

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

█████., by and through his parents, █████.	:	
and █████ █████; and █████.,	:	
Plaintiffs,	:	
	:	Docket No.:
v.	:	OSAH-DOE-SE-1203970-92-Miller
	:	
LOWNDES COUNTY	:	
SCHOOL DISTRICT,	:	
Defendant.	:	

ORDER GRANTING DEFENDANT’S MOTION TO DISMISS

I. SUMMARY OF PROCEEDINGS

On August 4, 2011, the Plaintiffs filed a Due Process Complaint under the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”) against the Lowndes County School District (“District”), Defendant herein. The Plaintiffs filed an Amended Complaint on September 1, 2011, after the original Complaint was found insufficient. On October 13, 2011, the District moved to dismiss the Amended Complaint on the grounds that the allegations did not support a claim for relief under IDEA.¹ The Plaintiffs filed a response in opposition to the District’s Motion on October 28, 2011, and the District replied on November 2, 2011.

The sole issue presented by the Amended Complaint is whether the District denied █████ a free and appropriate public education (“FAPE”) by refusing to participate in a pre-enrollment meeting to develop his Individualized Education Program (“IEP”). After careful consideration of the parties’ arguments and submissions, and for the reasons stated herein, this Court concludes

¹ The District’s Motion was timely filed. See Order on Notice of Insufficiency (Aug. 23, 2011); Order on Notice of Insufficiency (Sept. 21, 2011); Scheduling Order (Oct. 24, 2011). Further, it was properly titled a motion to dismiss. Documents outside the pleadings may be considered in ruling upon a motion to dismiss, so long as the documents are both undisputed and central to the plaintiff’s claim, as is the case here. Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2008).

that IDEA does not guarantee a right to a pre-enrollment IEP. Therefore, the District's Motion is **GRANTED**.

II. PROCEDURAL HISTORY

The instant matter was preceded by a 2010 action involving the same parties, [REDACTED], et al. v. Lowndes County Sch. Dist., Docket No. OSAH-DOE-SE-1106474 (OSAH 2010) (hereinafter "[REDACTED] I"), over which Administrative Law Judge Amanda C. Baxter presided. In that case, Judge Baxter determined that [REDACTED] had been a student in the District until September 3, 2010, when he enrolled at Georgia Cyber Academy. Thereafter, on September 8, 2010, the Plaintiffs requested a due process hearing in [REDACTED] I. Judge Baxter dismissed [REDACTED] I in its entirety, based on her finding that Georgia Cyber Academy was a program of the Odyssey School, a Georgia state charter public school and local educational agency ("LEA"). She concluded that because [REDACTED] had enrolled in another LEA before the due process complaint was filed, the Plaintiffs had failed to preserve their IDEA claims against the Lowndes County School District. [REDACTED] I, Docket No. OSAH-DOE-SE-1106474 (Orders of Dec. 6, 2010, and Feb. 8, 2011).

The Plaintiffs appealed Judge Baxter's ruling to the United States District Court for the Middle District of Georgia. In an Order dated September 9, 2011, Senior Judge Hugh Lawson affirmed in part and reversed in part Judge Baxter's decision. Judge Lawson determined that [REDACTED]'s pre-complaint enrollment at Georgia Cyber Academy was fatal to the Plaintiffs' claims for prospective relief, but that the claims for compensatory education and reimbursement, which accrued while [REDACTED] was enrolled in the Lowndes County School District, should be allowed to proceed. [REDACTED] v. Lowndes County Sch. Dist., 2011 U.S. Dist. LEXIS 101805 (M.D. Ga. Sept. 9, 2011). The case is currently pending remand to the Office of State Administrative Hearings.

In the case at bar, the Plaintiffs filed both their original Complaint and the Amended Complaint after [REDACTED] I was dismissed by Judge Baxter, but before Judge Lawson remanded the claims regarding compensatory education and reimbursement. The Amended Complaint alleges that the District improperly denied the Plaintiffs' March 2011 request for an IEP meeting regarding D.H., which occurred during the time [REDACTED] was enrolled at Georgia Cyber Academy. (Amended Complaint at 3.) According to the Amended Complaint, [REDACTED] continued his enrollment at Georgia Cyber Academy until August 23, 2011, when he enrolled at Georgia Christian School, a private school in Lowndes County, Georgia. (Amended Complaint at 1, 3.) As of September 1, 2011, the date the Amended Complaint was filed, [REDACTED] remained enrolled at Georgia Christian School.

III. LEGAL ANALYSIS

Pursuant to O.C.G.A. § 50-13-13(a)(6), this Court is authorized to “dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground” See also Ga. Comp. R. & Regs. r. 616-1-2-.22(1)(i); Fed. R. Civ. P. 12(b)(6). For the purpose of deciding the District's Motion, the Court assumes that the allegations contained in the Amended Complaint are true and construes them in the light most favorable to the Plaintiffs. See D.P. ex rel. E.P. v. Sch. Bd. of Broward County, 483 F.3d 725, 728 (11th Cir. 2007). Here, the facts alleged by the Plaintiffs do not support a cause of action against the District. Since [REDACTED] was enrolled in another LEA when his parents requested an IEP meeting, the District was under no obligation to hold a meeting or develop an IEP for him. Accordingly, the Amended Complaint fails to state a claim for relief under IDEA and must be dismissed.

