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Kevin Westray, Legal Assistant

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] by and through her parent, [redacted] and [redacted]	:	
	:	
Petitioners,	:	**Docket No.:**
	:	**OSAH-DOE-SE-[redacted]-18-Miller**
v.	:	13-280494
	:	
BUTTS COUNTY SCHOOL DISTRICT,	:	
	:	
Respondent.	:	

[redacted] by and through her parent, [redacted] and [redacted]	:	
	:	
Petitioners,	:	**Docket No.:**
	:	**OSAH-DOE-SE-[redacted]-18-Miller**
v.	:	15-300821
	:	
BUTTS COUNTY SCHOOL DISTRICT,	:	
	:	
Respondent.	:	

FINAL DECISION

For Petitioners:

[redacted]
Parent, *pro se*

For Respondent:

David M. Waldroup, Esq.
Janet Scott, Esq.
Smith, Welch, Webb & White, LLC

I. SUMMARY OF PROCEEDINGS

On August 10, 2012, the Petitioners, [redacted] and her mother, [redacted] filed a due process hearing request ("2012 Complaint") against the Respondent, the Butts County School District ("District"), under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). The 2012 Complaint was eventually dismissed, and the Petitioners appealed to the United States District Court for the Middle District of Georgia, where they filed an Amended Complaint on July 1, 2013. Subsequently, on November 25, 2013, the District Court remanded the case to the Office of State Administrative Hearings ("OSAH") for a hearing on the merits of the Petitioners' Complaint and Amended Complaint.[1] On October 3, 2014, the Petitioners also filed a separate due process hearing request ("2014 Complaint") before OSAH, which raised altogether different issues. The 2014 Complaint was consolidated for hearing with the 2012 Complaint and Amended Complaint.

The primary allegation raised in the 2012 Complaint and Amended Complaint was that from January 2008 until the fall of 2010, the District inappropriately provided [redacted] with home-based and/or modified-day services, rather than in-school services during the regular school day. However, because IDEA claims are subject to a two-year statute of limitations under 20 U.S.C. § 1415(f)(3)(C) and the Petitioners were unable to establish a basis for tolling the statute of limitations,[2] they were limited to pursuing claims that arose on or after August 10, 2010, two years prior to the date that the 2012 Complaint was filed. See Initial Order on Statute of

[1] Although the District Court specified only that a hearing should be held on the claims asserted in the Amended Complaint, the undersigned has interpreted the District Court's order to require a hearing on the substantive allegations of both the 2012 Complaint and the Amended Complaint, to the extent the Amended Complaint raises additional claims against the District.

[2] A hearing on the statute of limitations issue took place on November 6, 2014.

Limitations (Nov. 7, 2014); Memorandum Opinion and Order on Statute of Limitations (Dec. 2, 2014).

Thus, at the evidentiary hearing held on December 2, 2014,[3] the following claims remained for determination, as alleged in the 2012 Complaint, Amended Complaint, and/or 2014 Complaint: first, whether the District failed to provide [redacted] with a free appropriate public education from August 10, 2010, to the present, by refusing to offer her in-school special education services during regular school hours; and second, whether the District retaliated against the Petitioners, in violation of IDEA, through its handling of an incident involving bugs found on [redacted]s person, its filing of two reports with the Division of Family and Children Services ("DFCS"), and its practice of documenting marks and injuries to [redacted] as observed during the school day.[4]

After consideration of the evidence and for the reasons set forth below, the Court finds that [redacted] has received a free appropriate public education from August 10, 2010, to the present, and that the District did not take any retaliatory action against the Petitioners, either through its handling of the bug incident, its filing of the DFCS reports, or its injury documentation practices. Accordingly, the Petitioners are not entitled to any relief under IDEA.

II. FINDINGS OF FACT

1.

The Findings of Fact contained in the Memorandum Opinion and Order on Statute of Limitations entered on December 2, 2014, are adopted and incorporated herein by reference.

[3] The record closed on January 5, 2015, when the transcript was received.

[4] Although the DFCS reports and injury documentation practices were not specifically mentioned in the 2014 Complaint, the District did not object to litigating these issues at the hearing.

A. Free Appropriate Public Education

2.

The District has provided [redacted] with in-school special education services during regular school hours since the 2010-11 school year began in August 2010. The Petitioners are satisfied with the services [redacted] has received since August 10, 2010. (T. 12-13.)

B. Retaliation

3.

In September 2014, [redacted] was a student at [redacted] Middle School in a special education class taught by Amy Clyburn. On Friday, September 5, 2014, while changing [redacted]s diaper, Ms. Clyburn discovered two small bugs of unknown provenance on [redacted]s person and clothing. One of the bugs was on her blue jeans, and the other was in her diaper area. Ms. Clyburn reported this to the school nurse and to the principal, Renee Burgdorf, then called [redacted] and left a voice mail message informing her about the bugs. (T. 61.)

4.

