RE: DA v. COUNTY SCHOOL DISTRICT,

DOCKET NO.: OSAH-DOE-SE- -Baxter

MAIL TO:

☐

☐

☐ (DECISION ONLY)

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

D.A., Plaintiff,	)	DOCKET NO.: OSAH-DOE-SE- -Baxter
v.	)	
COUNTY SCHOOL DISTRICT,	)	
Defendant.	)	

FINAL ORDER

This action came before the Court pursuant to a complaint filed by D.A., Plaintiff, against County School District, Defendant, alleging that the Defendant had failed to provide Plaintiff with a free appropriate public education (FAPE) as required under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*, and its implementing regulations, 34 C.F.R. Part 300. After Plaintiff completed the presentation of her evidence, Defendant moved for an involuntary dismissal pursuant to the Administrative Rules of Procedure due to Plaintiff's failure to carry the burden of proof. After careful consideration of the evidence and arguments, and for the reasons set forth below, this Court finds that Defendant's motion for involuntary dismissal is **GRANTED** and Plaintiff's claims for relief are **DISMISSED**.

I. PROCEDURAL HISTORY

Plaintiff initiated the above-styled action on August 12, 2013, contending that Defendant violated her rights under IDEA related to her educational placement and provision of a FAPE. Plaintiff's complaints centered primarily on access to her tenth grade "classroom papers" (specifically work samples and classwork) as well as the lack of a general education teacher at

her IEP meetings. Following an unsuccessful resolution conference between the parties, a hearing on the merits was held on October 11, 2013. Plaintiff, represented by her parent, presented testimony from four witnesses. After Plaintiff's presentation of evidence, Defendant moved for an involuntary dismissal on the grounds that Plaintiff presented insufficient evidence of a denial of FAPE and thus failed to meet her burden of proof. This Court finds as follows:

II. FINDINGS OF FACT

1.

Plaintiff D.A. (D.O.B. 5/25/1996) is a seventeen year old student who is eligible to receive special education services pursuant to the IDEA from Defendant. Plaintiff currently attends M High School. T. 230.[1]

2.

Plaintiff was born prematurely at 26 weeks with a birth weight of 1 lb., 13 ounces. D. 225. Complications followed Plaintiff's birth including breathing problems, a brain bleed, and a staph infection in her joints. Id. At approximately six months of age, Plaintiff was diagnosed with a seizure disorder. Id. She has a history of developmental delays and learning problems. D. 224.

3.

Due her to disabilities, Plaintiff has received special education services pursuant to the IDEA under the categories of Moderate Intellectual Disability (MOID) and Speech/Language Impairment (SLI). D. 224-225.

[1] Citations to the record are: "P" followed by the page number for Plaintiff's exhibits; "D" followed by the page number for Defendant's exhibits; and "T" followed by the page number for the hearing transcript.

4.

Plaintiff is a cooperative, friendly student who loves school, her friends, and music. T. 66, 126. Plaintiff's cognitive ability has been assessed as falling well below average, with a full scale IQ score of 50 as measured by the Wechsler Intelligence Scale for Children-IV (WISC-IV). D. 228. This score, obtained as part of a neuropsychological evaluation by Dr. Jacqueline Kiefel with Children's Healthcare of Atlanta, falls within the Moderate Intellectual Disability eligibility category.[2] D. 225. Plaintiff's adaptive skills are similarly impaired, and she been described as having a generalized language impairment. D. 226.

5.

Plaintiff's mother has been an active and involved parent in all aspects of Plaintiff's education. Plaintiff's parent has attended and participated in Plaintiff's IEP meetings, some of which lasted over the course of two days, observed Plaintiff in her classroom and on community skills, accessed and reviewed Plaintiff's educational records, and maintained back and forth communication with Plaintiff's teacher via an agenda book and emails. See e.g. T. 96, 124, 134-140, 141-142, 144-145.

6.

In April 2011, Plaintiff's parent attended and actively participated in Plaintiff's IEP meeting to develop her IEP for the 2011-2012 school year. T. 146-155, 159. No general education teacher was present at this meeting. T. 147-148. Plaintiff's parent voiced her concerns and requests to the team. T. 152-158. In response to Plaintiff's parent's request, time in the general education environment was added for Plaintiff. T. 154-156. Plaintiff's parent was complimentary of Plaintiff's special education teacher, Dr. Ami Baksi, at the meeting for helping

[2] In 2010, Dr. Kiefel concluded that Plaintiff was "well placed" in her educational program – MOID – based upon her intellectual performance and her limited adaptive skills. T. 166; D. 230.

