

TEA DOCKET NO. 236-SE-0304

Student	§	BEFORE A SPECIAL
BNF Parent &Parent	§	EDUCATION
Petitioner	§	
v.	§	
	§	HEARING OFFICER FOR THE
HARDIN-JEFFERSON	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

Petitioner, Student bnf Parent and Parent (hereinafter Petitioner or Student) brings this action against Respondent Hardin-Jefferson ISD (hereinafter Respondent or HJISD) under the Individuals With Disabilities Education Act (hereinafter IDEA), 20 U.S.C. §1400 *et. seq.*

Petitioner alleges that Respondent denied him a free appropriate public education under IDEA and failed to comply with the terms of an agreed upon settlement between the parties by failing to provide transition and compensatory in home training and parent training services during the hours of the school day. For relief, Petitioner seeks an order requiring Respondent to provide the agreed upon compensatory and transition services during the hours of the school day.

Daniel McCall of Katy, Texas represents Petitioner in this proceeding. Denise Anderson of Irving, Texas represents Respondent.

PROCEDURAL HISTORY

Petitioner filed this action on March 9, 2004 following a dispute between the parties about the implementation of a settlement agreement reached in a prior due process proceeding between the parties, Student *bnf Parent and Parent v. Hardin-Jefferson ISD*, Docket No. 106-SE-1103.

Following a pre-hearing conference in which Respondent indicated its intention to file a Motion for Summary Judgment in this cause, the Hearing Officer entered an agreed scheduling order requiring Respondent to file its Motion for Summary Judgment by March 26, 2004 and Petitioner to file his response by April 2, 2004.

On March 26, Respondent filed a Motion to Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted pursuant to Rule 12(b)(6) of the Federal Rules

of Civil Procedure with supporting affidavits and documentary evidence. On April 2, Petitioner filed a response raising legal arguments and alleged disputes of material fact, but attached no affidavits or documentary evidence in support of its response.

After reviewing Respondent's motion and Petitioner's response thereto, the Hearing Officer informed the parties by letter dated April 8, 2004, that Respondent's Motion to Dismiss would be treated as a Motion for Summary Judgment as contemplated by Rule 12(c) of the Federal Rules of Civil Procedure because the motion presented and relied on matters outside the pleadings. Accordingly, the Hearing Officer provided Petitioner with additional time until April 14, 2004 in which to present material pertinent to the summary judgment motion.

On April 14, Petitioner filed a brief response without any supporting affidavits or documents, stating in relevant part, that he was unable to develop a response to the summary judgment in the time allowed by the Hearing Officer. Accordingly, the Hearing Officer contacted Petitioner to inquire about the time needed to submit a response and, based on Petitioner's request, granted a continuance of the due process hearing to allow Petitioner adequate time to file a summary judgment response, and set a deadline for such response of April 23, 2004. As of this date, Petitioner has not filed any additional response to Respondent's motion for summary judgment.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Both federal and state rules of civil procedure provide for the entry of summary judgment in favor of the defending party if the pleadings, discovery, stipulations, records, and affidavits on file show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Tex. Rules Civ. Pro. 166a; Federal Rules Civ. Pro., Rule 56. In reviewing summary judgment, the Hearing Officer must "accept as true evidence favoring the nonmovant, indulging every reasonable inference and resolving all doubts in the nonmovant's favor." *Park Place Hosp. V. Estate of Milo*, 909 S.W.2d (Tex. 1995).

The issue presented herein is the scheduling of in-home/parent training transition services (hereinafter referred to as IHT services) agreed to be provided pursuant to a settlement agreement entered into between the parties.¹ Petitioner claims that he is legally entitled to receive these services during the hours of the school day, such entitlement arising both from the settlement agreement and the statutory provisions of the IDEA. Respondent counters that, as a matter of law, Petitioner enjoys no such entitlement to receive these services at a particular time of day.

¹ The issue of Respondent's provision of compensatory services pursuant to the settlement agreement is not ripe for resolution. Although Petitioner raised the issue of these compensatory services during discussion at the pre-hearing conference, the record is clear that these services have not been scheduled or provided as of yet. The settlement agreement between the parties allows for the provision of these services up to August 31, 2004 and specifically addresses the scheduling of the services. If and when a dispute arises concerning the scheduling and provisions of these services, Petitioner may urge those claims at that time.

In reviewing the settlement agreement between the parties, the Hearing Officer concludes that it provides no entitlement to Petitioner to require that the transition IHT services be provided during the school day. In contrast to the agreement's treatment of compensatory services, the agreement is silent as to the time when the IHT services will be provided. As such, any entitlement Petitioner may have to insist on scheduling must derive from the provisions of the IDEA.²

IDEA allows schools to schedule services such as these according to administrative convenience and availability of personnel so long as a child's educational needs are met. Schools are not required to accommodate requests in scheduling that are based on family convenience or preference rather than educational need. *Fick v. Sioux Falls*, 337 F.3d 968 (8th Cir. 2003).

The summary judgment evidence presented herein establishes no genuine issue of material fact as to Student's educational need for these services during the school day. First, the evidence adduced shows that Petitioner's request for services after the school day was based on the family's preference rather than Student's educational needs. The affidavit of ***, Director of Special Education for the Gulf Coast Co-op, states that she spoke with Parent several times concerning the scheduling of the IHT services and Parent requested that the services be provided during the school day "for reasons of family preference." Summary judgment may properly be based on "uncontroverted evidence of an interested witness... if the evidence is clear, positive, and direct...and could have been readily controverted. In this instance, Petitioner could have easily controverted the affidavit of Ms. *** on this point by submitting sworn testimony from Parent as to some other reason to support the need for services during the school day. Petitioner's failure to submit controverting evidence supports the conclusion that the request for scheduling is based on family convenience rather than Student's educational needs.

In addition, the uncontroverted summary judgment evidence further demonstrates that the past practice between the parties was to provide the services after the school day when service providers were available except during the summer when school was not in session. The services were successfully provided after the school day during the 2002-2003 school year and no allegation is made or proof offered that Student did not benefit from the services.

Finally, the evidence presented demonstrates that Student has successfully completed the transition period during which these IHT services were to be provided. As such, any failure to provide the services during the school day did not ultimately preclude Student from successfully transitioning back into the school environment.

² Petitioner's argument that the settlement agreement's reference to the May 23 IEP in Paragraph 12 requires the provision of the IHT services during the school day, either on its own terms or pursuant to IDEA's stay put provisions, is entirely misplaced. First, the agreement is clear that the May 23 IEP provides the basis for the **goals and objectives** of the IHT services, not the scheduling required for those services. Second, the May 23 IEP which describes the ESY services Student would receive during the summer of 2003 does not address the scheduling of those services at all.

In short, Petitioner has not presented any competent summary judgment evidence sufficient to raise a genuine issue of fact as to whether providing the IHT services after the school day would fail to satisfy Student's educational needs under IDEA. To the contrary, the uncontroverted evidence conclusively establishes that Student's educational needs could be, and had been, successfully met with such services after the school day. As such, Respondent is entitled, as a matter of law, to schedule these services according to administrative convenience and the availability of its personnel.

For the foregoing reasons, Respondent's Motion for Summary Judgment is hereby **GRANTED**. All relief sought by Petitioner in this cause is **DENIED** and this proceeding is **DISMISSED**.

Signed and entered this 29th day of April 2004.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Special Education Hearing Officer