IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RUBY RUIZ, Plaintiff, v. FULTON COUNTY SCHOOL DISTRICT, Defendant.	: : : : : : : : : :	CIVIL ACTION FILE NO.: 1:19-CV-02943-CAP-JCF

ORDER and FINAL REPORT AND RECOMMENDATION

This case is before the Court on Defendant's Motion For Summary Judgment (Doc. 40) and Defendant's Objection And Motion To Strike Dr. Young Kang's Affidavit (Doc. 48).

Procedural Background

Ruby Ruiz ("Plaintiff") was formerly employed by Defendant Fulton County School District ("FCS," "the District," or "Defendant") as a teacher at Elkins Pointe Middle School. (Doc. 1 ¶ 8). On June 26, 2019, Plaintiff filed a Complaint against Defendant in which she asserted a claim pursuant to the Americans with Disabilities Act of 1990, as amended ("ADA") based on Defendant's alleged failure to make reasonable accommodation for her disability. (Doc. 1). Specifically, Plaintiff alleges that she suffers from osteoarthritis which "restricts her ability to walk or stand for extended periods of time due to swelling, secondary to pain of her joints of the knee,

ankle, and hips," and she submitted an accommodation form on April 9, 2018. (Doc. 1 ¶¶ 9-11). She further alleges that her physician Dr. Young Kang recommended the following accommodations on April 13, 2019:

> 1) allow Plaintiff to teach sitting at a desk; 2) no prolonged walking more than 50-100 feet; 3) no lifting more than 50 lbs; 4) avoid tasks involving stairs; 5) avoid supervising students for state standardized testing; and 6) assign classes of no more than 12 students.

(*Id*. ¶ 13). On May 30, 2018, Defendant approved Plaintiff "for an accommodation that included the condition that classroom assignments must be in close proximity," i.e., no more than 100 feet apart, and "not require the use of stairs." (*Id*. ¶¶ 14-15). According to Plaintiff, Defendant assigned her to a schedule after August 2018 which required her to move to different classrooms and travel between "82 feet to 224 feet." (*Id*. ¶¶ 18-20). Such a schedule exacerbated her disabling condition, and Plaintiff requested that Defendant "change her class schedule to meet the previously-approved accommodations," but Defendant refused. (*Id*. ¶¶ 21-23). Plaintiff therefore went out on leave of absence and Long-Term Disability. (*Id*. ¶ 24). Plaintiff asserts one claim for ADA discrimination based on Defendant's alleged failure to continue the reasonable accommodation "of limiting Plaintiff's physical movement throughout the school day by assigning her to classes in close proximity, 100 feet or less." (*Id*. ¶¶ 27-29).

Defendant answered on November 15, 2019 (Doc. 4) and the parties engaged in discovery. Defendant has now filed a motion for summary judgment (Doc. 40)

and supporting brief (Doc. 40-1), statement of undisputed material facts (Doc. 40-2), and exhibits (Docs. 40-3 through 40-23). Plaintiff responded (Doc. 42) with statement of additional material facts (Doc. 42-1), response to Defendant's statement of material facts (Doc. 42-2), and supporting exhibits (Docs. 42-3 through 42-8). Defendant filed a reply brief (Doc. 45) and responded to Plaintiff's statement of facts (Doc. 46).

Defendant also objected to and moved to strike the Affidavit of Dr. Young Kang provided in support of Plaintiff's summary judgment response (*see* Doc. 42-6) on the ground that Dr. Kang's affidavit "is completely inconsistent with his deposition" testimony, and therefore constitutes an improper "sham affidavit." (Doc. 48). Plaintiff responded in opposition to that motion (Doc. 49), and Defendant replied (Doc. 50).

With briefing complete, the undersigned now turns to the merits of Defendant's motions.

I. Defendant's Objection And Motion To Strike Dr. Kang's Affidavit (Doc. 48)

Defendant objects to and moves to strike the affidavit of Plaintiff's physician, Dr. Young Kang (*see* Doc. 42-6), Plaintiff's primary care physician, because Dr. Kang's affidavit statements contradict without explanation his earlier deposition testimony and therefore constitutes a "sham affidavit." (*See generally* Doc. 48). The undersigned finds that it is unnecessary to resolve this issue because even if the Court

considers Dr. Kang's affidavit statements, they do not create a genuine issue of material fact to be tried. Instead, the relevant evidence concerning Dr. Kang's treatment of Plaintiff and opinions about her limitations for purposes of considering Defendant's motion for summary judgment consists of his statements provided to Defendant concerning Plaintiff's impairments, recommended accommodations, and Plaintiff's inability to return to work, discussed in the Facts section below. Accordingly, Defendant's Objection And Motion To Strike Dr. Young Kang's Affidavit (Doc. 48) is **DENIED AS MOOT**.

II. Defendant's Motion For Summary Judgment (Doc. 40)

Plaintiff alleged in her Complaint that on May 30, 2018, Defendant approved Plaintiff "for an accommodation that included the condition that classroom assignments must be in close proximity," i.e., no more than 100 feet apart, and "not require the use of stairs," but then Defendant assigned her to a schedule after August 2018 which required her to move to different classrooms and travel between "82 feet to 224 feet" and refused to "change her class schedule to meet the previously-approved accommodations." (Doc. 1 ¶¶ 14-15, 18-23). Plaintiff asserts one claim for ADA discrimination based on Defendant's alleged failure to continue the reasonable accommodation "of limiting Plaintiff's physical movement throughout the school day by assigning her to classes in close proximity, 100 feet or less." (*Id.* ¶¶ 27-29). Defendant now moves for summary judgment on that claim. (Doc. 40).

A. Summary Judgment Standard

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support that assertion by[] . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." FED. R. CIV. P. 56(c)(1). The moving party has an initial burden of informing the court of the basis for the motion and showing that there is no genuine issue of material fact. *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986); *see also Arnold v. Litton Loan Servicing, LP*, No. 1:08-cv-2623-WSD, 2009 WL 5200292, at *4 (N.D. Ga. Dec. 23, 2009) ("The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact.") (citing *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1246 (11th Cir. 1999)). If the non-moving party will bear the burden of proving the material issue at trial, then in order to defeat summary judgment, that party must respond by going beyond the pleadings, and by the party's own affidavits, or by the discovery on file, identify facts sufficient to establish the existence of a genuine issue for trial. *See Celotex*, 477 U.S. at 322, 324. "No genuine issue of material fact exists if a party has failed to 'make a showing sufficient to

establish the existence of an element . . . on which that party will bear the burden of proof at trial.' " *AFL-CIO v. City of Miami*, 637 F.3d 1178, 1186-87 (11th Cir. 2011) (quoting *Celotex*, 477 U.S. at 322).

Furthermore, "[a] nonmoving party, opposing a motion for summary judgment supported by affidavits[,] cannot meet the burden of coming forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissible at trial." *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991), *cert. denied*, 506 U.S. 952 (1992); *see also* FED. R. CIV. P. 56(c)(1)(B), (c)(4). The evidence "cannot consist of conclusory allegations or legal conclusions." *Avirgan*, 932 F.2d at 1577. Unsupported self-serving statements by the party opposing summary judgment are insufficient to avoid summary judgment. *See Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714 (11th Cir. 1984).

