

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

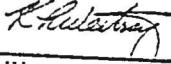


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FULTON COUNTY SCHOOL  
DISTRICT,

NOV 4 2013

Plaintiff,

: Docket No.:   
Kevin Westray, Legal Assistant  
: OSAH-DOE-IEE-1341914-60-Baxter

v.

Defendant.

:

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

**For Plaintiff:** Neeru Gupta, Esq.

**For Defendant:** Parent, *pro se*

**I. INTRODUCTION**

On May 24, 2013, Fulton County School District (“District”) brought this due process hearing request pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1482., against [REDACTED] (“Defendant”), a minor, by and through his parents, [REDACTED] and [REDACTED], seeking a determination of whether Defendant is entitled to an Independent Educational Evaluation (“IEE”) at public expense.<sup>1</sup> On October 7, 2013, the District filed a Motion for Summary Determination. On October 23, 2013, the Court held oral argument on the motion. After careful review of the record and submissions, and for the reasons set forth below, the District’s Motion for Summary Determination is **GRANTED**.

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<sup>1</sup> The hearing in this matter was originally set for July 8, 2013. Subsequently, the Court granted two joint motions for continuance to provide the parties time to resolve this matter in mediation.

## **II. FINDINGS OF UNDISPUTED MATERIAL FACTS**

1.

Defendant resides at [REDACTED] Road, [REDACTED] Georgia 30341 and is a resident of DeKalb County School District. (Complaint, p. 1-2.)

2.

Defendant is currently enrolled in [REDACTED] Academy, a private school in Fulton County School District. (Complaint, p. 1-2.)

3.

Defendant participates in the Georgia Special Needs Scholarship Program<sup>2</sup>, which allows him to attend [REDACTED] Academy. (Exhibit A, p. 2; Affidavit of Neeru Gupta ¶ 3.)

4.

The District performed a psychoeducational evaluation to determine Defendant's eligibility for special education services in Georgia. (Complaint, p. 2.)

5.

Defendant has requested an IEE at public expense because he alleges that the evaluation conducted by the District would deny him a free appropriate public education ("FAPE"). Specifically, Defendant's parents were concerned that the school psychologist misstated Defendant's age and that the evaluation "lacked teacher reports." Defendant requested a "functional and academic assessment of [Defendant's] strengths and weakness" and other specific exams. (Response to Complaint; Exhibit A, p. 1.)

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<sup>2</sup> Throughout the hearing, the parties both refer to "S.B. 10," commonly used to reference Georgia Senate Bill 10, enacted by Ga. L. 2007, p. 197, § 1/SB 10, which created the Georgia Special Needs Scholarship Act.

Unbeknownst to the District, Defendant's parents conducted an IEE at their own expense during the pendency of this hearing. (Testimony of [REDACTED])<sup>3</sup>

### **III. STANDARD FOR SUMMARY DETERMINATION**

On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact for determination. Ga. Comp. R. & Regs. ("OSAH Rule") 616-1-2-.15(1). When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials, but must show by supporting affidavit or other probative evidence that there is, truly, a genuine issue of material fact that requires a trial. OSAH Rule 616-1-2-.15(3); *Matsushita Elec. Indus. Col. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *First Nat. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 270 (1968).

### **IV. CONCLUSIONS OF LAW**

#### **A. Defendant waived his IDEA rights by accepting the Georgia Special Needs Scholarship**

Pursuant to IDEA, parents have the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency. 20 U.S.C. §§ 1415(b)(1) and 1415(d)(2)(A); 34 C.F.R. 300.502(b). In response to a request for an IEE, a school district may file a due process complaint and request a hearing to show that its evaluation is appropriate. 34

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<sup>3</sup> The District contends that because this matter involves a reimbursement of an IEE, Defendant's parents must file their own due process complaint. However, the applicable regulations do not specify that parents, rather than the school district, must file a due process request when they have already performed testing. See generally, 20 U.S.C. § 1415; 34 C.F.R. § 300.502(b)(1)-(3). Moreover, the object of the due process hearing is to afford parents the opportunity to challenge an evaluation and to allow the school district to defend the appropriateness of their evaluation, and "there is no reason to exalt form over substance." *P.R. ex rel. C.R. v. Woodmore Local Sch. Dist.*, 256 Fed. Appx. 751, 754-55 (6th Cir. 2007) (holding that there was no need for the school district to file a separate due process complaint when the parents had already done so). Finally, this due process hearing was already pending when Defendants moved forward with their own testing, rendering it unnecessary to file a second complaint to examine the same issue.

