BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

J.Z.J., by and through his parent, J.J.; and J.J.,	:	
Plaintiffs,	:	
	:	**Docket No.:**
v.	:	**OSAH-DOE-SE-[redacted]33-Miller**
	:	
COBB COUNTY SCHOOL DISTRICT,	:	
Defendant.	:	

ORDER ON
DEFENDANT'S MOTION TO DISMISS

For Plaintiffs:

James Jones
Parent, *pro se*

For Defendant:

Anita K. Balasubramanian, Esq.
Aric M. Kline, Esq.
Gregory, Doyle, Calhoun & Rogers, LLC

I. SUMMARY OF PROCEEDINGS

J.Z.J. is a student with a disability who is eligible for special education services under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). On February 21, 2014, the Plaintiffs, J.Z.J. and his father, J.J., filed a due process hearing request ("Complaint") against the Defendant, the Cobb County School District ("District"), alleging that the District has violated their rights under IDEA regarding J.Z.J.'s educational placement. The Complaint alleges the following facts:

> Members of [J.Z.J.]'s [individualized education program ("IEP")] team made a decision to change [J.Z.J.'s] educational placement without [J.Z.J.'s] or his parents' consent.

> Members of the IEP team recommended one school (H.A.V.E.N.). [J.Z.J.]'s parents have submitted other schools as alternatives but those schools were not considered.

Complaint, at 2. The Complaint also requests a remedy based on the above alleged facts, as follows:

> Our child's placement is critical. I recommend the district, in fact, request the district recommend three (3) schools that are SB-10 qualified.
>
> Our child will be placed in a school that his parents deem is appropriate for his present and future development, specifically an SB-10 qualified school.

Id.

On March 10, 2014, the District moved to dismiss the Plaintiffs' Complaint, on the grounds that it fails to state a claim upon which relief may be granted under IDEA. On April 10, 2014, following a prehearing conference and an unsuccessful mediation, the Plaintiffs filed an Amendment to Due Process Filing ("Amended Complaint"). Because the Amended Complaint does not appear to withdraw any of the claims stated in the original Complaint, the Court interprets the Amended Complaint as presenting additional issues for hearing rather than substituting its allegations for those of the original Complaint. The Amended Complaint alleges:

> The [District] predetermined and acted to change placement of [J.Z.J.] without parental consent[.]
>
> The [District] altered the IEP to support the [District]'s predetermination to place [J.Z.J.] in a more restricted environment[.]
>
> The [District] violated [J.Z.J.]'s access to [a free appropriate public education ("FAPE")] through a pattern of removal by way of out-of-school suspensions with frequency in direct response to manifestation of [J.Z.J.]'s documented disabilities[.]
>
> The [District] has not identified how the proposed placement in the [Georgia Network of Educational and Therapeutic Supports ("GNETS")] program is dissimilar to [J.Z.J.]'s current placement[.]

Amended Complaint, at 1. Regarding the relief sought, the Amended Complaint proposes that J.Z.J. be allowed to remain in his current placement. Id. The Plaintiffs have also filed a response to the District's Motion to Dismiss,[1] which does not address the merits of the District's Motion and essentially reiterates the allegations contained in the Amended Complaint.

After careful consideration of the arguments and submissions of the parties, and for the reasons stated below, the District's Motion to Dismiss is **GRANTED** as to the issues presented in the Plaintiffs' original Complaint. However, the additional claims presented in the Amended Complaint are preserved for determination at a hearing.

II. LEGAL STANDARD

Motions to dismiss are authorized by O.C.G.A. § 50-13-13(a)(6), which provides that "[t]he agency, the hearing officer, or any representative of the agency authorized to hold a hearing shall have authority to . . . dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground . . . ." See also O.C.G.A. § 9-11-12(b); Ga. Comp. R. & Regs. r. 616-1-2-.02(3). A motion to dismiss may be granted only if "(1) . . . the allegations in the complaint disclose[] with certainty that [the plaintiff] would not be entitled to relief under any set of provable facts and (2) [the defendant has] shown that [the plaintiff] cannot possibly introduce evidence within the framework of the complaint that would warrant the relief sought." Assoc. of Guineans in Atlanta, Inc. v. DeKalb Cnty., 292 Ga. 362, 363-64 (2013) (citation omitted). In ruling on a motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff, with any doubt resolved in the plaintiff's favor. Quetgles v. City of Columbus, 264 Ga. 708 (1994). Nonetheless, a motion to dismiss must be granted where the complaint is "clearly without any merit; and this want of merit may consist in an

[1] The response and amendment were timely filed in compliance with the Scheduling Order entered on April 3, 2014.

absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Earl v. Mills, 275 Ga. 503, 504 (2002) (citation omitted).