For a dispute about a material fact to be "genuine," the evidence must be such that "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted). It is not the court's function at the summary judgment stage to determine credibility or decide the truth of the matter. *Id.* at 249, 255. Rather, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [the nonmovant's] favor." *Id.* at 255.

B. Facts For Purpose Of Summary Judgment[1]

1. Standards For Determining Summary Judgment Facts

The facts, for summary judgment purposes only, are derived from Defendant's statement of undisputed material facts (Doc. 40-2 ("Def. SMF")); Plaintiff's statement of material facts (Doc. 42-1 ("Pl. SMF")); and uncontroverted record evidence. Many of these facts are taken from the deposition of Plaintiff (Docs. 40-7 and 40-8 ("Ruiz Dep.")) and exhibits thereto (Docs. 40-9 through 40-17); and the Affidavits of FCS personnel, including Ida Ward ("Ward Aff.") (Doc. 40-3); Kindra Smith ("Smith Aff.") (Doc. 40-4); and Pamela Gayles ("Gayles Aff.") (Doc. 40-5).[2] Plaintiff also submitted the Affidavit of Dr. Young Kang ("Kang Aff.") (Doc. 42-6) and Plaintiff's "Declaration-Affidavit" ("Ruiz Decl.") (Doc. 42-8), both of whom were deposed by Defendant.

The undersigned has reviewed the record, including the parties' summary judgment filings, to determine whether genuine issues of material fact exist to be tried. Yet the court need not "scour the record" to make that determination. *Tomasini v. Mt. Sinai Med. Ctr. Of Fla.*, 315 F. Supp. 2d. 1252, 1260 n.11 (S.D. Fla. 2004) (internal quotation omitted). In ruling on Defendant's summary judgment motion,

[1] Where relevant, additional facts are set out in the Analysis section below.
[2] It does not appear that Plaintiff deposed those employees.

the facts are construed in the light most favorable to Plaintiff as the non-movant. *See Frederick v. Sprint/United Mgmt. Co.*, 26 F.3d 1305, 1309 (11th Cir. 2001).

2. Facts

FCS hired Plaintiff August 2, 2016 for the 2016-2017 school year to work at Elkins Pointe Middle School ("Elkins"), her only assignment with FCS. (Def. SMF ¶¶ 1, 2). Kindra Smith was the Principal of Elkins and Plaintiff's direct and immediate supervisor during the 2017-2018 and 2018-2019 school years. (Def. SMF ¶¶ 6, 7). Plaintiff was first hired as an ESOL (English to Speakers of Other Languages) teacher, and she was an ESOL teacher for the 2016-2017 school year and the 2017-2018 school year. (Def. SMF ¶¶ 3, 116). As an ESOL teacher during those years, Plaintiff co-taught, where she taught students in different teachers' classrooms and shared the instructional teaching with the teacher of record in that classroom. (Def. SMF ¶¶ 117-118, 207-08).

In the 2017-2018 and 2018-2019 school years, Dr. Pamela Gayles was the Executive Director of Talent/Human Resources for FCS. (Def. SMF ¶¶ 9, 220). As Executive Director, Dr. Gayles was the only employee in the District with the authority and responsibility for granting or denying employee requests for accommodation under the ADA. (Def. SMF ¶ 10). On March 28, 2018, Gina Rome, FCS Leave Administration Manager, provided Plaintiff with forms she needed to apply for an ADA accommodation. (Def. SMF ¶ 113). On April 9, 2018, Plaintiff

submitted an Accommodation Request Form to FCS. (Def. SMF ¶ 222; Doc. 40-11 at 9-11). Prior to submitting that form, Plaintiff had been diagnosed with osteoarthritis and rheumatoid arthritis. (Pl. SMF ¶ 1). In her accommodation request, Plaintiff indicated that she had a mobility impairment due to severe rheumatoid arthritis and that she:

> cannot climb stairs; cannot stand for period longer than 10 minutes; cannot walk or perform tasks that require long distances of more than 100 feet; I cannot lift objects greater than 50 lbs; I must avoid severe stressful situations that require the above limitations or caring for large groups of more than 12 students/including standardized testing situations.

(Doc. 40-11 at 10). As accommodations, Plaintiff requested:

> (1) Assign small groups of students ([no more than] 12 student); (2) Allow seating; allow teaching from my desk; (3) Avoid assignments requiring standardized testing; (4) Avoid assignments that require distance walking; prolonged standing; heavy lifting; climbing stairs; and being subjected to handling large groups of students (of more than 12); (5) Provide more support to me at the teacher for handling unruly student behaviors that prevent my ability to teach and maintain a positive learning environment.

(*Id*.). Plaintiff also wrote, "Please allow me to sit at my desk to teach; limit constant walking, standing, climbing, and lifting. Please excuse me from standardized testing situations that require the above; please provide discipline support when severe student behaviors arise." (*Id*. at 11). Plaintiff's doctor, Dr. Young Kang, recommended the following accommodations:

> 1) allow [patient] to teach sitting from desk. Avoid standing more than 10 minutes without sit-down break; 2) No prolonged walking – more

> than 50-100 f[eet]; 3) No weight lifting [more than] 50 lbs; 4) Avoid tasks that involve[] taking stairs; 5) Can't stand and oversee students for all state standardized testing; 6) Please assign small group of students (less than 12) to teach.

(Doc. 40-11 at 25).

In May 2018, Principal Smith spoke with Dr. Gayles about Plaintiff's work schedule, duties, and responsibilities. (Def. SMF ¶ 11). In a May 30, 2018 letter, Dr. Gayles advised Plaintiff that the following accommodations would be provided to her, based on Plaintiff's request and her physician's recommendations:

> (1) during classroom instruction, you are allowed to alternate between sitting and standing as needed; (2) the proximity of your classroom assignments[] does not require walking extended distances or the use [of] stairs[3]; and (3) if you have items greater than 50 lbs that need to be moved, the school will provide appropriate assistance.

(Doc. 40-11 at 35). Dr. Gayles explained to Principal Smith that "extended distances" as referred to in the letter, in connection with Plaintiff's stated limitations regarding walking/travel, meant distances more than 100 feet at one time (Def. SMF ¶ 232; Gayles Aff. ¶ 9), which is consistent with the accommodations that were requested. According to Plaintiff's Complaint, the only accommodation at issue in this case is the alleged failure to limit her walking between classes to 100 feet. (*See* Doc. 1 ¶¶ 18-24, 27-29). Gayles also wrote in the letter that "these accommodations

[3] Elkins is a one-level school with no stairs, so Plaintiff was never required to climb stairs there. (Def. SMF ¶¶ 120-21, 189). She did, however, climb stairs at her house, where her bedroom was on the second floor. (Def. SMF ¶¶ 122, 181-182; Ruiz Dep. 83-86).

do not change any of the essential functions of your job and can be reviewed at any time," and she provided Plaintiff with her phone number and email address if Plaintiff had any questions. (*Id*.). Prior to sending the May 30th letter, Dr. Gayles explained to Plaintiff that they could revisit and reassess her accommodations as needed. (Def. SMF ¶ 237). In response to Dr. Gayles' letter, Plaintiff wrote that she was "very appreciative and thankful that my requested accommodations were approved as per my doctor's requests and my need." (Def. SMF 233; Doc. 40-11 at 37).

