IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],

Plaintiff,

v.

GWINNETT COUNTY SCHOOL DISTRICT,

Defendant.

Docket No.:
OSAH-DOE-SE-1226194-67-SCHROER
12-271191

MEMORANDUM ORDER AND DECISION GRANTING DEFENDANT'S MOTION FOR SUMMARY DETERMINATION

I. INTRODUCTION

Plaintiff [redacted] is a student in the Gwinnett County School District ("School District") and is eligible for services under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). On March 17, 2012, Plaintiff filed a Due Process Hearing Request, alleging that the School District violated IDEA by holding a meeting of Plaintiff's Individualized Education Program ("IEP") team at a time and location that was not mutually agreed upon with Plaintiff's parents.

On March 26, 2012, the School District filed a Motion for Summary Determination ("Motion"). Plaintiff filed a response to the Motion. On April 6, 2012, the Court heard oral argument on the Motion. Having considered the pleadings and the arguments of the parties, the Court concludes that, as a matter of law, the School District did not violate IDEA in scheduling and conducting the IEP meeting and the Motion is hereby **GRANTED**.

II. FINDINGS OF UNDISPUTED MATERIAL FACT

Viewing the probative evidence in the light most favorable to the Plaintiff, the following facts are undisputed:

1.

Plaintiff is [redacted] years old and attends Walnut Grove Elementary School. He is eligible for special education services under IDEA. (Motion, Shaw Aff., ¶ 4)

2.

Plaintiff's mother [redacted] is a high school special education teacher employed by the School District. (Plaintiff's Response to Motion ("Response"), ¶ 1)

3.

Plaintiff is one of 18,000 IDEA eligible students enrolled in the School District. The School District convenes tens of thousands of IEP meetings each school year. The School District prefers to conduct IEP meetings during the school day in order to ensure that the individuals who provide services to the student can be present and are able to devote sufficient time to the IEP meeting.[1] (Motion, Shaw Aff. ¶ 3)

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[1] In the Response, Plaintiff disputes whether the School District, in fact, only conducts IEP meetings during school hours. As an initial matter, the Court notes, however, that Plaintiff's Response was unsworn and filed without an affidavit. Although "[a] verified or sworn pleading may serve as the functional equivalent of an affidavit and suffice to create an issue of fact," an unsworn pleading does not serve as probative evidence of a genuine issue of material fact. Mt. Bound v. Alliant Food Services, 242 Ga. App. 557, 560 (2000), citing Fosky v. Smith, 159 Ga. App. 163, 164 (1981); see also Roland v. Martin, 281 Ga. 190, 191 (2006); Crutcher v. Crawford Land Co., 220 Ga. 298, 304 (Ga. 1964)(litigant must "produce proof by affidavit of his cause when full opportunity to do so is afforded and the movant produces proof of his right to have judgment"); Estate of Jennings v. Psychiatric Health Servs., 258 Ga. App. 111 (2002) (a signed but unsworn statement does not constitute a valid affidavit and has no probative value). Nevertheless, even if the Court were to consider the Response as sufficient to create an issue of disputed fact, the Court does not find the issue a material one. That is, the fact that in other cases under other circumstances the School District has conducted IEP meetings outside of school hours is not relevant to whether the School District's efforts in this case met its obligation under IDEA to schedule the meeting at a mutually agreed on time and place. 34 C.F.R. § 300.322(a)(2). See In re: Student with a Disability, 111 LRP 38736 (New Mexico State

4.

Historically, Plaintiff's IEP meetings have lasted several hours. Plaintiff's most recent IEP was scheduled to expire on March 22, 2012. On February 15, 2012, the School District sent an invitation to [redacted] to attend an IEP meeting on February 27, 2012 at 8:00 a.m. at Walnut Grove Elementary. The invitation identified eleven School District employees, other than [redacted]., who were members of Plaintiff's IEP team and who might be present at the meeting, including teachers, therapists, and administrators. (Motion, Shaw Aff. ¶ 4, Ex. 1)

5.

On or about February 15, 2012, [redacted] sent an email to the principal of Walnut Grove, Stephanie Cortellino, stating the following:

> *I do not accept notice via email.*
>
> *I can not* [sic] *miss school on 2/27. I must not be forced to take time off work (an lose* [sic] *my pay) due to this meeting.*
>
> *All meetings must occur after 3:00 or on a planning day.*
>
> ...
>
> *Please note: This does not constitute a first notice as you knew you had scheduled this meet at a time that would not be agreeable.*

(Motion, Shaw Aff., ¶ 6, Ex. 2)

6.

