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

| | | |
|---|---|---|
| **A.M.,** | : | |
| **Plaintiff,** | : | |
| | : | **Docket No.** |
| **v.** | : | **OSAH-** **Howells** |
| | : | |
| **COUNTY SCHOOL DISTRICT,** | : | |
| **Defendant.** | : | |

**FINAL DECISION AND**
**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DETERMINATION AND DENYING PLAINTIFF'S MOTION FOR SUMMARY DETERMINATION**

**For Plaintiff:**

Parent, *pro se*

**For Defendant:**

Aric M. Kline, Esq.
Anita L. Kumar, Esq.
Gregory, Doyle, Calhoun & Rogers, LLC.

## I. Introduction and Procedural Background

Plaintiff, A.M., is a student eligible for services under the under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). On May 13, 2013, Plaintiff filed a Due Process Hearing Request ("Complaint") contending that County School District ("Defendant") violated her rights under IDEA related to educational placement. On May 24, 2013, Defendant filed its Response to Plaintiff's Complaint, denying that it violated IDEA. Subsequently, on June 4, 2013, Defendant filed a Motion for Summary Determination. On June 19, 2013, Plaintiff filed a response in opposition to Defendant's motion and a cross motion for summary determination ("Plaintiff's Response"). After careful review of the record and submissions, and for the reasons set forth below, the Defendant's motion for summary

determination is **GRANTED**, and Plaintiff's cross motion for summary determination is **DENIED**.

## II. Findings of Undisputed Material Facts

The following facts are undisputed[1]:

### *Plaintiff's Disability and Eligibility for Services*

1.

A.M. is 11 years old (D.O.B. 5/30/2002) and has just completed fifth grade. (Def. Ex. 1A, p. 1.) She has been diagnosed with Optic nerve hypoplasia, atrophy, and nystagmus. (*Id.* at p. 5.) Because of her visual impairment, she is unable to read standard sized print or effectively see information presented at a distance. (*Id.*) Consequently, A.M. was determined to be eligible for special education services under the Vision Impaired category of IDEA on August 10, 2007 and began receiving such services within the County School system shortly thereafter. (Affidavit of Dr. Heidi J. Evans ["Evans Aff."], ¶ 3.) The services that A.M. receives are set forth in her Individualized Education Program ("IEP"), which is created by a team consisting of her mother, teachers, and Dr. Heidi J. Evans.[2] (*Id.*) The IEP at issue evaluated A.M.'s progress during the recent school year and set goals for the next school year to further her development. (*Id.*) During the past year, A.M.'s IEP was implemented at Elementary School. (Def. Ex. 1A, p.1.)

[1] While Plaintiff's parent denies the accuracy of some of these facts, her mere allegation or denials are insufficient to show that there is a genuine issue of material fact. Rather, she is required to "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). This she has not done.

[2] Dr. Evans, the Special Education Supervisor with County School District, oversees the Vision Impaired Program. (Evans Aff., ¶ 2).

*IEP Proposal for the 2013-2014 School Year*

2.

On March 28, 2013, as A.M. neared the completion of her fifth grade year at [redacted] Elementary, the team convened an IEP Meeting to discuss A.M.'s IEP for the following school year upon her entry into middle school. (Evans Aff., ¶ 5.) The team considered the severity of A.M.'s disability and noted that the severity of her disability was such that she could not achieve satisfactorily in the regular education setting, even with supplementary aids and services. (Def. Ex. 1A, p. 16.) The team recommended the following for A.M. during the 2013-2014 school year:

> (1) Orientation & Mobility—Expanded Core Curriculum in small group setting;
> (2) Vision Impaired Technology—Expanding Core Curriculum in small group setting;
> (3) Math in a general education setting with additional supportive services from a paraprofessional with experience regarding the needs of visually impaired students;
> (4) Science in a general education setting with additional supportive services from a paraprofessional with experience regarding the needs of visually impaired students;
> (5) Exploratories in a general education setting without support;
> (6) Literary Braille—Expanded Core Curriculum in a co-taught general education setting with direct instruction from a teacher of the visually impaired; and
> (7) Social Studies in a general education setting without support.

(*Id.*; Evans Aff., ¶ 5.)

3.

[redacted] Middle School ("[redacted]"), which hosts the Vision Impaired Resource Program, is the only school in Cobb County where all the services listed in A.M.'s IEP are available. (Evans Aff., ¶ 6.) The program has specialized materials, equipment, and personnel, including a Braille clerk and teachers and paraprofessionals with training and experience in supporting the needs of

students with visual impairments. (*Id.*) Because it houses the Vision Impaired Resource Program, S[illegible] "is the only building location within the District that provides this level of service and specialized materials." (*Id.*)

4.

A.M.'s parent agrees with the contents of A.M.'s IEP. The sole point of disagreement is the choice of location. She believes that A.M.'s IEP services "can be provided at her home school," [illegible] Middle School, which would allow her to remain with her current peers.[3] (Complaint; Def. Mot. for Summ. Determination.) A.M. requested a hearing, claiming that the School District's refusal to allow her to attend her home school with her peers is a denial of a free appropriate public education ("FAPE").[4]

## III. STANDARD FOR 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. 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

[3] Although A.M. would be required to attend Smitha under the proposed IEP, the School District has agreed to allow A.M. to participate in extracurricular activities at her home school. (Def. Exhibit 1A, p. 21.)