After she sent the letter, Dr. Gayles spoke with Principal Smith regarding the accommodations that had been approved for Plaintiff and how to best implement those accommodations for Plaintiff at the school level for the upcoming 2018-2019 school year. (Def. SMF ¶¶ 13, 231; Smith Aff. ¶ 4; Gayles Aff. ¶ 9). At the time the accommodations were granted, the 2017-2018 school year had ended, so they were to be implemented during the 2018-2019 school year. (Def. SMF ¶ 230). During the 2017-2018 and the 2018-19 school year, Assistant Principal Ida Ward, the Curriculum Assistant Principal, had oversight of teacher assignments and schedules at Elkins. (Def. SMF ¶ 15). Principal Smith communicated to Ward the school's

responsibility to implement Plaintiff's approved accommodations.[4] (Def. SMF ¶ 17).

In early July 2018, one of the special education teachers at Elkins was promoted to an Instructional Support Teacher (IST) role and left her position vacant. (Def. SMF ¶ 18). In July 2018, Smith told Plaintiff that she was moving Plaintiff into the vacant special education role.[5] (Def. SMF ¶ 19). Smith sent Plaintiff an email on July 23, 2018 thanking her "for stepping up for us in the role of a special education teacher for the 2018-19 school year. I will do my very best to make sure that you have a kidney table in your room. We will have you in room E121 for all of your classes. Ms. Anderson, the IST, will provide you with support and guidance through this transition." (Doc. 40-12 at 2). Plaintiff's assignment to the special education position allowed the school to implement Plaintiff's accommodations related to mobility restrictions and limitations approved by the District. (Def. SMF ¶ 23). On July 30, 2018 Plaintiff wrote Smith about two other teachers being in her

[4] Plaintiff objected to Def. SMF ¶ 17 and several other statements on the ground that "[m]otivation is a factual question. A reasonable jury may appropriately reject the testimony of biased witnesses." (Pl. resp. to Def. SMF ¶ 17). That is an improper objection where Smith stated in her Affidavit that she communicated Plaintiff's approved accommodations to Ward (Smith Aff., ¶ 5), a statement of fact which required Plaintiff to refute with evidence creating an issue of fact on whether Smith so communicated with Ward. Plaintiff failed to do so. The Court notes that Plaintiff does not appear to have deposed either Smith, Ward, or Gayles.

[5] Plaintiff alleges that the move into the special education role was a promotion (*see* Ruiz Decl., 42-8, ¶¶ 5-6), which Principal Smith denies (Smith Aff. ¶ 6). This dispute is not material to the issues in this case.

classroom, and Smith responded that Plaintiff would have to share Room E121 with the other two teachers, and that they would "continue to look for alternatives for them, but the building is tight, so we have to work together." (Doc. 40-12 at 4-5).

Pre-planning for the 2018-2018 school year began on July 31, 2018, and the first day for students to report was August 6, 2018. (Def. SMF ¶¶ 32, 33). On August 9, 2018, Principal Smith notified the Elkins special education department teachers that special education caseloads were low, and half of the special education teachers had high numbers of students and the other half had low numbers of students and open class periods with no students at all. (Def. SMF ¶ 36). Smith met with special education teachers on August 9th to discuss possible solutions to balancing caseloads, including potentially swapping and/or picking up teaching assignments and shifts necessary to balance teaching assignments with learning opportunities. (Def. SMF ¶ 37). On August 17, 2018, after the "10-day count," Smith received a call from a District Human Resources Representative notifying her that Elkins would be losing a special education teacher position. (Def. SMF ¶ 13; *see also* Smith Aff. ¶ 13).

At the time Smith learned that Elkins was to lose a special education teacher position, the following vacancies existed at the school: middle school math teacher (ESOL support/non special education); middle school science teacher (non special education); Georgia Network for Educational and Therapeutic Support (GNETS)

teacher; paraprofessional interrelated (special education); and paraprofessional autism (special education). (Def. SMF ¶ 41). Principal Smith stated in an affidavit that "[i]n reviewing vacancies, it was an academic priority to fill the ESOL math teacher support position, as it was the hardest to fill of the existing vacancies." (Smith Aff. ¶ 14). Elkins served as an ESOL center school and therefore provided ESOL services for qualified students that were enrolled in schools without an ESOL program. (Def. SMF ¶ 43). In mid- to late-August of 2018, the number of students receiving ESOL services increased at Elkins from 109 to 124. (Def. SMF ¶ 44). Elkins was required to make the necessary class, instructional schedule, and assignment changes necessary to legally accommodate and service those qualified English Learners. (Def. SMF ¶ 45). In order to prevent the loss of a teacher at the school, they reviewed the certifications of the special education teachers, and Plaintiff "was the only one that possessed ESOL certification and the math special education certification that was required to fill the ESOL math teacher position." (*Id.*). Smith therefore decided to move Plaintiff into the ESOL role. (Def. SMF ¶ 50; *see also* Smith Aff. ¶ 14).

Smith met with Plaintiff on August 21, 2018 to tell her that as a result of the 10-day count and Elkins low special education numbers, the school had lost one special education teacher position. (Def. SMF ¶ 51). Smith also told Plaintiff that she would be transitioning back to a vacant ESOL general education teacher position

that would provide math and language arts content support. (Def. SMF ¶ 52). Plaintiff alleges that Smith "assured" her that her "accommodations would remain in place and that students would report to me in room E-121."[6] (Ruiz Decl., Doc. 42-8, ¶ 9). Smith denies that she told Plaintiff "that she would remain in a single classroom, specifically Room E121, or that the students that would be assigned to her class schedules would or could travel to her in one classroom in the ESOL teacher assignment. In fact, in an email dated August 21, 2018, Assistant Principal Ward advised Dr. Ruiz that she would be meeting with her by Friday to discuss her new schedule." (Smith Aff. ¶17). As discussed below, Assistant Principal Ward—who had oversight of teacher assignments and schedules at Elkins (Def. SMF ¶ 15)—later sent Plaintiff a schedule wherein she traveled to other classes to co-teach, part of her responsibilities as an ESOL teacher. As also discussed below, this dispute is not material because the accommodation at issue as alleged by Plaintiff in her Complaint is the restriction against walking more than 100 feet at a time, not assignment to a single classroom with no traveling to other classrooms to teach. Thus, even if Smith told Plaintiff on August 21, 2018 that she would be in one classroom and then changed her mind, that evidence by itself does not show that Defendant failed to reasonably accommodate Plaintiff's disability as set forth in the

[6] Plaintiff has no documentation of Smith's alleged promise that she would remain in Room E-121 and her students would come to her. (Ruiz Dep. 261-62).

actual accommodations that Plaintiff requested in April 2018 and Defendant approved in May 2018. The relevant issue is whether that schedule failed to accommodate Plaintiff's restriction against walking extended distances, i.e., more than 100 feet at one time.