On Monday, September 8, 2014, [redacted] returned to school. While changing her diaper that morning, Ms. Clyburn discovered three additional bugs of the same type inside [redacted]'s diaper.[5] Ms. Clyburn again spoke to the school nurse and Ms. Burgdorf. The nurse visited the classroom and examined the bugs, but she was unable to identify them. Both Ms. Clyburn and Ms. Burgdorf called [redacted] and left voice mail messages for her. [redacted] did not return their calls that day. (T. 47-48, 61-62, 81-82.)

[5] Ms. Clyburn's testimony at the hearing was to some extent inconsistent with the written documentation regarding the number and location of the bugs found on each date. However, the parties do not genuinely dispute that bugs were present on Friday, September 5, and Monday, September 8, 2014. (T. 61-62; Exhibits J-35, J-36, J-37.)

5.

When she did not hear from [redacted] Ms. Burgdorf contacted the District's head nurse. They discussed the issue and decided to follow the District's policy on head lice, which was the only District policy regarding bugs of any kind. Ms. Burgdorf wrote a letter to [redacted] informing her of the bugs that had been found. The letter further stated as follows:

> Because of the numerous findings along with the bites on [redacted] she will be excluded from school until a clinical assessment has been performed by a private physician to identify the nature of possible infestation and treatment, if needed. A clearance letter and diagnosis must be provided in order to return to school.

A specimen of the bug was enclosed in a plastic bag and included with the letter, which was sent home in [redacted]'s bookbag. (T. 47-49; Exhibit J-36.)

6.

The District's policy on head lice provides that infested children will be sent home with a letter to their parents, and that "[c]hildren cannot return to school until treatment has been completed and a letter of clearance from the Butts County Health Department is provided to the school." At the hearing, [redacted] was concerned that the District did not follow its head lice policy, to the extent Ms. Burgdorf instructed her to obtain an assessment and clearance letter from a private physician rather than the Butts County Health Department. However, Ms. Burgdorf testified that an assessment by either a private physician or the Butts County Health Department would have sufficed to comply with the policy as she understood it, and that she had followed the same procedure she would have followed for any other student in the same situation. Ms. Burgdorf's testimony was credible. (T. 49-58, Exhibit J-39.)

7.

[redacted] visited her personal physician, Dr. Lezlie Biles, on Tuesday, September 9, 2014, and did not attend school that day. She returned to school on Wednesday, September 10, 2014. Dr.

Biles' office faxed a letter to [redacted] Middle School stating that [redacted] was authorized to return to school with no restrictions. Although the letter contained no further information and was received after the school day had begun, [redacted] was accepted back into school as soon as she arrived on the morning of Wednesday, September 10, 2014. (T. 50, 58; Exhibit J-38.)

8.

Because Ms. Clyburn is a mandated reporter and her discovery of the bugs caused her to be concerned about [redacted]'s welfare, she filed a report with DFCS. In addition to providing information about the bugs found on [redacted]'s person and clothing, her report stated that both [redacted] and [redacted] were consistently well-dressed and groomed, and that [redacted] "is always open to communications and welcoming of teacher concerns." (T. 64-65; Exhibit J-35.)

9.

Approximately one week prior to the bug incident, on September 2, 2014, [redacted] exhibited unusual behavior in the classroom. She began pulling at her pants and said, "Stop boy." This vocalization was unexpected because [redacted] is essentially nonverbal. It also appeared to Ms. Clyburn that [redacted] "was shooing something away." Because [redacted] had not previously exhibited these behaviors or vocalizations, Ms. Clyburn was concerned about possible abuse and submitted a report to DFCS. This report made the same positive observations about [redacted] and [redacted] noted in the bug report. (T. 64-65, 71-72, 75; Exhibit J-35.)

10.

At the hearing, [redacted] also expressed concern regarding the District's practice of documenting [redacted]s injuries, which [redacted] interpreted as a suggestion that she had abused her daughter. She believes that beginning in May 2014, [redacted] "was being stripped and checked every

day" for marks or injuries.[6] However, Ms. Clyburn testified that she documented only the injuries that she observed in the ordinary course of the school day, which might include injuries observed during a diaper change or while changing [redacted]s shirt. Ms. Clyburn kept these notes in order to track [redacted] self-injurious behavior, as well as to determine which injuries had occurred at home and to provide [redacted] with an explanation of any injuries that occurred at school. Ms. Clyburn's testimony was credible. Indeed, [redacted]'s school record is replete with examples of her self-injurious behavior, which has occurred regularly[7] and has often presented a danger not only to [redacted] but to staff members and other students in her class. Furthermore, [redacted]s daily communication logs also contain notes regarding her seizures, behavior, and activities at school, in addition to documentation of marks and injuries. Ms. Clyburn keeps daily reports for all of her students, which are individualized to address their specific needs. (T. 28-30, 66-67, 78; Exhibits J-28, J-29, J-30, J-31, J-32.)