[4] In Plaintiff's Response, Plaintiff's parent asserts that "A.M will not be given equal access to non-disabled peers" at the assigned school location. As an initial matter, the undersigned notes that Plaintiff presents no probative evidence to support this assertion, and as noted above, A.M.'s proposed IEP places A.M. in general education classes for five of seven classes. Thus, on its face, this assertion appears to be inaccurate. Plaintiff's parent argues that "the IEP is incomplete as it did not take into consideration A.M.'s current ability when the placement decision was made." She further argues Defendant violated IDEA "by its own admission by reserving the right to choose student placement location in any and all IEP situations." (Plaintiff's Response, p. 2.) Finally, she argues that Defendant's opposition to A.M.'s placement at her home middle school is due to the availability of resources, and that "placement was predetermined by the county before the IEP meeting on March 28, 2013." (*Id.*) However, Plaintiff did not raise any of these issues in her Complaint. Therefore, she may not raise these issues now or at the due process hearing. *See* 34 C.F.R. § 300.511(d).

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.*, No. OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (Oct. 21, 2004) (citing *Porter v. Felker*, 261 Ga. 421 (1991)); see also *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 determination).

Further, pursuant to OSAH Rule 15, "[w]hen 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. 616 -1-2-.15(3). Plaintiff, as the party seeking relief, bears the burden of proof in this matter. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); Ga. Comp. R. & Regs. 160-4-7-.12(3)(n) ("The party seeking relief shall bear the burden of persuasion . . . .")

## IV. CONCLUSIONS OF LAW

1.

IDEA enables a parent to bring challenges to the "identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to [the] child" by filing a due process complaint. 20 U.S.C. § 1415(b)(6), (c)(2)(A). In this case, Plaintiff's Complaint presents one issue: whether Plaintiff has the right to be assigned to a school facility of her own choosing.[5] Because the Court concludes, as a matter of law, that Plaintiff's Complaint

[5] In Plaintiff's Response, she cited *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 693 (11th Cir. 1991), *opinion withdrawn by Greer v. Rome City Sch. Dist.*, 956 F.2d 1025 (11th Cir. 1992), *and reinstated in part and affirmed by Greer v. Rome City Sch. Dist.*, 967 F.2d 470 (11th Cir. 1992), for the proposition that a handicapped child must be educated in his neighborhood school when the school district decides placement prior to the IEP meeting and does

does not raise a viable claim regarding the identification, evaluation, educational placement, or provision of a FAPE to the Plaintiff, the Defendant is entitled to summary determination in its favor. Further, because Plaintiff has failed to show that she is entitled to judgment as a matter of law, Plaintiff's cross motion for summary determination must be denied.

2.

The "[IDEA] 'creates a presumption in favor of the education placement established by a child's IEP, and the party attacking its terms bears the burden of showing why the educational setting established by the IEP is not appropriate.'" [6] *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285 (5th Cir. 1991) (citation omitted).

***The School District is entitled to choose the location of the IEP services***

3.

In this case, the Plaintiff challenges her educational "placement" because she believes that the selected IEP services should be provided at her neighborhood middle school, where her

---

not seriously consider alternative placement options. In *Greer*, the Eleventh Circuit Court of Appeals did determine that the school district did not consider accommodating the child in a regular education classroom with supplemental aids and services. *Greer*, 950 F.2d 668, 698 (11th Cir. 1991). The *Greer* court ***did not***, however, conclude that the child must be educated at her neighborhood school. *See Greer*, 950 F.2d at 699 ("This opinion is not determinative of Christy's future education.") Instead, the court merely decided that the school district failed to consider educating the child in a regular education classroom with the use of supplemental aids and services, and that it must consider such a placement. *Greer*, 950 F.2d at 699. Here, Defendant not only considered, but recommended that A.M. be educated in several general education classes with supplemental aids or services. The proposed IEP specifically provides for the use of supplemental aids and services in general education classes in Math and Science. It further provides for general education classes for Exploratories and Social Studies. The team specifically considered whether A.M. could achieve satisfactorily with the use of supplemental aids and services, entirely in a regular education classroom setting; ultimately it determined that she could not. Notwithstanding, the only classes where A.M. will not be in a general education setting are Orientation and Mobility and Vision Impaired Technology. Thus, A.M.'s IEP differs significantly from the child in *Greer*. Furthermore, the issues raised in Greer relate to the least restrictive environment, an issue that Plaintiff did not raise in her Complaint.