Plaintiff to progress. T. 149-152. At the end of the two day IEP meeting, Plaintiff's parent consented to the IEP which placed Plaintiff in a MOID class for the majority of the school day. T. 147, 239.

7.

Plaintiff's parent remained extremely involved in Plaintiff's education during the 2012-2013 school year, Plaintiff's tenth grade year. Her involvement included visits to the classroom, communication with the teacher, and review and input on Plaintiff's classroom assignments. See e.g., T. 138-140, 141-142, 144-145.

8.

Plaintiff's IEP team, including her parent, reconvened in May 2012 to develop an IEP for the 2012-2013 school year, Plaintiff's eleventh grade year. T. 157-158. Plaintiff's parent received two draft IEPs in advance of the IEP meeting. T. 160. No general education teacher attended the IEP meeting. T. 99.

9.

Like previous IEP meetings, the May 2012 IEP meeting was a lengthy one, though the IEP was completed in one day. T. 158, 160-161. Again, Plaintiff's mother participated in the discussion of Plaintiff's progress and goals and objectives and shared her concerns and requests. T. 158-159. The IEP team discussed and documented Plaintiff's progress over the course of the 2011-2012 school year in the IEP. T. 161-163.

10.

During the May 2012 IEP meeting, Plaintiff's teacher, Dr. Baksi, showed Plaintiff's parent a binder of Plaintiff's "classroom papers" consisting of work samples and classroom work produced by Plaintiff over the course of her tenth grade school year. T. 70. Plaintiff's mother

reviewed some of the classroom papers in the binder during the meeting and voiced complaints about the lack of dates on some of the work samples. T. 70-71, 245-246. During Plaintiff's parent's review of the binder, the special education department chair, Dr. Victoria Luke, suggested that Plaintiff's parent schedule a parent-teacher conference if she wished to review each work sample. T. 71, 76, 245-246. Plaintiff's parent never requested a parent-teacher conference with Dr. Baksi to review the records during the remainder of the 2012-2012 school year or during the summer break. T. 176, 246. Plaintiff's parent did not agree with the IEP as developed because she did not believe she received enough information to determine Plaintiff's progress.

11.

On August 2, 2012, Plaintiff's parent was given another opportunity to review these "classroom papers" and work samples from tenth grade. T. 82-83, 175-177. Though the binder of documents was available to Plaintiff's parent during an open house, she declined to review the documents at that time because she wanted to attend a scheduled lecture. Id.

12.

Sometime following August 2, 2012, Plaintiff's tenth grade classwork from the 2011-2012 school year was disposed of or otherwise went missing. T. 207. Plaintiff's parent asked, and was given, multiple opportunities to review all of Plaintiff's records maintained by Defendant, namely her supplemental and permanent file. See e.g., D. 71; T. 96, 121, 123, 134-137, 215-216. In addition to the opportunity to review Plaintiff's records, Plaintiff's parent was also provided with copies of Plaintiff's records on several occasions.[3] See e.g. D. 123; T. T. 96,

[3] Though Plaintiff's parent received a box of records mailed to her by Assistant Principal Dr. Chris Martin in the fall of 2012, Plaintiff's parent refused to open the box of records upon receipt and brought the unopened box of records to a subsequent mediation with Defendant involving a formal state complaint. T. 137.

121, 123, 134-137, 215-216. Much to Plaintiff's parent's dissatisfaction, the hundreds of pages of educational records produced did not include the tenth grade classroom papers other than a few work samples from Plaintiff's tenth grade year.[4] T. 137-138, 215-216. While it was explained to Plaintiff's parent that classwork and work samples are not typically maintained by Defendant and are disposed of by teachers over time, Plaintiff's parent remained unsatisfied with the explanation. T. 174-175, 215-216, 218-219, 243.

13.

