BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[REDACTED] BY AND THROUGH [REDACTED] AND [REDACTED]
Petitioner,

v.

COBB COUNTY SCHOOL DISTRICT,
Respondent.

Docket No.: 1939321
1939321-OSAH-DOE-SE-33-Malihi

Agency Reference No.: 1939321

FILED
OSAH

AUG 23 2019

Kevin Westray, Legal Assistant

FINAL DECISION
AND ORDER GRANTING SUMMARY DETERMINATION

This matter was initiated on May 24, 2019, when Petitioners, proceeding *pro se*, filed a Due Process Hearing Request ("Complaint") with this Court.[1] On June 7, 2019, the Court issued an Order on Notice of Insufficiency, determining that the Complaint was insufficient and ordering Petitioners to amend the Complaint accordingly. On June 17, 2019, Petitioners filed an Amended Complaint ("Amended Complaint"). On June 24, 2019, Respondent Cobb County School District ("Respondent" or "District") filed a second Notice of Insufficiency, and on July 12, 2019, Respondent filed a Motion for Summary Determination. Petitioners filed a response to the Motion for Summary Determination on July 22, 2019.[2]

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[1] The Petitioners previously filed a Complaint in this Court that was dismissed on October 3, 2018, by the Honorable Ana Kennedy: [REDACTED] by and through [REDACTED] and [REDACTED] [REDACTED]; and [REDACTED] v. Cobb County School District, 1907358-OSAH-DOE-SE-33-Kennedy. A motion for reconsideration was denied on December 5, 2018.

[2] On July 17, 2019, the undersigned issued an Order setting forth the rules regarding summary determination and timely electronic submissions, and allowing the Petitioners until August 5, 2019, to file a response to the Motion for Summary Determination. On July 22, 2019, the Petitioners filed their response and stated that they were unable to include certain documents requested via the Open Records Act. On July 23, 2019, the Respondent filed a Status Report Regarding Open Records Request, stating that their response to the Petitioner's Open Records Request was timely and complete.

On July 30, 2019, the Court issued an Order allowing the Petitioners until August 5, 2019, to finalize their response by providing any documents or other evidence they deemed necessary. On August 6, 2019, and on August 12, 2019, the Petitioners filed a Status Report and a Status Update, respectively, regarding certain requested records, and on August 12, 2019, the Respondent filed its own Status Report stating that the Petitioners' second Open Records Request had been timely and appropriately completed. On August 13, 2019, the Petitioners filed another Status Update. Pursuant to the Court's Order of July 30, 2019, the Petitioners were allowed to present additional

The Court has carefully reviewed the briefs and other pleadings filed by the parties in this matter. For the reasons that follow, the District's motion is **GRANTED**.

I. FINDINGS OF FACT

1.

[redacted] is thirteen (13) years old. He is a resident of the District and currently attends Fulton Science Academy, a private school located in Fulton County. (Exhibit A attached to Respondent's Response to the Complaint, Exhibit A attached to Respondent's Motion, Amended Complaint.)

2.

[redacted] last attended a District school, Mountain View Elementary School, as a fourth grader, during the 2015-2016 school year. His last day enrolled with the District was in May of 2016. (Exhibit A attached to Respondent's Response to the Complaint, Exhibit A attached to Respondent's Motion.)

3.

On March 16, 2016, a Response to Intervention Meeting was held. During the meeting, [redacted] parents were informed that they had a right to request that he be considered for specialized instruction under an Individualized Education Program ("IEP") if they so wished. The District never received any subsequent referral for special education services from the parents. (Exhibit A attached to Respondent's Motion, Exhibit B attached to Respondent's

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documents or other evidence by August 5, 2019, but they were not invited to expand on previous arguments or raise additional arguments. The various submissions by Petitioners contain scattered statements regarding the Petitioners' need for additional time to gather documents. The Court has reviewed all of the documents and evidence submitted by the Petitioners, even that which was submitted after the deadline of August 5, 2019.

Motion.)

4.

On March 24, 2016, the District developed a Section 504 plan for [redacted] His qualifying impairments were ADHD, Autism Spectrum Disorder with no accompanying intellectual impairment, and an unspecified anxiety disorder. (Exhibit A attached to Respondent's Motion, Exhibit C attached to Respondent's Motion.)

5.

[redacted] 2015-2016 grade report, his last from the District, shows that [redacted] received all As and Bs in academic subjects, as well as all Satisfactory ratings in non-academic subjects, except for his first nine (9) weeks conduct grade in Music. (Exhibit D attached to Respondent's Motion.)