[6] In Plaintiff's Response, she cites *Oberti v. Board of Educ. of Clementon School Dist.*, 801 F. Supp. 1392, 1402, 405 (D.N.J. 1992), for the proposition that the school district bear the burden of proof. While the language in *Oberti* is less than a model of clarity, it is clear that the burden of proof in an administrative hearing challenging an IEP lies with the party seeking relief (i.e., the plaintiff). *Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537 (2005).

peers will be attending. However, because the Plaintiff is not entitled to choose the location of her school, she has failed to raise a claim that may be addressed by IDEA.

4.

Under IDEA, states are required to ensure that "[a] free appropriate public education is available to all children with disabilities." 20 U.S.C. § 1412(a)(1)(A). "The purpose of the IDEA generally 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 and prepare them for further education, employment and independent living . . . .'" *C.P. v. Leon County Sch. Bd.*, 483 F.3d 1151, 1152 (11th Cir. 2007) (*quoting* 20 U.S.C. § 1400(d)(1)(A)). In order to achieve this goal, a written IEP specifically tailored to each disabled student delineates the special education services that the student must receive in order to obtain a FAPE. *See* 20 U.S.C. § 1414(d)(1)(A). "[I]n the case of a child who is blind or visually impaired, [an IEP must] provide for instruction in Braille and the use of Braille unless the IEP Team determines . . . that instruction in Braille or the use of Braille is not appropriate for the child." 20 U.S.C. § 1414 (d)(3)(B)(iii). The school district must implement the student's IEP in the least restrictive environment possible by educating the student "to the maximum extent appropriate" with non-disabled students. 20 U.S.C. § 1412(a)(5)(A).

5.

Defendant's selection of the physical location of A.M.'s school is simply not a matter to be determined under IDEA. The Office of Special Education Programs ("OSEP"), which provides federal policy guidance regarding the provision of special education services under IDEA, considered a similar situation in *Letter to Fisher*, 21 IDELR 992 (OSEP July 6, 1994). There, OSEP advised that a change in the physical location of the facility where services would

be provided did not amount to a change in a student's educational placement. *Id.*; *see also Letter to Veazey*, 37 IDELR 10 (OSEP Nov. 26, 2001) ("the assignment of a particular school or classroom may be an administrative determination"); *Dep't of Educ. v. T.F.*, No. 10-00258 AWT-BMK, 2011 U.S. Dist. LEXIS 110307, at *24 (D. Haw. Aug. 30, 2011) (stating "the Ninth Circuit concluded that 'educational placement' means the general educational program of the student."); *L.M. v. Pinellas County Sch. Bd.*, No. 8:10-cv-539-T-33TGW, 2010 U.S. Dist. LEXIS 46796, at *3 (M.D. Fla. Apr. 11, 2010) ("'educational placement' . . . refers to the educational program and not the particular institution or building where the program is implemented."); *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 383 (5th Cir. 2003); *Hill v. School Bd. for Pinellas County*, 954 F. Supp. 251, 253-54 (M.D. Fla. 1997), *aff'd*, 137 F.3d 1355 (11th Cir. 1998).

6.

In *White*, a hearing impaired student wanted to transfer to his neighborhood elementary school to "enhance his social development, including allowing him to attend school with neighborhood children." *White*, 343 F.3d at 376. However, the services necessary to implement his IEP were only available at one school in the district. *Id.* His parents requested that the IEP services be offered at the neighborhood school. *Id.* The court found that "'[e]ducational placement,' as used in the IDEA, means educational program—*not* the particular institution where that program is implemented." *Id.* at 379 (emphasis added). Furthermore, the Court noted that "no federal appellate court has recognized a right to a neighborhood school assignment under the IDEA." *Id.* at 381. Accordingly, selection of the particular school where a child's IEP will be implemented is left to the sole discretion of the school district. *Id.* at 383.

7.

A.M. wants to attend her neighborhood middle school to be with her peers. Like in *White*, the necessary resources are only available at one school in the district. A.M.'s IEP, the contents of which are not contested, specifies that she will have one of her classes co-taught with direct instruction from a teacher of the visually impaired, and that she will have the assistance of a paraprofessional with experience regarding the needs of visually impaired students in her Math and Science classes. S , as part of its Vision Impaired Resource Program, employs these necessary personnel, as well as a Braille clerk. It also has the necessary equipment to produce specialized materials to implement A.M.'s IEP. Thus, in order for A.M. to receive her IEP services she will need to attend S A.M.'s mother agrees with the services offered in the IEP for the 2013-2014 school year. She only contests the school district's choice of location where the services will be provided. However, Plaintiff is not entitled to dictate the location where her IEP services will be provided. *White*, 343 F.3d at 380-383. Rather, that determination is left to the discretion of the school district. *Id.*

8.

Because Defendant has the discretion to select the school within the district that will provide A.M. with special education services, Plaintiff has failed to raise a claim for which IDEA can provide relief. Accordingly, Defendant is entitled to judgment as a matter of law.

## V. ORDER

Based on the foregoing findings of fact and conclusions of law, Defendant's motion for summary determination is **GRANTED**. Plaintiff's cross motion for summary determination is **DENIED** and this matter is **DISMISSED**.

**SO ORDERED, this 26th day of June 2013.**

**STEPHANIE M. HOWELLS**
**Administrative Law Judge**