Smith sent Plaintiff an email August 21, 2018 thanking her "for being flexible through these changes," and Catherine Anderson sent an email to the special education department explaining that Elkins had lost a special education position as a result of the 10-day count and that Plaintiff "will be transitioning back to an ESOL/RTI gen ed position that is vacant." (Doc. 40-12 at 12). Plaintiff sent Smith an email thanking her for meeting with her earlier: "I am very grateful to you for the time given, and I look forward towards transitioning into the new instructional segments successfully on August 27th." (Doc. 40-12 at 14). Assistant Principal Ward advised Plaintiff in an August 21, 2018 email that she would be meeting with her Friday, August 24, 2018 to discuss her new schedule. (Def. SMF ¶ 63). The night of August 21, 2018, Plaintiff sent an email to Patty Johnson in HR "writing to agree to move from a special education IRR Math Position to a General Education Math Position effective 08/27/2018." (Doc. 40-12 at 19).

Around 10 p.m. on August 21, 2018, Blake McGaha, Executive Director of the District's Services for Exceptional Children Department, sent an email to Principal Smith informing her that Elkins would not lose the special education

teacher allotment for the 2018-2019 school year. (Def. SMF ¶ 64). Principal Smith sent an email to Plaintiff the morning of August 22, 2018 and informed her that the District had returned the special education position to Elkins that she moved her from the day before. (Def. SMF ¶ 65; Doc. 40-12 at 23). Smith also told Plaintiff that she planned to hire for the special education position[7] that had been returned and that Plaintiff would still serve as the RTI math push in and the ESOL Language Arts sheltered teacher as they had discussed the previous day. (Def. SMF ¶ 66; Doc. 40-12 at 23). She also told Plaintiff that "Ms. Ward will get you your class line up soon!" (Doc. 40-12 at 23). Plaintiff responded:

> Thank you, Principal Smith. Sure thing, Principal Smith. I understand. I will continue to standby for my new Instructional Schedule from Ms. Ward. Everything will work out just fine, and I know this is going to be a great school year. I will do my very best to make sure that everything is well with my new students that I will receive. Let's[] pull together as a team through all of the unfor[e]seen changes.

(Doc. 40-12 at 23). Smith thanked Plaintiff for being a "true team player" and "so flexible and understanding." (*Id.*).

Principal Smith worked with Assistant Principal Ward to ensure that Plaintiff was provided an instructional schedule in her new assignment that did not violate or

[7] Smith hired Theresa Schulte, who was working as a paraprofessional at Elkins and had obtained her special education math content certification in August 2018, for the returned special education teacher position. (Def. SMF ¶ 68; Smith Aff. ¶ 18). Schulte did not have an ESOL certification and could not teach ESOL. (Def. SMF ¶ 69; Smith Aff. ¶ 18). At that time, Plaintiff was the only special education teacher at Elkins who possessed ESOL certification. (Def. SMF ¶ 70; Smith Aff. ¶ 18).

ignore her approved accommodations. (Def. SMF ¶ 74; Smith Aff. ¶ 19). Before finalizing Plaintiff's ESOL teaching schedule, Smith and Ward walked the distances between the classroom assignments to ensure that Plaintiff would not be walking extended distances. (Def. SMF ¶ 75; Smith Aff. ¶ 19). In developing Plaintiff's schedule, Ward "arranged her planning periods in a manner that would allow her to rest between her classes, limit her mobility and get herself situated, as teacher planning periods were usually back to back." (Ward Aff. ¶ 13). Ward also "coordinated with teachers to ensure that Dr. Ruiz was not walking extended distances between her classes, and [Ward] walked the distance between the classes as well to be sure of the same." (*Id*.).

In an August 27, 2018 email, Ward provided Plaintiff with her new schedule. (Def. SMF ¶ 76; Smith Aff. ¶ 19; Doc. 40-12 at 29). Ward sent the following schedule to Plaintiff: 1st period with Billups (Math) (E109); 2nd period with Young (ELA) (E125); 3rd period with Allen (ELA) (D125); 4th period with Kurowski (Math) (F103); 5th period planning (E121); 6th period WINN with Allen's class (D125); 7th period planning (E121); and 8th period with Billups (Math) (E109). (Ward Aff. ¶ 14; *see also* Doc. 40-12 at 29). Ward told Plaintiff not to report to Young's and Allen's 2nd and 3rd period classes while Ward worked to reduce class sizes and to remain in E121 during those periods. (Ward Aff. ¶ 14). Ward stated in

her affidavit that the distances between those classes was no more than 80 feet. (Ward Aff. ¶ 14).

During her deposition, Plaintiff testified that she did not measure the distances between her classes with a measuring tool such as a yardstick, ruler, or similar tool or by counting steps. (Ruiz Dep. 142-43). Instead, after Plaintiff was no longer working at the school, she and her attorney used a measuring tool on Google Earth based on aerial views of the school, but she does not recall what those measurements were, including the distance from the parking lot to her first class, and she has no idea how accurate those Google Earth measurements were. (Ruiz Dep. 140-42, 212-14, 317-18). Plaintiff asserted in response to Defendant's statement of undisputed material facts that "Plaintiff used Google Earth to determine that the distance did in fact exceed 100 feet" and cited to her declaration (*see* Pl resp. to Def. SMF ¶¶ 284, 285), but in her declaration, Plaintiff simply stated that she "measured the distances between classrooms using Google Earth, which I believe to be more accurate than Principal Smith's measurements." (Ruiz Decl., Doc. 42-8, ¶ 26). She did not provide those measurements in her declaration, however, nor did she testify to them during her deposition.

On August 28, 2018, Principal Smith met with Plaintiff to discuss her schedule and showed her on a map of Elkins where her classrooms would be located. (Def. SMF ¶ 78; Smith Aff. ¶ 20). Smith stated in an affidavit that "[a]t no time

during my discussion with Dr. Ruiz did she express any concern, objections, opposition or problems related to the schedule, the location of her classrooms or anything related to her assignment, including expressing no concerns that she believed that we were not implementing her accommodations as the District had approved them, or that her accommodations were being violated." (Smith Aff. ¶ 20). Plaintiff states in a Declaration that she "expressed that the new schedule would not accommodate me" (Ruiz Decl., Doc. 42-8, ¶ 10), but she did not describe or explain in her declaration how the schedule would not accommodate her, nor did she state that she expressed during that meeting how the schedule would not accommodate her, and in particular, that the schedule would require her to walk more than 100 feet at a time. On August 28, 2018, Principal Smith updated Dr. Gayles about Plaintiff's class schedule, the locations of her classes in the building, including the distance from Plaintiff's car in the parking lot to her first class, and the implementation of Plaintiff's approved accommodations. (Def. SMF ¶¶ 81, 239; Smith Aff. ¶ 20; Gayles Aff. ¶ 12).

