

ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

RECEIVED
JUN 24 2009
SPECIAL EDUCATION
SERVICES

[REDACTED]
Student,

v.

)
)
) CASE NO. 2009-0031
)
)
)

) Mary A. Onken
) Due Process Hearing Officer

DECISION AND ORDER

JURISDICTION

This matter coming before the Hearing Officer on Parent's Motion For Summary Judgment As A Matter Of Law filed on May 11, 2009 asserting there is no material issue of fact as to whether the District complied with the procedural requirements of implementing the student's IEP with 10 days as required by state regulations. As relief, parent requests this Hearing Officer issue a final order as a matter of law ordering the district to implement the Student's Individual Education Plan (IEP), specifically Section 17, Compensatory Services within ten (10) days of the final order.

District opposes the motion on several grounds asserting the District is not required to implement the IEP until the hearing request is withdrawn or the parties agree to waive stay put. District further argues there are no remaining issues to proceed to hearing over because the District has at all times provided student with FAPE by implementing an IEP that provides for every single item of relief requested by the Student and the Student is currently receiving all of his educational and related services. District requests that this Hearing Officer deny the Parent's Motion for Summary Judgment as a matter of law as there exists material issues of fact which would preclude a finding of summary judgment.

This Hearing Officer has jurisdiction pursuant to the *Individual with Disabilities Education Improvement Act ("IDEA")*, 20 U.S.C. Section 1400 et. Seq., 105 ILCS 5/14-8.02a et seq., and 23 Ill. Adm. Code Section 226.600 et. Seq.

PROCEDURAL MATTERS

On November 26, 2008, the Parent through his attorney, filed a second due process complaint requesting a hearing for the District's failure to implement

the 11/12/2008 IEP with 10 days, failure to provide records, failure to reimburse parent for [REDACTED] evaluation, and failure to develop appropriate goals and objective in the 11/08 IEP. As relief, Parent requested implementation of the 2 years of compensatory services immediately. (See 11/26/08 Due Process Complaint, No.4.) The November 26, 2008 due process complaint was consolidated with the remaining issues pending from the August 8, 2008 due process complaint. (See Parent's Motion for Summary Judgment, page 2).

District responded to the amended complaint on December 31, 2008 stating that the 11/12/08 IEP was not immediately implemented because the District was waiting until the Parent's initial due process hearing was resolved and stay-put still applied in this case as there was no waiver. However in an attempt to resolve the pending due process matter, the District placed the student at [REDACTED] and agreed to reimburse the parent for any outstanding invoices. In addition, the District provided parent's counsel with the full test protocol booklets as requested on December 16, 2008. (See District's Response dated December 31, 2008, page 2).

On January 26, 2009 an IEP meeting was held and it was not successful in resolving the issues set forth in parent's amended due process request and the compensatory tutoring and speech services were not addressed. At the meeting, the [REDACTED] staff recommended full day ESY services for the student and as a result the parent requested leave to amend their due process request to include a request for 6 weeks of full day ESY services for the student. (See January 30, 2009 Request to Amend due process complaint, page 2). District did not file a response to the amended complaint.

On April 8, 2009, another IEP meeting was held to address ESY and the parties were successful in resolving the ESY issues set forth in the amended complaint. Compensatory tutoring and speech services were not discussed at the meeting. (See Parent's Motion for Summary Judgment, page 3).

A prehearing conference was held on April 14, 2009 and both parties submitted prehearing conference disclosure statements. The parent submitted that the District denied the student a free appropriate public education in failing to implement the November 12, 2008 IEP per the 10 day time period imposed by state regulation and as relief requests the District provide student immediately with 2 years of compensatory tutoring services and 2 years of speech services as listed in the November 12, 2008 IEP and reimburse [REDACTED] for tutoring. (See Parent's letter dated April 14, 2009). The District maintained that they have at all times provided the student with a free appropriate public education and they have implemented the November 12, 2008 IEP as written. The District further contends that the IEP provides the relief requested by the parent and there is no date written in the IEP to start providing the agreed upon 2 years of compensatory tutoring and speech services. (See District's April 13, 2009 Prehearing Conference Disclosure Statement).