Plaintiff's parent was also frustrated by Plaintiff's teacher's lack of communication because Plaintiff's teacher would not promptly respond to emails. Ultimately, Plaintiff's teacher went on medical leave and has yet to return. Plaintiff's parent was also dissatisfied with Plaintiff's ability to interact with general education students. However, Plaintiff attended lunch in the lunchroom, though there were days when Plaintiff may have eaten in her classroom with her classmates. T. 230. Second, while art and music were not in Plaintiff's IEPs, her IEPs did include time in the general education setting. T. 154-156. Testimony showed that, though not in her IEPs, Plaintiff in fact had the opportunity to attend art and music in the general education setting. T. 233-234.

14.

With Plaintiff's parent's concerns and requests for records continuing, Plaintiff's parent and Defendant scheduled an IEP meeting for the week of September 24, 2012. D. 71; T. 135. Prior to the IEP meeting, however, Plaintiff's parent abruptly withdrew Plaintiff from Defendant's schools on September 25, 2012. D. 126; T. 135. On the withdrawal form,

[4] Plaintiff's parent complained at the hearing that Defendant produced too many records, including work samples from eleventh grade, when Plaintiff only wanted the classroom papers from tenth grade. T. 211-213.

2.

This Court's review is limited to the issues Plaintiff raised in the due process complaint.[7] 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d); Ga. Comp. R. & Regs. 160-4-7-.12(j)(3); see also Co. of San Diego v. Ca. Special Educ. Hearing Office, 93 F.3d 1458, 1460 (9th Cir. 1996); B.P. v. New York City Dept. of Educ., 841 F. Supp. 2d 605, 611 (E.D.N.Y. 2012). Plaintiff raised complaints related only to her educational placement and provision of a FAPE, and she bore the burden of showing by a preponderance of the evidence that Defendant denied her a FAPE.

Brief Overview of IDEA

3.

The purpose of the 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 and prepare them for future education, employment, and independent living . . . ." 20 U.S.C. § 1400(d)(1)(A).

4.

The IDEA requires school districts to provide to a student eligible for special education services a free appropriate public education ("FAPE") in the least restrictive environment ("LRE"). 20 U.S.C. § 1412; 34 C.F.R. §§ 300.17, 300.114 – 300.118.

[7] Specifically, the issues cited in Plaintiff's due process complaint concern her parent's access to Plaintiff's tenth grade classroom papers; the absence of a general education teacher and nurse from IEP meetings; and Plaintiff's ability to participate in the least restrictive environment including her participation in lunch, art, and music. To the extent Plaintiff raised other issues at the hearing including the denial of a permissive transfer, retaliation, and harassment of Plaintiff, these issues were not considered by the Court as they were not in Plaintiff's due process complaint.

5.

The IDEA is designed to open the door of public education to children with disabilities but it does not guarantee any particular level of education once inside those doors. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 191 (1982); JSK. v. Hendry Co. Sch. Bd., 941 F.2d 1563 (11th Cir. 1991). The Eleventh Circuit has determined that when measuring whether a handicapped child has received educational benefits from an IEP and related instructions and services, courts must only determine whether the child has received the "basic floor of opportunity." JSK, 941 F.2d at 1572-3.

6.

The "IDEA requires school districts to develop an IEP for each child with a disability, with parents playing a 'significant role' in this process." Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524 (2007) (internal citations omitted). While the parent's concerns must be considered by the IEP team, the parents are not entitled to the placement they prefer. M.M. v. Sch. Bd. of Miami-Dade Co. Fla., 437 F.3d 1085, 1102 (11th Cir. 2006); see also Heather S. v. State of Wis., 125 F.3d 1045, 1057 (7th Cir. 1997). "The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child." Rowley, 458 U.S. at 207. Thus, the educators who develop a child's IEP are entitled to "great deference." Todd D. v. Andrews, 933 F.2d 1576, 1581 (11th Cir. 1991).

7.

The United States Supreme Court established a two part test to determine the sufficiency of an IEP in Rowley, which has been adopted by the Eleventh Circuit. See JSK, 941 F.2d 1563.

Under the Rowley standard, a court must consider whether (1) there has been compliance with the procedures[8] set forth in the Act and (2) whether the IEP is reasonably calculated to enable the child to receive educational benefit in the least restrictive environment. Rowley, 458 U.S. at 206-7.

8.