The Plaintiffs concede in their Amended Complaint that [REDACTED] was enrolled in Georgia Cyber Academy on March 16, 2011, when his parents requested an IEP meeting with the

District.² Nevertheless, they argue that because he continued to reside physically in Lowndes County, the District was required to convene an IEP meeting. This argument is without merit. ■ was enrolled in Georgia Cyber Academy, which is an LEA under Georgia law, at all times relevant to the Amended Complaint. Consequently, the District was not required to hold a meeting to develop his IEP.

Under IDEA, an LEA is required to develop an IEP “for each child with a disability in the agency’s jurisdiction.” 20 U.S.C. § 1414(d)(2)(A). Certain charter schools, such as Georgia Cyber Academy, are considered LEAs under Georgia law, consistent with IDEA.³ ■ I, Docket No. OSAH-DOE-SE-1106474 (Order of Dec. 6, 2010); 34 C.F.R. § 300.28; Ga. Comp. R. & Regs. r. 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 part⁴ are met, unless State law assigns that responsibility to some other entity.” 34 C.F.R. § 300.209(c). The Plaintiffs have identified no Georgia law that assigns responsibility for developing an IEP to another entity, nor is this Court

² The Plaintiffs further contend that they requested an IEP meeting in March, April, May, and July 2010, when ■ was enrolled in the District. However, this issue is already being litigated in ■ I and is not relevant to the Plaintiffs’ assertion of a right to a pre-enrollment IEP in the present matter. See ■ v. Lowndes County Sch. Dist., 2011 U.S. Dist. LEXIS 101805, at *9; O.C.G.A. § 9-2-5 (“No plaintiff may prosecute two actions in the courts at the same time for the same cause of action and against the same party. . . . If two such actions are commenced at different times, the pendency of the former shall be a good defense to the latter.”); O.C.G.A. § 9-2-44(a) (“A former recovery or the pendency of a former action for the same cause of action between the same parties in the same or any other court having jurisdiction shall be a good cause of abatement.”); Coastal Water and Sewerage Co. v. Effingham County Indus. Dev. Auth., 288 Ga. App. 422, 425-26 (2007).

³ The Plaintiffs attempt to argue that Georgia Cyber Academy is not an LEA. However, inasmuch as this issue was already decided in ■ I, they are barred from relitigating it here. ■ I, Docket No. OSAH-DOE-SE-1106474 (Order of Dec. 6, 2010), aff’d in part, ■ v. Lowndes County Sch. Dist., 2011 U.S. Dist. LEXIS 101805; see Restatement (Second) of Judgments § 27 (1982) (“When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”).

⁴ 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 the requirement, found at 34 C.F.R. § 300.112, for development of an IEP in accordance with §§ 300.320 through 300.324.

aware of any such law. Therefore, as a public charter school that is also an LEA, Georgia Cyber Academy was responsible for developing ██████'s IEP during the period of his enrollment.⁵

The Plaintiffs further contend that when a student transfers from one LEA to another, IDEA requires the new LEA to provide a pre-enrollment IEP. This assertion is incorrect. Instead, pursuant to 34 C.F.R. § 300.323(e), when a student transfers from one in-state LEA to another during the school year:

the new public agency⁶ (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either—

- (1) Adopts the child's IEP from the previous public agency; or
- (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324.

34 C.F.R. § 300.323(e); see Ga. Comp. R. & Regs. r. 160-4-7-.06(15). Thus, the District is obligated to develop an IEP for ██████ only if he actually enrolls in the District. IDEA simply does not mandate a pre-enrollment IEP meeting where a child is already being educated under an IEP offered by another LEA. Id.

The cases relied upon by the Plaintiffs, including James v. Upper Arlington Sch. Dist., 228 F.3d 764 (6th Cir. 2008), are inapposite. In James, the Sixth Circuit Court of Appeals held that an LEA was required to offer a pre-enrollment IEP for a student living within its jurisdiction. Id. at 768. The student in that case, however, was attending a private school and had not enrolled in another LEA. Therefore, the school district retained certain duties to the

⁵ According to Judge Baxter's Order of December 6, 2010, Georgia Cyber Academy did, in fact, educate ██████ pursuant to an IEP. ██████ I, Docket No. OSAH-DOE-SE-1106474 (Order of Dec. 6, 2010), aff'd in part, ██████ v. Lowndes County Sch. Dist., 2011 U.S. Dist. LEXIS 101805.

⁶ The term "public agency" is defined to include "the SEA, LEAs, ESAs, nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities." 34 C.F.R. § 300.33.

child under IDEA. Id.; see 34 C.F.R. §§ 300.130-300.144. Here, in contrast, [REDACTED] terminated the District's obligation to provide him with an IEP by enrolling in another LEA, which assumed the responsibility of educating him and providing him with special education services under IDEA. [REDACTED] v. Lowndes County Sch. Dist., 2011 U.S. Dist. LEXIS 101805; see M.P. v. Indep. Sch. Dist. No. 721, 326 F.3d 975, 981 (8th Cir. 2003).

IV. ORDER

In accordance with the foregoing, the District's Motion to Dismiss the Plaintiffs' Amended Complaint is **GRANTED**, and the Amended Complaint is hereby **DISMISSED**.

SO ORDERED, this 23rd day of November, 2011.



KRISTIN L. MILLER
Administrative Law Judge