III. CONCLUSIONS OF LAW

1.

The case at bar is governed by IDEA, 20 U.S.C. §§ 1400-1482; its implementing federal regulations, 34 C.F.R. Part 300; and the Rules of the Georgia Department of Education, Ga. Comp. R. & Regs. 160-4-7-.01 to -.21.

2.

Claims brought under IDEA are subject to a two-year statute of limitations. 34 C.F.R. § 300.507(a)(2). Here, because the Petitioners' 2012 Complaint was filed on August 10, 2012,

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[6] The District did not begin its practice of documenting [redacted]s marks and injuries in May 2014; it has done so for many years. However, in August 2013, Ms. Clyburn began using sheets of paper containing an outline of the human body to note the location of particular marks. It is this practice that [redacted] believes is retaliatory. (T. 76-78.)

[7] Although [redacted] continues to have self-injurious and aggressive outbursts at school, the frequency, intensity, and duration of her outbursts have decreased over time. (Exhibits J-28, J-29, J-30, J-31, J-32.)

only events occurring after August 10, 2010, are at issue in this proceeding. Id.; see Memorandum Opinion and Order on Statute of Limitations (Dec. 2, 2014).

3.

The Petitioners bear the burden of proof in this matter. Schaffer v. Weast, 546 U.S. 49 (2005); Ga. Comp. R. & Regs. 160-4-7-.12(3)(n); 616-1-2-.07. The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

A. Free Appropriate Public Education

4.

The overriding purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs . . . ." 20 U.S.C. § 1400(d)(1)(A). The statute defines "free appropriate public education" as follows:

> The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 614(d) [20 USCS § 1414(d)].

20 U.S.C. § 1401(9).

5.

The United States Supreme Court has developed a two-part test for determining whether a free appropriate public education has been provided. Board of Educ. v. Rowley, 458 U.S. 176,

206 (1982). The first inquiry is whether the school district complied with the procedures set forth in IDEA. Id. The second prong of the test is whether the individualized education program ("IEP") developed through these procedures is "reasonably calculated to enable the child to receive educational benefits." Id. at 206-07.

6.

In this case, the Petitioners presented no evidence that the District failed to provide [redacted] with a free appropriate public education from August 10, 2010, to the present, either by disregarding IDEA's procedures or by failing to develop an IEP that was reasonably calculated to enable her to receive educational benefits. Therefore, the Petitioners did not meet their burden as to this issue.

B. Retaliation

7.

Under IDEA, the Petitioners are afforded an "opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." 20 U.S.C. § 1415(b)(6). This provision includes the implicit authorization to pursue claims of retaliation under IDEA. M.T.V. v. DeKalb Cnty. Sch. Dist., 446 F.3d 1153, 1158-59 (11th Cir. 2006).

8.

The Petitioners failed to prove, by a preponderance of the evidence, that the District used the bug incident as a pretext to retaliate against the Petitioners for exercising their rights under IDEA. Rather, the evidence showed that District personnel were justifiably concerned about the unidentified bugs found on the person and clothing of [redacted] a nonverbal, severely intellectually

disabled student, over the course of two school days. The District's handling of the incident was appropriate under the circumstances.

9.

The Petitioners failed to prove, by a preponderance of the evidence, that the District retaliated against them by filing two reports with DFCS. Under Georgia law, teachers are mandated reporters who must file a report with DFCS[8] whenever there is "reasonable cause to believe that a child has been abused." O.C.G.A. § 19-7-5(c)(1)(H), (c)(2). For purposes of the child abuse reporting statute, the term "reasonable cause to believe" means "reasonable cause to suspect." 1976 Ga. Op. Att'y Gen. 76-131; O'Heron v. Blaney, 276 Ga. 871, 873 (2003). Here, Ms. Clyburn had reasonable cause to suspect abuse,[9] especially given [redacted]s severe disabilities and inability to communicate, and she reported her concerns to DFCS as required by Georgia law.

10.

The Petitioners failed to prove, by a preponderance of the evidence, that the District's practice of documenting [redacted]s marks and injuries was retaliatory. There is no evidence that this documentation was kept for any purpose other than to ensure the health, safety, and welfare of [redacted]

[8] Under the statute, a teacher must report "to a child welfare agency providing protective services, as designated by the Department of Human Services . . . ." O.C.G.A. § 19-7-5(e). The Department of Human Services has designated its Division of Family and Children Services as the child welfare agency that receives reports of suspected abuse. See http://www.dfcs.dhr.georgia.gov. Teachers may also report to their school principal or another school designee, who would then make the report to DFCS. O.C.G.A. § 19-7-5(c)(2).

[9] Of course, this does not mean that [redacted] has actually been abused in any way.

IV. ORDER

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Petitioners' request for relief under IDEA is hereby **DENIED**.

SO ORDERED, this 22nd day of January, 2015.

KRISTIN L. MILLER
Administrative Law Judge