III. ANALYSIS

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). To facilitate compliance with this mandate, IDEA offers procedural safeguards that allow a parent to request a due process hearing regarding the "identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6)(A). However, IDEA does not confer a right to a hearing as to issues outside its statutory scope. In this case, dismissal is warranted to the extent the Plaintiffs have: (1) objected to the physical location of J.Z.J.'s placement; (2) alleged that a change of J.Z.J.'s educational placement requires parental consent; and (3) sought relief, such as the identification of SB-10 qualified schools, that is not authorized under IDEA.

A. Choice of School Facility

The Plaintiffs object to the District's proposal to implement J.Z.J.'s IEP at H.A.V.E.N. Academy, rather than [redacted], the school he currently attends. However, under IDEA, the Plaintiffs are not entitled to choose the particular school at which J.Z.J.'s IEP will be implemented. Accordingly, as to this issue, the Plaintiffs have failed to state a claim upon which relief may be granted.

The District's selection of the physical location of J.Z.J.'s school is simply not a component of his educational placement and does not impact the District's provision of a FAPE to him. 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"); White v. Ascension Parish Sch. Bd., 343 F.3d 373 (5th Cir. 2003) ("'educational placement' as used in the IDEA means educational program – not the particular institution where the program is implemented").

Therefore, because the District has the discretion to select the school that will provide J.Z.J. with special education services, the Complaint is subject to dismissal to the extent it challenges the District's authority to choose the physical location at which J.Z.J.'s IEP will be implemented.

B. Parental Consent to Change of Placement

The Plaintiffs further assert that the District has violated IDEA by changing J.Z.J.'s educational placement without his parents' consent. However, because IDEA does not give parents veto power over a proposed change of placement, the District is entitled to dismissal of this claim.

IDEA requires a school district to ensure that an eligible child's IEP is reviewed and revised by the IEP team at least annually. 20 U.S.C. § 1414(d)(4)(A). The child's parents are always included as members of the IEP team. 20 U.S.C. § 1414(d)(1)(B). In fact, the right to parental participation is one of IDEA's most important procedural safeguards, because "[p]arents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only

they are in a position to know." Amanda J. v. Clark Cnty. Sch. Dist., 267 F.3d 877, 882 (9th Cir. 2001). However, decisions regarding the child's placement are made by the IEP team as a whole, and cannot be dictated by the parents. When the team decides upon a change of placement during an IEP meeting, as alleged by the Plaintiffs here, parental consent is plainly not required. K.A. v. Fulton Cnty. Sch. Dist., 741 F.3d 1195, 1206 (11th Cir. 2013). Rather, parental consent is required only where a child's placement is changed *without* convening an IEP meeting. Id.

Accordingly, because there is no basis in IDEA for the Plaintiffs' assertion that J.Z.J.'s parents must consent to a change of his placement, the District is entitled to dismissal of this claim.

C. Identification of SB-10 Qualified Schools

The Plaintiffs' original Complaint requests that the District identify three schools, as an alternative to H.A.V.E.N. Academy, that are SB-10 qualified and able to implement J.Z.J.'s IEP. This request for relief refers to the Georgia Special Needs Scholarship Act ("Act"), which was enacted in 2007 by Senate Bill 10. Through the Act, disabled students who prefer not to enroll at their assigned public schools may attend other public or participating private schools, either within or outside their home districts, subject to certain conditions. O.C.G.A. § 20-2-2113(b). Although school districts are mandated to provide annual notice of this option to the parents of children with disabilities, nothing in the Act requires a district to identify those schools with the ability to implement a particular student's IEP. O.C.G.A. 20-2-2113(a). In fact, the Act provides that "[a]ny scholarship directed to a participating school is so directed wholly as a result of the genuine and independent private choice of the parent." O.C.G.A. § 20-2-2114(h).

Therefore, because the relief requested in the Plaintiffs' original Complaint cannot be afforded under IDEA, the District is entitled to dismissal as to this issue.

III. ORDER

For the foregoing reasons, and as more fully explained above, the District's Motion to Dismiss is **GRANTED** as to the claims presented in the Plaintiffs' original Complaint. However, because the Amended Complaint contains additional claims that remain for determination, the hearing will proceed as scheduled on May 12 and 15, 2014.

SO ORDERED, this _____ day of April, 2014.

KRISTIN L. MILLER
Administrative Law Judge