C.F.R. 300.502(b). If the hearing officer determines that the agency's evaluation is appropriate, the parent still has the right to an IEE, but not at public expense. *Id.*

The Georgia Special Needs Scholarship Act, Georgia Code sections 20-2-2110 through 20-2-2118 created the Special Needs Scholarship Program for the purpose of "tailoring a student's education to that student's specific needs and enabling families to make genuine and independent private choices to direct their resources to appropriate schools." O.C.G.A. § 20-2-2111(4). Essentially, the Act created a voluntary voucher system for students with disabilities in Georgia, which allows parents to request and receive a scholarship for the student to enroll and attend a participating private school. O.C.G.A. § 20-2-2113(4). The scholarship remains in force until the student returns to his assigned school in the resident public school system, graduates from high school, or turns 21 years old. O.C.G.A. § 20-2-2114(e). "Acceptance of a scholarship shall have the same effect as a parental refusal to consent to services pursuant to [IDEA]." O.C.G.A. § 20-2-2114(f); Ga. Comp. R. & Regs. 160-5-1-.34(6)(d).

There is no dispute that Defendant accepted and is currently receiving the Georgia Special Needs Scholarship. Defendant argues that a separate and distinct right to an evaluation exists, even during the period when he participates in the Special Needs Scholarship, because the LEA must still "locate, identify, and evaluate" children enrolled in its district. The Court finds no merit to Defendant's argument. The "right" to an IEE at public expense is an explicit right under IDEA available only to those students entitled to services under IDEA. *See* 34 C.F.R. § 300.502(a)(1); Ga. Comp. R. & Regs. 160-4-7-.09(4)(a).

Georgia's IDEA regulations provide that although a parent "may revoke consent for the receipt of special education and related services once the child is initially provided special education and related services," revocation of consent "is for *all* special education and related

services; *not individual services.*” Ga. Comp. R. & Regs. 160-4-7-.09(6)(l) (emphasis added). Furthermore, the Scholarship Program’s implementing regulations also expressly provide that acceptance of a special needs scholarship “waives a parent’s rights under IDEA.” Ga. Comp. R. & Regs. 160-5-1-.34(6)(d). Thus, once a parent has accepted a special needs scholarship and waived their IDEA rights, they are not entitled to any special education and related services, including evaluations, during the waiver period.

Finally, when parents of a child with a disability under IDEA refuse to consent to special education and related services, IDEA mandates that the District “*shall not* provide special education and related services to the child . . . .” 20 U.S.C. § 1414(a)(1)(D)(ii)(II). When a parent revokes consent for special education services, “the child is considered a general education student.” 73 Fed. Reg. 73,011 (2008). Both IDEA and Georgia implementing regulations also mandate that after the parent of a child with a disability revokes consent for the continued provision of special education and related services, the District may not continue to provide special education and related services and is not required to convene an IEP meeting or develop an IEP for further provision of special education and related services. *See* 34 C.F.R. § 300.300(b)(3)(iii), 300.300(b)(4)(i); Ga. Comp. R & Regs. 160-4-7-.09(6)(h)(2), 160-4-7-.09(6)(l)(3)(i).

The Court concludes that both federal and state law prohibit the District from providing special education and related services because Defendant’s parents revoked consent for all IDEA services by accepting the Special Needs Scholarship. This waiver includes receiving an IEE at public expense. Therefore, the evidence, construed favorably to Defendant, demonstrates that the District is entitled to judgment as a matter of law.

**B. The District is not responsible for ensuring that Defendant receives FAPE**

A student who participates in the Special Needs Scholarship may forfeit the scholarship, return to public school, and seek services under the IDEA. O.C.G.A. § 20-2-2114(e). The Georgia Department of Education<sup>4</sup> (“GDOE”) makes clear that a student receiving the Scholarship must return to public school to receive “all rights and services pursuant to IDEA, so long as the child remains eligible to receive services through an IEP.” *See Georgia Special Needs Scholarship Program Frequently Asked Questions*, Georgia Department of Education, August 2013, p. 18. Here, it is undisputed that Defendant is currently enrolled in and attends Chrysalis Academy, a private school. Because he has not returned to any public school, the waiver of IDEA rights made effective by his voluntary acceptance of scholarship funds remains in effect.

Moreover, even if Defendant were to leave [REDACTED] Academy and return to a public school, he could not enroll in any school within the District because he is not a resident. An LEA must “locate, identify, and evaluate all children with disabilities who are enrolled [in private schools] in the school district served by the LEA.” 34 C.F.R. § 300.131; *see also* 20 U.S.C. § 1412(a)(10)(A)(ii). However, an LEA is only obligated to make FAPE available to each eligible child *residing in the LEA*. Ga. Comp. R. & Regs. 160-4-7-.02(1)(c)(1) (emphasis added). Accordingly, Defendant must return to a DeKalb County public school to enforce his right to FAPE—and other IDEA rights, including the right to an IEE at public expense—from that LEA alone.

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<sup>4</sup> The GDOE is the body empowered to develop rules and procedures to implement the Special Needs Scholarship pursuant to Georgia Code section 20-2-2117.

**V. ORDER**

For the foregoing reasons, the District's Motion for Summary Determination is **GRANTED** and Defendant is not entitled to an independent educational evaluation at public expense.

**SO ORDERED** this 4<sup>th</sup> day of November, 2013.

  
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**Amanda Baxter**  
**Administrative Law Judge**