On April 16, 2009, this Hearing Officer issued a prehearing Conference Report outlining the issues remaining for hearing and the requested relief and ordering the parties to convene a resolution session to resolve these issues on or before April 30, 2009.

In an attempt to resolve their request for compensatory tutoring and speech language services, the District sent a letter to the attorney for the student, [REDACTED] on May 5, 2009 stating "the District will arrange for tutoring and speech services to begin after the conclusion of this current semester and the services will continue for two years from the date the services commence. The District will have the private tutor and speech therapists contact the parent to arrange for a mutually convenient time to provide these services." In the alternative, the District proposed funding up to \$75.00 per hour for speech and tutoring services in the event the parent wishes to arrange for the speech and language services on her own." (See District's letter of May 5, 2009). It is the District's position that there is nothing in the state regulations that require compensatory services to be implemented within 10 days and there is nothing within the November 12, 2008 IEP which states when compensatory services must be provided. (See District's May 5, 2009 email) With regard to payment of the tutor, [REDACTED] the District has provided confirmation that she has become a vendor with [REDACTED] and has provided a receipt indicating the District has issued payment to [REDACTED] for the tutoring services rendered. (See District email of May 5, & 8, 2009 and [REDACTED] invoice dated May 7, 2009) As the tutor has been paid and the District has agreed to provide the requested services as required by the IEP after the conclusion of this current semester, counsel for the district, requested a dismissal of the student's due process request. (See District's email of May 5, 2009 and May 8, 2009) However, the District has not filed a motion to dismiss. On May 6, 2009, this Hearing Officer sent an email to the parties requesting clarification of their position regarding implementation of compensatory services. (See HO email of May 6, 2009).

In response to District's proposal, attorney for student [REDACTED] would not agree to waiting 5 months for the district to implement the IEP compensatory services and wanted the compensatory services to be implemented immediately. (See Parent's May 5, 2009 email). Further, the Parent argued that the District has not agreed to implement the compensatory services in a specific time period as after the end of the semester could be a year from now and requested a specific date for the compensatory services to start and the names, credentials and contact information for the tutors. The Parent would not agree to front the cost of the tutoring unless they were going to be paid up front by the District and they would also not agree to the proposed \$75.00 rate proposed by the District for payment because it is lower than the community rate. (See Parent's email of May 5 & 6, 2009)

In an email to the parties this Hearing Officer asked the District to provide parent with the names, credentials and contact information for the private tutor and speech therapist who will be providing compensatory services at the end of the semester and what date these services will begin. The District was ordered to provide this information on or before May 8, 2008. (See Hearing Officer's email of May 6, 2009) The District responded on May 8, 2009 by stating the tutor had been paid and submitting the receipt showing payment of the tutor. However, the District did not offer any dates for implementation of the IEP or the names, credentials and contact information for the tutors as requested by this Hearing Officer. (See District's email of May 8, 2009).

On May 10, 2009, [REDACTED] on behalf of the student filed a motion for summary judgment requesting this Hearing Officer to issue a final order as a matter of law ordering the district to implement the November 12, 2008 IEP specifically section 17, compensatory services within ten days of the final order.

On May 12, 2009, the parties held a resolution session with the parent attending by phone and the parties were unable to resolve the remaining issue of implementation of compensatory tutoring and speech services. District represented at resolution meeting that District would provide names, credentials and start date for compensatory services in two weeks. (See Parent's email dated May 12, 2009). On June 16, 2009, District's attorney advised that they are working on facilitating the private compensatory speech and [REDACTED] tutoring and such services will begin shortly at [REDACTED] (See District's email dated June 16, 2009). To date, District has not provided a start date or any information as to the staff that will be providing the services.

ISSUES PRESENTED AND REMEDIES SOUGHT

In their motion for summary judgment the issue raised by the parent is whether there exists a material issue of genuine fact to support a final judgment in favor of the parent as a matter of law.