The first prong of the two-part test examines whether any harm has resulted from a technical violation of the procedural requirements set forth in the IDEA. As a rule of law, procedural violations are not a per se denial of FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513. That is, a violation of the procedural safeguards will not automatically constitute a denial of FAPE. Rather, Plaintiff must show that any alleged procedural inadequacies in her IEP (i) impeded her right to a FAPE; (ii) significantly impeded her parent's opportunity to participate in the decision-making process regarding the provision of a FAPE; or (iii) caused a deprivation of educational benefit. Id. The Eleventh Circuit has held that plaintiffs must show actual harm as a result of a procedural violation in order to be entitled to relief. See Weiss v. Sch. Bd. of Hillsborough Cnty., 141 F.3d. 990 (11th Cir. 1998); Doe v. Ala. State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990); see also Knable ex rel. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 765 (6th Cir. 2001) ("A school district's failure to comply with the procedural requirements of the Act will constitute a denial of FAPE only if such violation causes substantive harm to the child.") Where a family has had "full and effective participation in the IEP process. . . the purpose of the procedural requirements [is] not thwarted." Weiss, 141 F.3d at 996.[9]

[8] The Act's procedural safeguards are specifically enumerated in 20 U.S.C. § 1415.

[9] Indeed, in Weiss, the Eleventh Circuit recognized that there was no denial of FAPE even where the school failed to ensure the parents understood the ramifications of a meeting where placement was determined, failed to provide appropriate notice of procedural safeguards, failed to provide the parents with all the school records, failed to notify the parents of when evaluations

9.

The second prong of the FAPE analysis under Rowley assesses whether students have been provided with educational programs reasonably calculated to enable them to receive educational benefit in the least restrictive environment. Rowley, 458 U.S. 176; JSK, 941 F.2d 1563. In order to show a school district's program is not reasonably calculated to enable a student to receive educational benefit, it must be shown that no measurable and adequate gains were made. Rebecca S. v. Clarke Cnty. Sch. Dist., 22 IDELR 884 (M.D. Ga. 1995).

Access to Records

10.

Among the procedural protections afforded to parents is the opportunity to "inspect and review all education records with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child." 34 C.F.R. § 300.501(a). For the purposes of the IDEA, "education records" means the types of records covered under the definition of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, ("FERPA"). 34 C.F.R. § 300.611(b). FERPA defines education records as records which "contain information directly related to a student; and are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(3).

11.

The U.S. Supreme Court has made clear that the term "educational records" cannot be defined as including all records generated concerning a student. In Owasso Indep. Sch. Dist. No. I-0111 v. Falvo, 534 U.S. 426 (2002), the Supreme Court held that a construction of the term

---

were scheduled, and unilaterally formulated objectives without equal participation of the parents. Weiss, 141 F.3d 990. Despite these many procedural violations, the Court recognized that the plaintiff failed to show resulting harm to the student. Id. at 997.

"educational records" that would cover materials such as "student homework or classroom work would impose substantial burdens on teachers across the country." Id. at 435. Similarly, "parental access to educational records does not extend so far as to allow access to each individual piece of student work." K.C. v. Fulton Cnty. Sch. Dist., CIV.A. 103-CV-3501-TWT, 2006 WL 1868348, *10 (N.D. Ga. June 30, 2006). Thus, the District Court held, the parents in K.C. were not entitled to some 700 pages of writing samples, evaluations, written assignments, and worksheets.

12.

Central among Plaintiff's allegations at the hearing concerned her parent's access to Plaintiff's tenth grade "classroom papers," namely the classwork and work samples completed by Plaintiff and shown to Plaintiff's parent during the May 7, 2012 IEP meeting. Plaintiff argued that her parent's inability to access these records the following school year infringed upon her parent's ability to participate in Plaintiff's education. Plaintiff's argument fails for several reasons. First and foremost, the records sought by Plaintiff are not records which the school is required to maintain and provide to Plaintiff's parent. The tenth grade classroom work is precisely the type of records which the U.S. Supreme Court has recognized a school is *not* required to maintain as such a requirement "would impose substantial burdens on teachers across the country." Owasso, 534 U.S. at 435. Thus, nothing in the IDEA or FERPA entitles Plaintiff's parent to access to these records.

13.

Second, Plaintiff's argument that her parent was denied access to these records fails as a practical matter as the evidence showed, in fact, that her parent *was* provided with an opportunity to review the tenth grade work samples and classroom work in a parent/teacher conference.