Plaintiff took sick leave on Friday, September 7, 2018, Monday, September 10, 2018, Tuesday, September 11, 2018, and Wednesday, September 12, 2018. (Def. SMF ¶¶ 86, 96, 218). At no time between May 2018, when Dr. Gayles approved Plaintiff's April 2018 request for accommodation, and September 7, 2018, when Plaintiff went out on leave, did Plaintiff follow up with Dr. Gayles for any reason at

all, including but not limited to reasons related to her request for accommodations, the approval of her accommodations, her teaching assignment at Elkins, her employment with the District, her instructional schedule at Elkins, or any perception of how her accommodations were being violated or not implemented at Elkins. (Def. SMF ¶ 235). Nor did Plaintiff complain to Dr. Gayles at any time between August 27, 2018 and September 7, 2018 that she was walking more than 100 feet between classes, that she believed she was walking more than 100 feet between classes or that she was having problems or challenges, mobility or otherwise, navigating her assignment and schedule during that period of time. (Def. SMF ¶ 279; Gayles Aff. ¶ 32).[8]

[8] Plaintiff disputed Def. SMF ¶ 279 and cited to her declaration at paragraph 12 in support. (Pl. resp. to Def. SMF ¶ 279). Plaintiff stated in her declaration that "[b]etween August 28, 2018, and September 16, 2018, I complained about the failure to accommodate me multiple times to Principal Smith, Assistant Principal Ward and Pamela Gayles and requested to teach out of a single classroom." (Ruiz Decl., Doc. 42-8, ¶ 12). That statement does not indicate that Plaintiff complained to Gayles about the distances she was walking between classes or that she made a request to Gayles about teaching out of a single classroom before she went on leave September 7, 2016. To the contrary, Plaintiff testified in her deposition that she first spoke with Gayles in May 2018 and the next time they spoke was in October 2018. (Ruiz Dep. 173-76). Nor has Plaintiff identified written correspondence she sent to Gayles prior to September 7, 2018 complaining about the alleged failure to accommodate her or requesting to teach out of a single classroom. Moreover, Plaintiff did not dispute Def. SMF ¶ 235, which states that Plaintiff did not follow up with Dr. Gayles for any reason at all between May 28, 2018 and September 7, 2018, including but not limited to reasons related to her request for accommodations, the approval of her accommodations, her teaching assignment at Elkins, her employment with the District, *her instructional schedule at Elkins, or any perception of how her*

Following her absence of September 7, 2018, Plaintiff never returned to her position with FCS. (Def. SMF ¶¶ 87, 219). The last time Plaintiff held any type of employment, including with FCS, was September 2018, and she never sought employment thereafter. (Def. SMF ¶¶ 128-29). In a September 12, 2018 email, Plaintiff advised Principal Smith that she had been told that she could not return to work until further evaluation of problems associated with her disability and her doctor cleared her to return to work, and that she was praying she could return to work on Monday, September 17, 2018. (Def. SMF ¶ 98; Doc. 40-13 at 5). Dr. Kang wrote in a "To Whom It May Concern" letter dated September 12, 2018:

> I am writing this letter in behalf of my patient Ruby Ruiz in order to request to accommodate her job schedule, duties and responsibilities. Ms. Ruiz suffers from rheumatoid arthritis with severe knee pain, swelling and weakness. She is not able to walk one classroom to another for 8 classes per day due to her current medical condition. I previously submitted the accommodations request to Fulton county public school; however, Ms. Ruiz claims it has not been implemented at the local school evidenced by worsening of her knee swelling due to her current schedule with 8 different classrooms. Ms. Ruiz is not making progress and improvement due to her class schedule. I will continue to support her are and control pain. She will also follow up with her orthopedic surgeon and rheumatologist as needed. She should stay in one class room to teach her students at this time. If this request is not approved, she will need to be on disability leave to prevent worsening of her medical condition.

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accommodations were being violated or not implemented at Elkins. (Def. SMF ¶ 235; Pl. resp. to Def. SMF ¶ 235).

(Doc. 40-13 at 3). The letter itself does not indicate that it was submitted to FCS or if so, when it was submitted. (*Id.*). Plaintiff did not then submit an accommodations request through the District's HR requesting a single classroom. Instead, on September 16, 2018, she sent Smith an email stating that her "doctor has not released me to work as my condition has worsened," and that she "will continue to wait for your reply to my medical doctor and I with regards to the requests found in the Medical Letter Dated 09-12-18 that my doctor previously forwarded." (Doc. 40-13 at 7). Smith responded that she would "need to review your submissions with my team and Dr. Gayle[]s on Monday when all parties are at work," and that she would follow up with Plaintiff after they reviewed her request. (*Id.*). Dr. Gayles received notice on September 16, 2018 that Plaintiff might be seeking a single classroom as an accommodation, which Plaintiff had not requested in her April 9, 2018 request. (Def. SMF ¶ 240; Gayles Aff. ¶ 13). Neither Plaintiff nor her doctor identified being assigned to a single classroom as a requested accommodation in Plaintiff's April 2018 request (*see* Doc. 40-11 at 9-11, 25), and Gayles' May 30th letter accommodations approval letter did not include such an accommodation (Doc. 40-11 at 35). After receiving Plaintiff's September 16th email, Smith and Ward re-measured the distance between Plaintiff's classrooms and provided that information to Dr. Gayles. (Smith Aff. ¶ 40-4). Plaintiff also filed a grievance on September 18, 2018 in which she alleged that her school had ignored her approved accommodations

"as prescribed by my medical doctor," though she did not specify what those prescribed or approved accommodations were or how her school had ignored them, and she requested that she "be in one classroom to teach small group students close to handicap parking or be transferred to a school near my home that will provide accommodations." (Doc. 40-17 at 27-28).

In September 2018, the District approved Plaintiff's Family and Medical Leave Act (FMLA) leave and extended leave from September 7, 2018 until December 20, 2018 with an expected return date of January 3, 2019. (Def. SMF ¶ 103; Doc. 40-13 at 28-29). Plaintiff also applied for and was approved for short-term disability benefits from The Hartford. (Def. SMF ¶¶ 142-43). In connection with that application, made in September or October 2018, she represented that she could not work. (Def. SMF ¶ 143; Ruiz Dep. 34).

Gayles spoke with Plaintiff in October 2018 concerning her teaching schedule and her request for a single classroom with no travel to students. (Gayles Aff. ¶¶ 13, 16, 18; Ruiz Dep. 175-76). Smith told Gayles that a single classroom was not available, and Plaintiff's assignment and schedule at the time she went on leave required her to travel to at least three classes to support students as a co-teacher. (Gayles Aff. ¶ 16). Dr. Gayles explored other options, such as providing Plaintiff

with a wheelchair to reduce the need to walk to classrooms, but Plaintiff declined.[9] (Gayles Aff. ¶¶ 16, 18). Smith and Ward also worked on Plaintiff's schedule in an effort to reduce the amount of walking required between classes and to and from her car when she returned to work (*see* Gayles Aff. ¶¶ 14-15; Smith Aff. ¶ 29; Ward Aff ¶ 18), but Plaintiff continued to request a single classroom with no travel to other classrooms (*see* Gayles Aff. ¶ 16).