6.

During the 2016-2017 school year, [redacted] attended The Walker School, a private school within the boundaries of Marietta City Schools ("MCS"). (Exhibit A attached to Respondent's Response to the Complaint, Exhibit A attached to Respondent's Motion.)

7.

On March 31, 2017, MCS conducted a speech-language evaluation for [redacted] as a result of a direct parent referral. [redacted] diagnoses on the evaluation were listed as ADHD, Autism Spectrum Disorder without intellectual impairment (Asperger's), and an anxiety disorder. (Exhibit A attached to Respondent's Motion, Exhibit E attached to Respondent's Motion.)

8.

In April of 2017, [redacted] began to complete The Walker School's curriculum at home. (Exhibit A attached to Respondent's Response to the Complaint, Exhibit A attached to Respondent's Motion.)

9.

On April 24, 2017, MCS completed a special education eligibility report for [redacted] He was found eligible under the exceptionality categories of Autism and Other Health Impaired ("OHI"). (Exhibit A attached to Respondent's Motion.)

10.

The District received the eligibility determination from MCS and conducted an IEP meeting for [redacted] on May 24, 2017.[3] At the meeting, an IEP was developed for [redacted] (Exhibit A attached to Respondent's Response to the Complaint, Exhibit A attached to Respondent's Motion.)

11.

On November 9, 2018, the IEP team held an annual IEP meeting for [redacted] His parents attended in person, and his doctor, Dr. Johnson, participated via telephone. The following matters were discussed: [redacted] anxiety and feeding issues, gifted services, District schools and The Walker School, scheduling [redacted] outside services around attendance at a District school, the availability of accelerated classes, and evaluating [redacted] for redetermination purposes. The team also discussed [redacted] current functioning and various goals, objectives, supportive aids,

[3] As discussed further herein, the Petitioners question the make-up of the IEP team, including whether District employee Beth Hudson actually was in attendance at this IEP meeting on May 24, 2017.

and services as well as placement options. Ultimately, the placement offered was in the general education classroom, with consultative services in Language Arts, Science, Math, and Reading for twenty (20) minutes per month, and consultative services in Social Studies for twenty (20) minutes per day. Additionally, the team developed a strategy for integrating [redacted] back into a District school. (Exhibit B attached to Respondent's Response to the Complaint, Exhibit A attached to Respondent's Motion.)

12.

On December 13, 2018, [redacted] IEP team reconvened for an amendment meeting, and [redacted] mother attended via telephone. The team discussed various matters, including [redacted] mother's request that he be able to contact her at any time during the day, [redacted] upportive aids and services, and his transition to Hightower Trail Middle School within the District. In response to several concerns raised by [redacted] mother (including [redacted] food intake while at school), the team requested additional information, such as a feeding plan and information from the private school regarding services provided. For various reasons, information requested by the IEP team could not or would not be provided by the parents. (Exhibit B attached to Respondent's Response to the Complaint, Exhibit A attached to Respondent's Motion.)

13.

Currently, [redacted] is eligible to receive services under the categories of Autism and OHI. (Exhibit B attached to Respondent's Response to the Complaint, Exhibit A attached to Respondent's Motion.)

14.

[REDACTED] was not enrolled with the District and did not attend a District school or a private school located within the District at any time during the two years prior to the filing of Petitioners' Complaint. (Exhibit A attached to Respondent's Motion.)

II. CONCLUSIONS OF LAW

A. Standard of Review

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 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). 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. 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)); see generally A.B. v. Clarke County Sch. Dist., 2009 U.S. Dist. LEXIS 27102, at *9 (M.D. Ga. 2009); Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2006). The party opposing the motion for summary determination "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).

Because the Petitioners are *pro se*, they have been afforded some leeway in the manner in which documents were submitted to the Court and how their arguments were made. However, the Petitioners nonetheless are required to offer sufficient evidence, beyond mere allegations or

denials, to show that there are genuine issues of material fact that make summary determination inappropriate.

B. Claims Arising Under the ADA or Section 504

OSAH's jurisdiction in an IDEA due process hearing does not extend to causes of action that arise under other federal laws, such as the Americans with Disabilities Act ("ADA") or Section 504 of the Vocational Rehabilitation Act ("Section 504"). See Atlanta Indep. Sch. Sys. v. S.F., 2010 U.S. Dist. LEXIS 141552, *21-22 n.4 (N.D. Ga. February 22, 2010) ("There is nothing in the Georgia Administrative Code section applicable to IDEA dispute resolution that suggests that the impartial due process hearing is an appropriate venue for raising non-IDEA claims.") (citation omitted).