The District maintains there are material issues of fact regarding whether the IEP was implemented and whether there was a denial of FAPE upon the District's alleged failure to implement compensatory services within the 10 days. District asserts there are genuine issues of fact which preclude a finding of summary judgment and requests this Hearing Officer to deny Parent's Motion. (See District's Response page 8).

APPLICABLE LAW

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." ***Fed.R.Civ.Pro 56(c); Celotex Corp v. Catrett***, 477 U.S. 317, 322 (1986). In ruling on a motion for summary judgment, the court may not weigh the evidence or resolve issues of fact; disputed fact must be left for resolution at trial. ***Anderson v. Liberty Lobby, Inc.*** 477 U.S. 242, 249-50 (1986). A court should grant summary judgment only when the record shows that a reasonable jury could not find for the non-moving party. ***Jessica P*** citing ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986).

Although summary judgment may be helpful in obtaining prompt and final dispositions in some lawsuits, it is a "drastic measure" that should not be granted here. ***Davila***, 776 N.E. 2d at 722. Rather, it should be granted only when the materials submitted by the moving party are "reviewed in the light most favorable to the nonmovant, showing that there is no genuine issue as to any material fact and that the moving party's right to judgment is clear and free from doubt." *Id.* citing ***Pyne***, 129 Ill.2d at 358.

The State regulations as set forth in *Section 226.220(a)* regarding the development, review and revision of the IEP require immediate notice to parents and implementation of the IEP within 10 days after the provision of notice. 23 *Illinois Administrative Code §226.220(a)*.

Section 300.513 entitled **Hearing Decisions** provides in pertinent part as follows:

- (a) Decision of hearing officer on the provision of FAPE. (1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.
 - (2) In matter alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies-
 - (i) Impeded the child's right to a FAPE;
 - (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
 - (iii) Caused a deprivation of educational benefit.

(3) Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under §§300.500 through 300.536. 34 CFR §300.513(a)(1)(2)(3).

FINDINGS OF FACT

The material facts relevant to the aforesaid issues are as follows: Student is a 12 year old male who is eligible to receive special education and related services from District under the IDEA category of Other Health Impaired. The initial evaluation dated April 27 2004 indicated an IDEA eligibility of Learning Disabled. (See parent's due process request dated August 6, 2008) Student is in the 6th grade and currently attending [REDACTED]

District agreed to provide in the student's 11/12/08 IEP [REDACTED] will provide compensatory services beyond the regular school day: 1:1 tutoring by certified sp. Ed. Teacher trained in [REDACTED] program for 2 60 min sessions per week for 2 years; 1:1 speech by certified speech pathologist 60 min per week. (below) Compensatory services will be provided as follows: for 2 yrs; continued placement at day school until end of ESY 2010; reimb of private tutoring paid for by parent in last two years & IEEs in Sec. 3.... (See IEE dated 11/12/08 page 19).

The District has not yet provided compensatory services to student in the past 6 months as listed in the 11/12/08 IEP. The IEP provides for 2 years of compensatory services without a start date for the services. The District has offered to provide the compensatory services to begin after the conclusion of this current semester and the services will continue for two years from the date the services commence. (See District letter dated May 5, 2009). As of June 16, 2009, District's attorney advised that they are working on facilitating the private compensatory speech and [REDACTED] tutoring and such services will begin shortly at [REDACTED] (See District's email dated June 16, 2009). The District has not offered a date to start the compensatory services or offered a professional staff trained in [REDACTED] or a certified speech language pathologist to provide the services. (See Parent's motion for summary judgment page 7).

CONCLUSIONS OF LAW

Whether there exists a genuine issue of fact which would preclude a finding of summary judgment in favor of the parent?

This is a case in which the Parent's assert that the District failure to implement the student's IEP in a timely fashion resulting in a 6 month delay in the student receiving compensatory services. Parent further contends that this has resulted in a denial of FAPE. The Parent relies upon the following undisputed facts: (1) the District has not implemented Section 17 of the 11/12/08 IEP, (2) District agreed to provide compensatory services as written into the 11/12/08 IEP; and (3) District provided notice of the IEP to the Parents pursuant to state regulation. (See Parent's Motion for Summary Judgment page 6 & 7).

