the IEP team at ICSA discussed additional classroom testing at one point, nothing in the evidence shows that anyone—including [redacted]s parents—actually requested additional evaluations. In fact, as noted above, his parents informed ICSA that they were awaiting their own testing results, a point which the Petitioners reiterate in their Complaint.

C. Placement

Third, although the Petitioners did not explicitly cite [redacted]s educational placement as a ground for relief under IDEA, their Complaint may be read to set forth such a claim. See 34 C.F.R. §§ 300.114-300.117; Dunn-Fischer v. Dist. Sch. Bd., No. 2:10-cv-512-FtM-29SPC, 2011 U.S. Dist. LEXIS 114896, at *12-13 (Aug. 30, 2011) (liberally construing IDEA plaintiff's *pro se* pleadings). More specifically, the Petitioners contend that [redacted] should not be placed in the GNETS program at [redacted] Elementary School—as the IEP team determined in the

October 2016 IEP—but instead should be moved to a school that offers a STEM curriculum and smaller classrooms, among other features. However, the Petitioners cannot bring this claim against ICSA because ICSA never effectuated [redacted]s placement in the GNETS program. Instead, it is undisputed that at the Petitioners' request, [redacted] remained a student at ICSA until he was withdrawn on January 10, 2017. To the extent the Petitioners sought to raise a claim regarding [redacted]s placement in the GNETS program, such a claim cannot be brought against ICSA.

D. Remedy

Moreover, the Complaint's sole requested remedy—placement in a different school, where [redacted] can "push beyond the comfort zones" of GNETS—is prospective in nature and thus unavailable in a proceeding against an LEA that is no longer educating [redacted] See D.H. v. Lowndes County Sch. Dist., No. 7:11-CV-55, 2011 U.S. Dist. LEXIS 101805 at *1 (M.D. Ga. Sep. 9, 2011) (affirming dismissal of claims for prospective relief under IDEA because student had enrolled in another school district prior to filing complaint); Neshaminy School Dist. v. Karla B., No. Civ. A. 96-3865, 1997 U.S. Dist. LEXIS 13571, at *2, 6-7 (E.D. Pa. Sep. 3, 1997) (noting that student's counterclaim for prospective relief in IDEA case was moot because student had moved out of the district in question after the complaint was filed), cited in Dunn-Fischer, 2011 U.S. Dist. LEXIS 114896, at *22-23. Since [redacted]s parents have withdrawn him from ICSA and enrolled him in another LEA, ICSA is no longer authorized to oversee any aspect of his education, including his IEP and educational placement. Therefore, the relief sought by the Petitioners cannot be granted in this proceeding,[8] and ICSA is entitled to judgment as a matter of law.

[8] Compensatory relief —consisting of extra educational services designed to compensate for a past deficient program—remains available under IDEA even after a child withdraws from the school in question. See D.H., 2011 U.S. Dist. LEXIS 101805, at *8; Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1280 (11th Cir. 2008) (defining compensatory education). However, the Petitioners have not sought compensatory relief in this proceeding.

V. DECISION

For the reasons set forth above, ICSA's Motion for Summary Determination is hereby **GRANTED**, and judgment is entered in favor of ICSA as a matter of law.[9]

SO ORDERED, this 2nd day of March, 2017.

KRISTIN L. MILLER
Administrative Law Judge

[9] In addition to its motion for summary determination, the Respondent submitted a motion to dismiss without prejudice, on the grounds that the Petitioners failed to appear for two in-person pre-hearing conferences. As this Court has disposed of the proceeding on the merits by granting summary determination, the motion to dismiss is **DENIED** as moot.

NOTICE OF FINAL DECISION

Attached is the Final Decision of the administrative law judge. The Final Decision is not subject to review by the referring agency. O.C.G.A. § 50-13-41(e)(3). A party who disagrees with the Final Decision may file a motion with the administrative law judge and/or a petition for judicial review in the appropriate court.

Filing a Motion with the Administrative Law Judge

A party who wishes to file a motion to vacate a default, a motion for reconsideration, or a motion for rehearing must do so within 10 days of the entry of the Final Decision. Ga. Comp. R. & Regs. 616-1-2-.28, -.30(3). All motions must be made in writing and filed with the judge's assistant, with copies served simultaneously upon all parties of record. Ga. Comp. R. & Regs. 616-1-2-.04, -.11, -.16. The judge's assistant is Kevin Westray - 404-656-3508; Email: kwestray@osah.ga.gov; Fax: 404-818-3719; 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303.

Filing a Petition for Judicial Review

A party who seeks judicial review must file a petition in the appropriate court within 30 days after service of the Final Decision. O.C.G.A. §§ 50-13-19(b), -20.1. Copies of the petition for judicial review must be served simultaneously upon the referring agency and all parties of record. O.C.G.A. § 50-13-19(b). A copy of the petition must also be filed with the OSAH Clerk at 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303. Ga. Comp. R. & Regs. 616-1-2-.39.