Of course, under certain circumstances, a petitioner's claims under the ADA or Section 504 may seek relief that is also available under the IDEA, in which case federal law requires that the petitioner first exhaust the IDEA's administrative procedures. See Durbrow v. Cobb Cty. Sch. Dist., 887 F.3d 1182, 1190 (11th Cir. 2018) ("Since the only remedy available under the IDEA is injunctive relief for the wrongful denial of a FAPE, any such claim must undergo an administrative hearing before proceeding to state or federal court, whether the claim arises under the IDEA, § 504, the ADA, or any other federal law.") (citing Fry v. Napoleon Cmty. Sch., 137 S.Ct. 743, 750 (2017)). In other words, "if relief is sought pursuant to other Federal statutes and the IDEA may provide relief for the same allegations that form the basis of claims asserted in a later action, those allegations must first be contested through the IDEA's administrative process." S.F., 2010 U.S. Dist. LEXIS 141552, at *18.

The exhaustion requirement does not expand OSAH's jurisdiction, however, or confer authority on OSAH to resolve all legal claims between parties regardless of the origin of such

claims. Accordingly, the Court concludes that OSAH does not have jurisdiction over any ADA or Section 504 claims that Petitioners may be asserting.

C. Claims Arising Prior to May 24, 2017

Claims brought under the IDEA are typically subject to a two-year statute of limitations. 20 U.S.C. § 1415(b)(6)(B); Mandy S. v. Fulton County Sch. Dist., 205 F. Supp. 2d 1358 (N.D. Ga. 2000), aff'd without opinion, 273 F.3d 1114 (11th Cir. 2001). The District argues that the Petitioners' Amended Complaint articulates concerns outside of the applicable statute of limitations, including events occurring in 2015 and 2016. In response, Petitioners focus on alleged procedural violations in conjunction with the IEP meeting of May 24, 2017, and they state their concerns that [redacted] needs would not be met if he were to return to a District school.

To the extent that Petitioners have asserted claims arising before May 24, 2017, such claims are barred by the statute of limitations. These time-barred claims include, for example, claims from the 2015-16 school year that [redacted] was improperly denied gifted services (Petitioners specifically refer to an IEP meeting on March 24, 2016), was bullied, was denied an IEP, had diagnoses ignored, was not timely evaluated, and was denied a free appropriate public education ("FAPE").

D. Claims Previously Adjudicated

The doctrine of res judicata is set forth in the Georgia Code as follows:

> A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.

O.C.G.A. § 9-12-40. The Georgia Court of Appeals has explained that "[a] dismissal with prejudice is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff. It is res judicata of all questions which might have been

litigated in the suit." Cranford v. Carver, 124 Ga. App. 767, 768 (1971). See also Hutcheson Med. Ctr. v. Scealf, 205 Ga. App. 204, 206 (1992) ("A dismissal with prejudice is res judicata of all questions which might have been litigated in the action and is a final disposition, barring the right to bring another action on the same claim.").

As noted, the Petitioners previously filed a Complaint with OSAH on August 29, 2018, that was dismissed with prejudice on October 3, 2018, by the Honorable Ana Kennedy: [redacted] by and through [redacted] and [redacted], and [redacted] v. Cobb County School District, 1907358-OSAH-DOE-SE-33-Kennedy. The decision states that "all of the claims raised are barred by the two-year statute of limitations." A motion for reconsideration was denied on December 5, 2018. Thus, any claims related to events occurring during the 2015-2016 school year, as addressed in the 2018 decision, are also barred by res judicata.

Regarding the instant action, in their response to the Motion for Summary Determination, the Petitioners argue that they have not previously raised any claims related to the IEP meeting of May 24, 2017. They allege that Beth Hudson was not actually present for that meeting and should not have been designated as both a general education and a special education teacher, which resulted in an improperly composed IEP team, which resulted in a procedural violation of FAPE, which, in turn, they argue, warrants tuition reimbursement. They also allege that they did not receive a copy of their procedural rights until October 2018. The undersigned observes, and the District has acknowledged in its pleadings, that 34 CFR 300.513(c) permits a parent to file a "separate due process complaint on an issue separate from a due process complaint already filed." Therefore, the undersigned next considers whether there is a genuine issue of material fact regarding a procedural violation of FAPE.