Instead of offering facts or affirmative evidence to refute the above allegations, the District mistakenly relies upon conclusions instead of facts to support their position. First, the District states that the IEP has been implemented in full. This conclusion is contrary to the above findings of fact and the District has not presented any factual basis to support its position. Additionally, the admissions by counsel for the District stating the services will begin after the start of the semester and they are working on facilitating the services indicates the IEP has not been fully implemented. (See District's Letter dated May 5, 2009 attached hereto as Exhibit

Second, the District contends that the parent has offered no legal basis supporting their motion for summary judgment. This assertion again is not supported by the record. The Parent not allow relies on the state regulation that requires implementation within 10 days after notice §226.220(a) and federal regulations that allow hearing officers to order Districts to comply with procedural requirements 34 C.F.R. §300.513(a)(3) but cites to relevant case law. In **Hernandez**, a Northern District of Illinois Federal Judge ordered an injunction because the district had not fully implemented the hearing officer's order and IEP developed after the hearing that listed compensatory services. **Hernandez v. Bd. Of Educ of the City of Chicago**, 2001 U.S. Dist. LEXIS 6027, pages 5 (N.D. Ill. 2001). The district court ruling in **B.B. v. Perry Township School Corp.** affirmed a hearing officer's award of compensatory services despite not finding a denial of FAPE. **B.B. v. Perry Township School Corp.**, 2008 U.S. Dist Lexis 53246, page 7 (S.D. Ind., 2008). The 7th Circuit also confirmed the authority of hearing officers and courts to grant the full range of equitable remedies, including ordering compensatory education. **Evanston Community Cons. School. Dist. No 65 vs. Michael M.**, 356 F.3d 798 (7th Cir. 2004). The Supreme Court has also addressed this issue and determined that a school district must comply with a child's IEP to provide a free appropriate education. **Rowley**, 458 U.S. at 188-89.

Thirdly, the District does not provide any state or federal regulations to support its claim that they are not required to implement the IEP within 10 days

nor do they offer any case law in support of their position. The cases cited by the District are inapposite and do not support their position that the district is not subject to the requirement that the IEP be implemented with 10 days or there is no timeframe for implementation or that the District could pick and choose what part of the IEP can be enforced. *Pyne v. Witmer*, 129 Ill.2d 351, 357-58 (Ill. Sup. Ct. 1989); *Davila v. Yellow Cab Co.*, 776 N.E.2d 720, 722 (1st Dist. 2002); and *Schrager v. North Community Bank*, 328 Ill App. 3d 696 (Ill. App. 1st Div., 2002). None of the above cases addressed IEP implementation and the cases are not controlling in this matter.

In analyzing the facts it is important to note that the moving party must demonstrate "that there is no genuine issue of material fact". Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Jessica P v. CPS*, 44 IDELR 215, page 2 (N.D. Ill. 2005) The moving party will prevail on a motion for summary judgment if the nonmoving party is unable to present "specific facts showing that there is a genuine issue for trial". *Id.* page 2. A court should grant summary judgment only when the record shows that a reasonable jury could not find for the non-moving party. *Id.*