On February 22, 2012, the School District provided [redacted] notice of an IEP meeting to

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Educ. Agency Nov. 2, 2009) (even though it may be the practice of a public agency to routinely conduct parent-teacher conferences in the evenings, that practice alone would not compel the public agency to schedule IEP Team meetings in the evening).

begin at 12:00 p.m. on March 1, 2012. [redacted] responded by email on February 22, 2012, stating:

> *That time is not an agreeable time as you know. I can not come at that time. I should not be forced to lose pay to come to this meeting. Please change the meeting time until after 3:00.*

(Motion, Shaw Aff., ¶¶ 7, 8, Exs. 3, 4; Response, at p. 3)

7.

Cortellino contacted [redacted] by email on February 24, 2012. Cortellino stated that she was trying to allow enough time to complete the IEP meeting, while accommodating the scheduling demands of all of the IEP team members, including [redacted]'s. Cortellino proposed starting at 1:00 p.m. on either March 1st or 5th, so that [redacted] would not have to miss as much of her work day and the team would have at least three hours for the meeting. [redacted] responded to this proposal on February 24, 2012, identifying a number of circumstances – such as the "late start" time at Walnut Grove Elementary, Plaintiff's multiple doctor and therapy appointments, and School District early release days – that have required Plaintiff's parents to miss work this year. She stated that "[i]t is simply unreasonable to expect us to lose pay to attend an IEP meeting."[2] (Motion, Shaw Aff., ¶¶ 9, 10, Exs. 5, 6; Response, at p. 3)

8.

[redacted] proposed two alternative scheduling arrangements. First, she proposed that the team convene for one hour, from 3:00 p.m. to 4:00 p.m., over the course of four to five days. Second, she proposed allowing the IEP team to meet without the parents for the purpose of extending Plaintiff's current IEP, and then scheduling a second IEP team meeting later in May on a teacher work day. (Motion, Shaw Aff., ¶ 10, Ex. 6; Response, ¶ 2)

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[2] During oral argument, [redacted] admitted that she had not sought permission from her principal to leave work an hour or so early in order to attend the IEP meeting at Walnut Grove Elementary. She also acknowledged that she was not certain that an early departure for purposes of attending Plaintiff's IEP meeting would require her to take unpaid leave.

9.

On February 27, 2012, Cortellino suggested a "compromise." She proposed scheduling an initial two-hour IEP meeting to begin at 2:00 p.m. on March 5, 2012. At the conclusion of that meeting, the IEP team could select remaining dates prior to the March 22nd deadline for completion of Plaintiff's IEP. Cortellino stated that the teacher work day in May was not available because of previously-scheduled commitments for other IEP Team members. Finally, Cortellino offered to have a paraprofessional from Plaintiff's class stay with Plaintiff during the meeting. (Motion, Shaw Aff., ¶¶ 11, 12, Exs. 7, 8; Response, at pp. 3-4)

10.

[redacted] would not agree to a 2:00 p.m. start time. Cortellino sent another email to [redacted] on February 27, 2012, explaining that a 3:00 p.m. start time was not agreeable with the School District due to the personal demands of the School District employees who were a part of Plaintiff's IEP team. Cortellino also rejected Plaintiff's suggestion of multiple one-hour meetings from 3:00 p.m. to 4:00 p.m. as "unacceptable and impractical." (Motion, Shaw Aff., ¶ 13, Ex. 9)

11.

The Director of Compliance for Special Education for the School District, John Shaw, believed it was "futile to continue to try to reach an agreeable compromise" with [redacted] Consequently, without further communication with [redacted], the School District convened the IEP team meeting on March 5, 2012 at 2:00 p.m. Neither of Plaintiff's parents attended the meeting at any time, including after 3:00 p.m. (Motion, Shaw Aff., ¶ 14; Response ¶ 3)

12.

[redacted] filed a due process complaint on March 6, 2012. At the IDEA-mandated early

resolution session scheduled for March 16, 2012 at 3:00 p.m., the School District assembled some of the members of Plaintiff's IEP team who were prepared to discuss the IEP developed at the March 5th meeting. [redacted] refused to discuss the March 5th IEP during the resolution session because not all of the same IEP team members were present. Shaw also asked [redacted] if either she or Plaintiff's father would be available to participate in an IEP meeting by telephone beginning at 2:00 p.m. [redacted] responded that she wanted the meeting to begin at 3:00 p.m. Thereafter, [redacted] reported that she had limited time and left the meeting at 3:14 p.m. (Motion, Shaw Aff., ¶ 15, Ex. 10)

III. CONCLUSIONS OF LAW

A. STANDARD ON SUMMARY DETERMINATION

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. r. 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 Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2006) (noting that a summary determination is "similar to a summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by

summary adjudication); G.J. v. Muscogee County Sch. Dist., 2010 U.S. Dist. LEXIS 28764 (N.D. Ga. 2010); A.B. v. Clarke County Sch. Dist., 2009 U.S. Dist. LEXIS 47701 (N.D. Ga. 2009).