E. Alleged Procedural Violation of FAPE

In support of their argument that the IEP meeting of May 24, 2017, was procedurally inadequate, the Petitioners have submitted evidence that purports to show that Beth Hudson was not present for the meeting and should not have been designated as both a general education and a special education teacher. For example, the Petitioners have submitted records showing when Beth Hudson's employee badge was used to access certain doors at the school and a copy of Beth Hudson's calendar for May 24, 2017.

IDEA regulations mandate who is to be included in an IEP team. 34 C.F.R. § 300.321(a). But even if one assumes that there were procedural inadequacies as a result of the composition of the IEP team on May 24, 2017, or any other procedural inadequacies, that is not the end of the inquiry. The Petitioners must also present affidavits or other evidence to show that there is a genuine issue of material fact for determination as to whether the procedural violations "(I) impeded the child's right to a [FAPE]; (II) significantly impeded the parents' opportunity to participate in the decision[-]making process regarding the provision of a [FAPE] to the parents' child; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2)(i)-(iii). While the IDEA's procedural safeguards are complex, the Eleventh Circuit has rejected the notion that violation of a procedural requirement is a per se denial of FAPE. Rather, the Eleventh Circuit has held that a petitioner must show actual harm as a result of the procedural violation in order to be entitled to relief. See Weiss v. Sch. Bd. of Hillsborough Cty., 141 F.3d. 990, 996-97 (11th Cir. 1998); see also Doe v. Ala. Dep't of Educ., 915 F.2d 651, 662-63 (11th Cir. 1990).

As explained above, the party opposing the motion for summary determination "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). The Petitioners, although they have submitted numerous documents to the Court, have not provided such evidence.

F. Gifted Services

A child eligible for services under the IDEA may also be eligible for gifted services. However, giftedness is not a category of eligibility under the IDEA, and gifted services are not special education services under the IDEA. See 34 C.F.R. § 300.8 (listing specified impairments); Letter to Anonymous, 55 IDELR 172 (OSEP 2010) ("The IDEA is silent regarding 'twice exceptional' or 'gifted' students.").

In their Response to the Motion for Summary Determination, the Petitioners argue that gifted services are necessary to reduce ███ anxiety; they state that ███ doctors recommended gifted services for this reason. "[A] physician's diagnosis and input on a child's medical condition is important and bears on the team's informed decision on a student's needs. But a physician cannot simply prescribe special education[.]" Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 640-41 (7th Cir. 2010). Nor, in this case, can a physician prescribe gifted education. The IEP team is to determine the special education and related services, and supplementary aids, services, and other supports that are needed for the child to advance appropriately toward meeting the child's annual goals. See 34 C.F.R. § 300.320(a)(4).

G. Proper Notice of Private Placement

Under certain circumstances, when a child is placed by a parent in a private educational program, the parent may seek reimbursement from the public school district. See 34 C.F.R. § 300.148. Tuition reimbursement may be denied where, prior to removing their child from public school, parents did not "inform the IEP Team that they were rejecting the placement proposed by

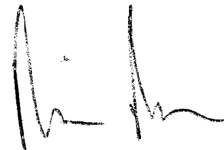
the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense." 34 C.F.R. § 300.148(d)(1)(i). Exceptions to this regulation include situations in which compliance "would likely result in serious emotional harm to the child." 34 C.F.R. § 300.148(e)(2).

In their Response to the Motion for Summary Determination, the Petitioners acknowledge that they did not provide proper notice prior to removing [redacted] from public school in 2016. Indeed, this issue was addressed in the decision of October 3, 2018: "There is no indication that Petitioners provided prior notice of their intention for unilateral placement at public expense." The Petitioners now argue, however, that their failure to do so was a result of their not having received a copy of their procedural rights, and that compliance with the regulation would have resulted in serious emotional harm to [redacted] The undersigned concludes that this claim is barred by res judicata, as discussed above.

III. DECISION

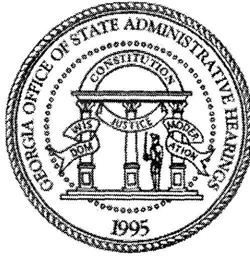
For the foregoing reasons, the District's motion for summary determination is **GRANTED**, and Petitioners' Amended Complaint is **DISMISSED**.[4]

This the 23rd day of August 23, 2019.



Michael Malihi
Administrative Law Judge

[4] Any other pending motions, including the second Notice of Insufficiency, are dismissed 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. 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: 404-818-3751; 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.