Based on the material facts presented by the Parent supported by admissible evidence, I conclude that the Parent has met its burden and the Parent is entitled to summary judgment as a matter of law. First, the conclusions offered by the District that the IEP was appropriately implemented and there was no denial of FAPE are not enough to establish facts showing that there is a genuine issue for trial. (See District's response page 1). Second, the District has failed to offer specific material facts that are supported by affirmative evidence or submission of legal authority to support its position that the IEP including § 17 is not required to be implemented with 10 days and has been timely and fully implemented. Finally, the Parent has made a compelling argument based upon state and federal regulations as well as relevant case law that the District has not complied with the procedural requirement of implementing the IEP with 10 days and establishing this Hearing Officer's authority to order the District to comply with the procedural requirements for implementation of the IEP per federal regulation. It is undisputed that the District has not implemented Section 17 of the IEP with 10 days as required by state regulation and there has been a delay of over 6 months in providing the compensatory services the District has already agreed to provide and the Parent has agreed is appropriate. It is undisputed that the District has not offered a start date for compensatory services or provided contact information for the staff who will be providing the tutoring and speech services. It is undisputed that the District has not presented any specific facts or affirmative evidence to dispute these material fact issues at hearing. As all other relief requested by the Parent has been provided for by the District in the student's 11-12/08 IEP and there do not remain any issues of material fact to be decided at a hearing, I must conclude that the Parent is entitled to summary judgment as a matter of law.

IT IS HEREBY ORDERED THAT:

1. Parent's Motion for Summary Judgment is granted upon this Hearing Officer's finding there exists no genuine issue of material fact and the District's failure to present any affirmative evidence showing they have timely implemented the 11/12/08 IEP specifically Section 17. Based upon the material facts that are relevant to the issues and the applicable law, this Hearing Officer concludes that the Student is entitled to summary judgment in his favor and against the District as a matter of law.
2. The District shall implement the November 12, 2008 IEP, Section 17, compensatory services within 10 days of its receipt of this Impartial Due Process Decision, per the IEP: [REDACTED] will provide compensatory services beyond the regular school day: 1:1 tutoring by certified sp. Ed. Teacher trained in [REDACTED] program for 2 60 min sessions per week for 2 years; 1:1 speech by certified speech pathologist 60 min per week for 2 years.
3. The previously scheduled hearing dates of June 23 and June 24 are hereby stricken.

The District shall provide proof of compliance with Order No. 1 above to the Illinois State Board of Education, Program Compliance Division, 100 N. First Street, Springfield, IL 62777-0001 within fifteen (15) days of its receipt of this Impartial Due Process Decision.

RIGHT TO REQUEST CLARIFICATION

Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned Hearing Officer with five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other party(ies) and the Illinois State Board of Education. After the decision is issued, the Hearing Officer may not make substantive changes to the decision. The right to request such clarification does not permit a party to request reconsideration of the decision itself, and the Hearing Officer is not authorized to entertain a request for reconsideration.

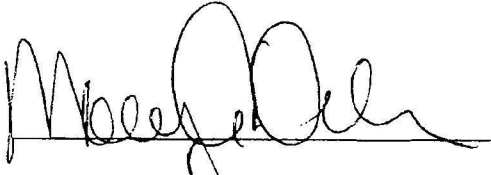
FINALITY OF DECISION

This decision is final and shall be binding upon all parties.

RIGHT TO FILE CIVIL ACTION

This decision is binding on the parties unless a civil action is timely commenced. Any party to this hearing aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.02a(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision is mailed to the parties.

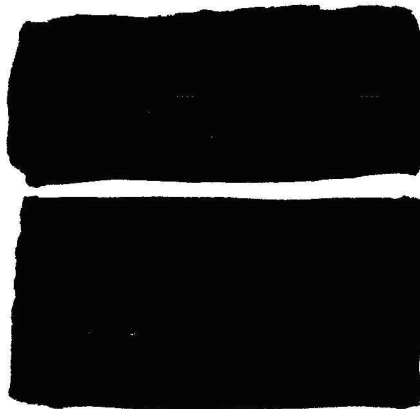
ISSUED: June 21, 2009

A handwritten signature in black ink, appearing to read 'Mary A. Orken', written over a horizontal line.

Mary A. Orken
Due Process Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Decision and Order was placed in the U.S. mail at Naperville, Illinois, with first class postage prepaid and directed to:



Mr. Andrew Eulass
Due Process Coordinator
Illinois State Board of Education
100 North First Street
Springfield, Illinois 6277-0001

before 6:00 p.m. on June 21, 2009

A handwritten signature in black ink, appearing to read "Mary A. Onken", is written over a horizontal line.

Mary A. Onken
Due Process Hearing Officer
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