In November 2018, Plaintiff applied for disability benefits through the Social Security Administration and stated that she had been unable to work since September 8, 2018.[10] (Def. SMF ¶¶ 163-67; Doc. 40-13 at 33-46; Doc. 40-14 at 29-46; Ruiz Dep. 202-03). Plaintiff testified during her deposition that as of November 2018 when she applied for Social Security disability benefits, she was unable to work "at all," with or without accommodations (Ruiz Dep. 276-77, 299), and she thereafter remained unable to work as a teacher with or without accommodations (Ruiz Dep. 35-36, 69-70, 277-78, 280, 283, 285, 287, 300).[11]

Dr. Kang wrote a letter dated December 4, 2018 stating that Plaintiff was "unable to return to any work that may involve physical activity due to her current

[9] The reasons given for Plaintiff declining to use a wheelchair appear to be in some dispute but are not material to the resolution of Defendant's motion.
[10] Her applications were ultimately denied. (Def. SMF ¶¶ 170-72).
[11] Plaintiff at first testified that she could work in September 2018 with accommodations (Ruiz Dep. 30, 69), but later she testified that could not have worked after she took leave September 7, 2018, with or without accommodations (*id*. at 309, 327).

condition." (Doc. 40-14 at 15). In a Fitness for Duty certification, Dr. Kang wrote that Plaintiff must remain off work until March 20, 2019. (Doc. 40-14 at 16). On December 7, 2018, the District approved Plaintiff's leave until March 19, 2019. (Doc. 40-14 at 24). Plaintiff submitted an Accommodation Request Form on January 17, 2019 in which she requested, among other things, to be assigned "to a single classroom of my own close to handicap parking." (Doc. 40-15 at 14). Dr. Kang recommended as accommodations:

> 1) allow [patient] to sit while teaching, avoid standing more than 10 minutes without sit-down break; 2) avoid walking, climbing, weight lifting; 3) assign small group of students (less than 12) to teach.

(Doc. 40-15 at 21). Dr. Kang also wrote in a January 16, 2019 letter that Plaintiff's "condition remains unchanged and she is unable to return to any work that may involve physical activity due to her current conditions." (*Id*. at 23).

On January 31, 2019, Plaintiff told Dr. Gayles that she intended to remain on FMLA leave through March 20, 2019. (Def. SMF ¶ 267). Dr. Gayles sent Plaintiff a letter dated February 4, 2019 concerning her January 2019 request for accommodations. (Doc. 40-15 at 42). Gayles acknowledged that Plaintiff was on approved medical leave and that her anticipated return date of March 20, 2019 had been changed by her doctor to an indefinite period. (*Id*.). Gayles wrote that "the following accommodations can be provided should you return to work":

> (1) a single classroom will be considered; however, if one is not available you will be assigned to classrooms that do not require more

> than approximately 50 to 100 feet of travel between them; (2) you may alternate sitting and standing as needed during instructional time with or the supervision of any groups of students; (3) you will not be assigned duties that require excessive or extended walking or standing; (4) a handicap parking space should be available to provide closer proximity to the school building; (5) a scooter may be considered if for some reason your classroom assignments extends beyond 50 to 100 feet; (6) if necessary, you will be provided access to elevators to avoid climbing stairs; and (7) if you need assistance lifting and moving heavy objects in the work place, the school administration will provide necessary support.

(*Id*.). On February 4, 2019, Dr. Kang completed a Fitness For Duty Certification in which he indicated that Plaintiff "cannot return to work and must go on long-term disability leave due to worsened condition." (Doc. 40-15 at 37). Having heard nothing from Plaintiff following her February 4, 2019 correspondence, Dr. Gayles sent Plaintiff an email on February 25, 2019 and told her that accommodations were available to her if she desired to return to work. (Def. SMF ¶ 276). Plaintiff responded the next day and told Dr. Gayles that she was unable to consider workplace accommodations at that time and going forward due to her "indefinite Long-Term Disability Medical Leave due to worsening of her condition." (Def. SMF ¶ 277; Doc. 40-15 at 53).

On February 12, 2019, the District advised Plaintiff that her leave would expire March 19, 2019. (Def. SMF ¶ 297). She exhausted all of her leave under the FMLA and Fulton County Board of Education policy on March 19, 2019. (Def. SMF ¶ 278). On March 21, 2019 the District notified Plaintiff that she had exhausted her

protected leave of absence under the FMLA, and her additional leave under District policy was exhausted March 20, 2019. (Def. SMF ¶ 298). As of March 25, 2019, Plaintiff's doctor had still not released her to work, and she was still unable to work with or without accommodations. (Def. SMF ¶ 299; Ruiz Dep. 287). Plaintiff began receiving long-term disability benefits from The Hartford in March 2019. (Def. SMF ¶ 154; Ruiz Dep. 284). In a letter dated May 20, 2019, Defendant notified Plaintiff of the Superintendent's intent not to renew her employment. (Def. SMF ¶¶ 300, 303). As of that date, Plaintiff's doctor had not released her to return to work, and she could not work with or without accommodations. (Def. SMF ¶ 301; Ruiz Dep. 288).

C. Analysis Of Plaintiff's ADA Failure To Accommodate Claim

1. Relevant ADA Standards

"The ADA prohibits an employer from discriminating against a 'qualified individual on the basis of disability.' " *McCarroll v. Somerby of Mobile, LLC*, 595 Fed. Appx. 897, 899 (11th Cir. 2014) (quoting 42 U.S.C. § 12112(a)). "In the context of a failure-to-accommodate claim, an employer discriminates by 'not making reasonable accommodations to the known physical . . . limitations of an otherwise qualified individual . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business.' " *Hill v. Clayton Cty. Sch. Dist.*, 619 Fed. Appx. 916, 920 (11th Cir. 2015) (unpublished decision) (quoting 42 U.S.C. § 12112(b)(5)(A)). "To establish a *prima*

facie case of disability discrimination based on a failure-to-accommodate, a plaintiff must demonstrate that: (1) she is disabled; (2) she was a 'qualified individual' when she suffered the adverse employment action; and (3) that she was discriminated against because of her disability by being denied a reasonable accommodation to allow her to keep working." *Cappetta v. North Fulton Eye Ctr.*, No. 1:15-CV-3412-LMM-JSA, 2017 U.S. Dist. LEXIS 214906, at *69 (N.D. Ga. Feb. 1, 2017), *adopted by* 2017 U.S. Dist. LEXIS 214787 (N.D. Ga. Mar. 7, 2017).