Plaintiff's parent, however, failed to schedule a parent/teacher conference during the remainder of the 2011-2012 school year or over the summer. Plaintiff's parent was additionally provided an opportunity to review the records the following school year, on August 2, 2012, and failed to do so. That the records were purged sometime following August 2, 2012, without Plaintiff's parent's taking the opportunity to review them, does not entitle Plaintiff to relief as Defendant was not required to maintain the records under FERPA or the IDEA. See Owasso, 534 U.S. 426.

IEP meeting participants

14.

Plaintiff also complained at the hearing about the absence of a general education teacher from Plaintiff's IEP meetings. The IDEA provides that an IEP team shall include "no less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment)." 34 C.F.R. § 322.321(a). Though Plaintiff participated in the regular education environment, her IEP team did not include a regular education teacher.

15.

While Plaintiff complained about this per se violation of the IDEA's procedural requirements, she failed to present any evidence beyond mere speculation that the absence of this participant caused her any harm or resulted in a substantive denial of FAPE.[10] By failing to present any evidence demonstrating that the absence of a general education teacher impeded Plaintiff's right to a FAPE, significantly impeded her parent's opportunity to participate in the decision-making process, or resulted in a deprivation of educational benefit, Plaintiff's complaint regarding the lack of a general education teacher fails. See Weiss, 141 F.3d. 990; 20 U.S.C.

[10] Similarly, to the extent Plaintiff alleged that her IEP team was deficient because it did not include a nurse, no evidence was presented that the absence of a nurse caused harm to Plaintiff. Notably, Plaintiff does not receive nursing services and no evidence was presented that her individualized needs necessitate the participation of a nurse as an IEP team member in order to develop an appropriate IEP for Plaintiff. T. 169.

§1415(f)(3)(E)(ii); 34 C.F.R. § 300.513; J.W. v. Fresno Unified Sch. Dist., 626 F.3d 431 (9th Cir. 2010); J.F. v. New York City Dept. of Educ., 12 CIV. 2184 KBF, 2012 WL 5984915 (S.D.N.Y. Nov. 27, 2012); W.T. v. Bd. of Educ. of the Sch. Dist. of New York City, 716 F. Supp. 2d 270 (S.D.N.Y. 2010); Anderson v. District of Columbia, 606 F. Supp. 2d 86, 91 (D.D.C. 2009).

Least Restrictive Environment

16.

Finally, Plaintiff complained that the absence of art and music from her schedule, as well as her purported restriction from the lunchroom, violated her right to participate in the least restrictive environment (LRE). The LRE provision of the IDEA states that schools must establish procedures to assure that: "To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . ." 20 U.S.C. § 1412(a)(5).

17.

The evidence which Plaintiff presented did not demonstrate a violation of the LRE requirement. First, no evidence was presented that Plaintiff was restricted from the lunchroom or from eating lunch with her general education peers. The evidence only showed that on occasion, Plaintiff ate in her classroom with her classmates. Second, the evidence also showed that Plaintiff was provided the opportunity to attend art and music in the general education setting.

18.

Though Plaintiff's parent expressed her concerns at the hearing about these issues, she demonstrated no harm to Plaintiff or denial of FAPE. Instead, the evidence shows that Plaintiff has progressed from year to year; that she loves school; that she is well-placed in a Moderate ID class; and that her parent has been afforded multiple opportunities to participate in even the minutiae of Plaintiff's educational programming. Plaintiff has failed to meet her burden and establish that Defendant violated her right to receive a FAPE in the LRE.

IV. ORDER

Based on the foregoing, Plaintiff's request for relief is **DENIED** and Defendant's motion for involuntary dismissal is **GRANTED.**

SO ORDERED this 31st day of October, 2013.

AMANDA C. BAXTER
ADMINISTRATIVE LAW JUDGE

JUDICIAL REVIEW

Any party aggrieved by the findings and decision of the Judge has the right to appeal the decision under 20 U.S.C. § 1415 by bringing a civil action with respect to the complaint presented which action may be brought in any State court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy. In any action or proceeding under 20 U.S.C. § 1415, courts may award reasonable attorney's fees. A copy of the Notice of Appeal should be filed with the Department of Education.