Further, pursuant to OSAH 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. r. 616-1-2-.15(3). See Guy 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 Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)).

B. THE SCHOOL DISTRICT COMPLIED WITH IDEA'S PROCEDURAL REQUIREMENTS REGARDING PARENT PARTICIPATION

IDEA requires school districts to take steps to ensure that the parents of a disabled child are given the opportunity to participate in each IEP meeting. 34 C.F.R. § 300.322(a). Such steps include giving the parents notice of the meeting in a timely manner and "[s]cheduling the meeting at a mutually agreed on time and place." Id. See also Ga. Comp. R. & Regs. 160-4-7-.06(11)(a). If, after attempts to arrange a mutually agreed on time and place, the school district cannot convince the parents to attend, the school district may conduct the meeting without the parents in attendance. Id.

The Office of Special Education Programs has interpreted a school district's obligation with respect to scheduling IEP meetings as requiring "flexibility" and "a good faith effort" on the part of the district. See Letter to Anonymous, 18 IDELR 1303 (OSEP 1992). "However, the language ... does not preclude a school district from considering its own scheduling needs," as evidenced by the words, "*mutually agreed upon.*" Id. Similarly, federal courts have held that

"[t]he duty to take steps to find a mutually agreed on time assumes good faith attempts to agree by both sides." See Mr. M. ex rel K.M. v. Ridgefield Bd. of Educ., 2007 U.S. Dist. LEXIS 2491, *17-18 (D. Conn. 2007)(although regulations do not require "school boards to continue to accommodate an infinite number of parental requests for an alternative time, ... the record in this case is not one of repeated parental veto of suggested times. Rather, the record reflects no effort at all by the Board to negotiate a mutually agreed time for the meeting...."); B.H. v. Joliet Sch. Dist. 86, 2010 U.S. Dist. LEXIS 28658, *24-25 (N.D. Ill. Mar. 19, 2010) (holding that "the concept of mutual agreement does not encompass one party's unilateral insistence that an IEP meeting be held at a particular time, especially when that time is after school hours").

Finally, although a school district may not "'simply prioritize its representatives' schedules over that of the parents,'" if the school district makes a good faith effort to schedule a "mutually agreed on time and place" for the IEP meeting and is unsuccessful at procuring the parents' attendance, the school district does not commit an actionable procedural violation by proceeding with an IEP meeting in the parents' absence. E.P. v. San Ramon Valley Unified Sch. Dist., 2007 U.S. Dist. LEXIS 47553, *32 (N.D. Cal. 2007) (citations omitted). The court in the *San Ramon Valley* case cited the Ninth Circuit's decision in *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115 (9th Cir. 2003), to explain why a school district, that was facing an imminent deadline for the formulation of an IEP for a disabled child, did not commit a procedural violation by conducting an IEP meeting notwithstanding the parents' unavailability.

> "[A]lthough the formulation of an IEP is ideally to be achieved by consensus among the interested parties at a properly conducted IEP meeting, sometimes such agreement will not be possible. If the parties reach a consensus, of course, the [IDEA] is satisfied and the IEP goes into effect. If not, the agency has the duty to formulate the plan to the best of its ability in accordance with the information developed at [prior] meetings, but must afford the parents a due process hearing in regard to that plan."

Vashon Island, 337 F.3d at 1132, quoted in San Ramon Valley, 2007 U.S. Dist. LEXIS 47553, *32.

In this case, the School District proposed four different meeting dates and times to Plaintiff's parents in an attempt to accommodate a number of scheduling concerns, including Plaintiff's mother's preference for a start time after three o'clock, the need to allow several hours for the team to meet and confer regarding Plaintiff's IEP, the approaching expiration of Plaintiff's current IEP, and the scheduling needs of the eleven other IEP team members. In fact, the School District's final proposal of a "compromise" – an initial meeting on March 5th from two o'clock until four o'clock and a commitment that the team would select remaining dates before the March 22nd deadline – was imminently reasonable, and yet emphatically rejected by [redacted]., who continued to insist on her preferred dates and time. The Court concludes that based on the undisputed material facts, the School District met its obligations under IDEA to take reasonable steps to ensure that Plaintiff's parents were present at the IEP meeting and that its efforts were in good faith and properly documented as required by 34 C.F.R. § 300.322.

Accordingly, the School District is entitled to summary determination in its favor on Plaintiff's due process complaint.

IV. ORDER

For the foregoing reasons, Defendant's Motion for Summary Determination is **GRANTED**. This matter is hereby **DISMISSED** with prejudice.

IT IS SO ORDERED, this 21st day of May, 2012.

KIMBERLY W. SCHROER
Administrative Law Judge