"The ADA defines a 'qualified individual' in the employment context as 'an individual who, with or without reasonable accommodation, can perform the essential functions' of the relevant position." *Davis v. Columbus Consol. Gov't.*, 826 Fed. Appx. 890, 893 (11th Cir. 2020) (quoting 42 U.S.C. § 12111(8)). "An accommodation is reasonable and necessary under the ADA 'only if it enables the employee to perform the essential functions of the job.' " *Medearis v. CVS Pharm., Inc.*, 646 Fed. Appx. 891, 895 (11th Cir. 2016) (quoting *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1256 (11th Cir. 2007)). "The ADA does not require an employer to eliminate essential functions of the job, however; if an individual is unable to perform them, even with the accommodation, she cannot meet the definition of qualified." *Id*. (citing *Holly*, 492 F.3d at 1256-57). "The burden is on the plaintiff to identify a reasonable accommodation the employer should have made." *Id.* (citing *Terrell v. USAir*, 132 F.3d 621, 624 (11th Cir. 1998)). Moreover,

"the duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made[.]" *Gaston v. Bellingrath*, 167 F.3d 1361, 1363 (11th Cir. 1999). "Nonetheless, an employer is not required to give an employee his choice of accommodation." *Medeiris*, 646 Fed. Appx. at 895. "And, although reasonable accommodations may include job restructuring, part-time hours, or reassignment to a vacant position, an employer is not required to create and fund a position as an accommodation, nor must an employer reallocate job duties that would alter the essential function of a job." *Id*. Moreover, "an accommodation is unreasonable under [Eleventh Circuit] precedent unless it would allow the employee to 'perform the essential functions of their jobs presently or in the immediate future.' " *Billups v. Emerald Coast Utils. Auth.*, 714 Fed. Appx. 929, 935 (11th Cir. 2017) (quoting *Wood v. Green*, 323 F. 3d 1309, 1314 (11th Cir. 2003)).

2. Analysis

Defendant does not dispute that Plaintiff has a disability, but it argues that Plaintiff's failure to accommodate claim fails because Plaintiff was not a "qualified individual" under the ADA and because Defendant provided Plaintiff with her requested and approved reasonable accommodation at issue and Plaintiff went on leave rather than engaging in an interactive process to develop additional

accommodations. (Doc. 40-1 at 5-24).[12] In response, Plaintiff contends that Defendant failed to accommodate her disability by removing her from the single classroom where she was placed as a special education teacher, "which accommodated all of Plaintiff's restrictions," and therefore "failed to accommodate Plaintiff with this position." (Doc. 42 at 17-18). Plaintiff further argues that Defendant failed to accommodate her in the ESOL position because FCS did not allow her to remain in one classroom as Smith allegedly promised on August 21, 2018, which "is the second failure to accommodate Plaintiff by Defendant." (*Id*. at 19). Thus, according to Plaintiff, "Defendant . . . fails to prove that it took all reasonable steps to secure an accommodation for Plaintiff." (*Id*.).

The difficulty with Plaintiff's position, i.e., that Defendant failed to accommodate her by allowing her to have a single classroom, is that the only accommodation at issue in this case is Defendant's alleged failure to comply with the accommodations she requested and her doctor recommended in April 2018, and which Defendant approved in May 2018. (*See, e.g.*, Pl. resp. to Def. ¶ 261 (arguing that Defendant's statement concerning Plaintiff's request to transfer was "not a

[12] Defendant also argues that Plaintiff failed to exhaust her administrative remedies with respect to her April 9, 2018 request for accommodation (Doc. 40-1 at 4-5) and that Defendant did not cause Plaintiff's condition to worsen (*id*. at 24-27). Because the undersigned finds that Plaintiff has failed to create a triable issue of material fact on whether Defendant provided Plaintiff a reasonable accommodation, the Court need not reach Defendant's other arguments.

material fact" as it did "not speak to the section of the April 2018 accommodation that was specifically denied and is at issue in this case[.]")). Plaintiff did not request in her April 2018 ADA accommodations request that she be assigned to a single classroom (Doc. 40-11 at 9-11); her doctor did not recommend that accommodation in support of her April 2018 request (Doc. 40-11 at 22-25); and Defendant did not approve that as an accommodation in Dr. Gayles' May 30th letter setting forth Plaintiff's approved accommodations (Doc. 40-11 at 35).

Moreover, Plaintiff did not allege in her Complaint that Defendant failed to accommodate her disability by failing to assign her to a single classroom. Plaintiff alleges in her Complaint that she requested accommodations on April 9, 2018 and that on May 30, 2018, Defendant approved Plaintiff "for an accommodation that included the condition that classroom assignments must be in close proximity," i.e., no more than 100 feet apart, and "not require the use of stairs," but then Defendant assigned her to a schedule after August 2018 which required her to move to different classrooms and travel between "82 feet to 224 feet" and refused to "change her class schedule to meet the previously-approved accommodations." (Doc. 1 ¶¶ 11, 14-15, 18-23). In support of her sole ADA discrimination claim, Plaintiff alleges that Defendant failed to continue the reasonable accommodation "of limiting Plaintiff's physical movement throughout the school day by assigning her to classes in close proximity, 100 feet or less." (*Id*. ¶¶ 27-29). To the extent that Plaintiff now seeks to

amend her Complaint by alleging that Defendant failed to accommodate her disability by assigning her to a single classroom and not requiring her to travel to other classrooms, " '[a] plaintiff may not amend her complaint through argument in a brief opposing summary judgment.' " *Cont'l 223 Fund v. Albertelli*, No. 20-13133, 2021 U.S. App. LEXIS 22346, at *7-8 (11th Cir. July 28, 2021) (quoting *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004)); *see, e.g.*, *Connelly v. Wellstar Health Sys.*, No. 1:16-CV-2687-RWS, 2018 U.S. Dist. LEXIS 66314, at *6 (N.D. Ga. Feb. 28, 2018) (noting that the plaintiff identified in her complaint two accommodations she requested and defendant failed to provide but "[n]ow, Plaintiff argues that Defendant had an obligation to accommodate her with intermittent breaks or a referral to Defendant's [EAP], but she cannot amend her complaint through argument in summary judgment briefing"); *Ibrahim v. Chi. Transit Auth.*, No. 09 C 5252, 2015 U.S. Dist. LEXIS 23165, at *13-15 (N.D. Ill. Feb. 26, 2015) (refusing to consider requested accommodations not alleged in the complaint but raised in response to summary judgment).

It is true that allowing Plaintiff to remain in one classroom and have her students travel to her class (and co-teachers, who would then have had had to leave their classrooms and the other students they were assigned to teach who were not Plaintiff's students) would have accommodated Plaintiff's disability. But that was not the accommodation Plaintiff's doctor recommended or that Plaintiff requested

in April 2018, and that was not an accommodation that Defendant granted in May 2018. Nor was assigning Plaintiff to a single classroom the only way Defendant could accommodate her limitation to walking no more than 100 feet at a time. Nothing in her accommodations request or approval prevented Defendant from requiring Plaintiff to travel to other classrooms so long as she was not required to walk more than 100 feet at a time. Plaintiff has not created an issue on that point, however.

Defendant has presented evidence that Smith and Ward—both of whom were aware of Plaintiff's accommodations and considered those accommodations in developing Plaintiff's schedule for the 2018-2018 year—walked and measured the distances between Plaintiff's classes, and that those distances were consistent with her accommodations, i.e., did not exceed 100 feet. (*See* Gayles Aff. ¶ 9; Smith Aff. ¶¶ 4-5, 19; Ward Aff. ¶ 9, 13-14). Plaintiff did not testify during her deposition or state in her declaration that her schedule in late-August 2017 and early-September 2017 required her to walk more than 100 feet; she did not measure those distances using measuring tools such as tape measure, ruler, yardstick, or even by counting steps; and she did not testify as to the distances she walked. (*See* Ruiz Dep. 140-43, 212-14, 317-18; *see also* Ruiz Decl., Doc. 42-8). While Plaintiff might have preferred remaining in a single classroom as a way to accommodate her disability,

"an employer is not required to give an employee his choice of accommodation." *Medeiris*, 646 Fed. Appx. at 895.

Furthermore, even if Plaintiff's contentions concerning the failure to assign her to a single classroom were properly before the Court, Plaintiff has failed to show that that would have been a reasonable accommodation. As of September 7, 2018, when Plaintiff went out on leave, Plaintiff could not be assigned a single classroom because there were no vacant classrooms that were not already occupied or shared by one or more teachers. (Def. SMF ¶ 89; Smith Aff., ¶ 23; Gayles Aff. ¶ 16). Although Plaintiff states in her declaration that "[t]here were available classrooms that I could have taught out of that I can recall" (Ruiz Decl., Doc. 42-8, ¶ 21), she testified in her deposition that she was told there was not an available classroom, that she does not know if there was an available classroom, and that she was not aware of one when she went on leave or when she filed her grievance September 18, 2018; "all I know is that there were . . . like lab classrooms available, but they . . . were designed for computer lab only." (Ruiz Dep. 216-17, 310, 314, 321-22). The undersigned therefore finds that Plaintiff's conclusory and non-specific allegation in her declaration about her recollection of available classrooms is insufficient to create a triable issue of fact on this point, particularly in light of her deposition testimony to the contrary.

In addition, Plaintiff's 2018-2019 schedule as a ESOL teacher required her to co-teach, which involved going into other teachers' classrooms to provide support and instruction to some students in those classrooms, as she had done in 2016-2017 and 2017-2018. (Def. SMF ¶¶ 107-109, 197, 209; Smith Aff. ¶ 23; Gayles Aff. ¶ 16; Ruiz Dep. 100, 111-13, 176-77). Although Plaintiff asserts that the students assigned to her could have come to her in a single classroom (Ruiz Dep. 176), she acknowledged that in her two previous years as an ESOL teacher, she had never been assigned to a single classroom for the entire day and she traveled to the students (Ruiz Dep. 176-77), and co-teaching involved her going to the classrooms of other teachers of record to co-teach the students assigned to her in those classrooms rather than having all of those teachers and all of the students—regardless of whether they were her students or not—come to Plaintiff's classroom (Ruiz Dep. 181-83, 334-35). Plaintiff points to the three days that she remained in E121 before Assistant Principal gave Plaintiff her schedule as an ESOL teacher on August 27, 2018 as evidence that she would have been able to continue only seeing her students in that classroom. (Ruiz Dep. 186-87, 333). But Plaintiff also acknowledges that there was no co-teaching during that time "because the schedules were messed up and they told me that they were working on distributing new schedules to students." (Ruiz Dep. 189, 191-93). The fact that she was not required to move to other co-teachers' classrooms while Ward was finalizing her assignments and schedule does not

indicate that she was not required to do so once Ward provided her with that schedule requiring her to co-teach, and thus move to those teachers' classrooms. Plaintiff has pointed to no evidence that as an ESOL co-teacher, it would have been reasonable to require her students and other co-teachers to come to her classroom and either bring all of the students who were not assigned to Plaintiff to Plaintiff's classroom or to leave those students in the teachers of record classrooms without their teachers. Plaintiff did not explain during her deposition how she would have been able to co-teach as an ESOL teacher while remaining in a single classroom and not traveling to her co-teachers' classrooms. Thus, even if Plaintiff's contention that Defendant failed to reasonably accommodate her disability by not assigning her to a single classroom before she went on leave were properly before the Court in this case—which it is not—she has not created a triable issue of material fact concerning that request given the uncontroverted evidence that a single classroom was not available and given Plaintiff's ESOL assignment as of September 7, 2018 which included co-teaching responsibilities.

Moreover, the uncontroverted evidence shows that even after Plaintiff went out on leave, Defendant continued to seek ways to reasonably accommodate her disability, including allowing her to remain on leave from September 7, 2018 until March 19, 2019 (*see* Doc. 40-14 at 24); attempting to work on a schedule that would have required less walking (*see* Gayles Aff. ¶¶ 14-15; Smith Aff. ¶ 29; Ward Aff ¶

18); investigating the provision of a wheelchair to Plaintiff to help her move from classroom to classroom (*see* Gayles Aff. ¶¶ 16, 18); and ultimately granting her request for a single classroom in February 2019 if one were available as well as other accommodations, including the use of a scooter (Doc. 40-15 at 42). In spite of those offered accommodations, Plaintiff did not return to work, and she informed Dr. Gayles in February 2019 that she was unable to consider workplace accommodations at that time and going forward due to her "indefinite Long-Term Disability Medical Leave due to worsening of her condition." (Doc. 40-15 at 53).[13]

Thus, Plaintiff has failed to create an issue of fact on whether Defendant failed to provide the requested and approved accommodation at issue in this case, i.e., a restriction against walking more than 100 feet at one time, or on whether Defendant otherwise failed to reasonably accommodate her disability. It is therefore **RECOMMENDED** that Defendant's motion for summary judgment be **GRANTED**.

Conclusion

[13] It is uncontroverted that as of at least November 2018, if not earlier, Plaintiff was not a qualified individual with a disability in light of Plaintiff's unrebutted testimony that she could not have worked, with or without accommodations, in November 2018 when she applied for Social Security disability benefits (Ruiz Dep. 276-77, 299) or at any time thereafter (*id*. at 35-36, 69-70, 277-78, 280, 283, 285, 287, 300). *See Davis*, 826 Fed. Appx. at 893; *Medeiris*, 646 Fed. Appx. at 895; 42 U.S.C. § 12111(8) (defining "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

Defendant's Objection And Motion To Strike Dr. Young Kang's Affidavit (Doc. 48) is **DENIED AS MOOT**. It is **RECOMMENDED** that Defendant's Motion For Summary Judgment (Doc. 42) be **GRANTED**.

The Clerk is directed to terminate the reference of this case to the undersigned Magistrate Judge.

IT IS SO ORDERED, REPORTED AND RECOMMENDED this 30th day of July, 2021.

/s/ J. Clay Fuller
J. Clay Fuller
United States Magistrate Judge