

STUDENT b/n/f Parent	§	BEFORE A SPECIAL EDUCATION
	§	
V.	§	HEARING OFFICER FOR THE
	§	
HOUSTON INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

REVISED ORDER ON RESPONDENT’S MOTION FOR SUMMARY JUDGMENT

On October 17, 2007, Respondent Houston Independent School District (“HISD”) timely filed Respondent’s Motion for Summary Judgment in the above referenced due process hearing under the Individuals with Disabilities Education Improvement Act 20 U.S.C. §1400 et seq., (hereinafter referred to as "IDEIA"). Attached to Respondent’s Motion was the affidavit of **, ** Special Education Director, HISD, which was submitted as summary judgment evidence in support of Respondent’s Motion. On November 2, 2007, Petitioner timely filed Petitioner’s Motion to Strike Affidavit, Objections to Affidavit and Response in Opposition to Respondent’s Motion for Summary Judgment. Attached to Petitioner’s pleading was the affidavit of Mr. **, father of the student who is the subject of this due process hearing request.

Petitioner’s Motion to Strike Respondent’s Summary Judgment Evidence

Petitioner objected to the affidavit of ** as being improper summary judgment evidence. Petitioner argues, as pertinent to this ruling, that Ms. ** affidavit is hearsay, does not comply with applicable rules of evidence, and offers testimony that is not based on her personal knowledge. In response, Respondent asserts that Ms. ** position as ** Special Education Director is sufficient to establish her personal knowledge of all the facts contained in her affidavit. After considering both arguments, Petitioner’s position on Ms. ** affidavit is the more persuasive. Ms. ** affidavit is objectionable hearsay and, therefore, does not qualify as summary judgment evidence.

IT IS THEREFORE ORDERED that Petitioner's Motion to Strike the Affidavit of 88 is GRANTED.

Consideration of Respondent's Motion for Summary Judgment

Without Ms. ** affidavit, the question remains whether there is sufficient evidence in the parties' pleadings and the remaining summary judgment evidence, the affidavit of Mr. ** to support Respondent's motion. Respondent is entitled to summary dismissal of this due process hearing if the summary judgment evidence and arguments establish that there are no genuine issues of material fact, such that this case should be dismissed as a matter of law (Tex. R. Civ. P. 166a (c)(ii). I am of the opinion that the affidavit of Mr. ** demonstrates that there are no disputed issues of material fact which would preclude summary judgment in this case. *Reese v. Anderson*, 926 F.2d 494, 498, (5th Cir. 1991).

The gravamen of Respondent's Motion is that Petitioner is not entitled to reimbursement for private school expenses incurred for the Student's placement in the private ** School because the Student's parents never gave HISD the opportunity to provide Student with a free appropriate public education ("FAPE"). Respondent cites 20 U.S.C. §1412(a)(10)(c)(ii) (2007) which provides:

(ii) REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT – If the parents of a child with a disability, **who previously received special education and related services under the authority of a public agency**, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(Emphasis supplied)

Respondent argues that because the Student's parents failed to ultimately enroll the Student in HISD and *receive services*, Petitioner is not entitled to reimbursement for private school expenses.

Petitioner's response focuses on the definition of the word "enroll" used in Respondent's Motion and the cited authority. He suggests that HISD is using the word as a "term of art," and states that Respondent should be required to define the term for the purposes of summary judgment evidence. Petitioner cites *Frank G. v. Board of Education of Hyde Park*, 459 F.3d 356 (2nd Cir. 2006), *cert. denied. Bd. of Ed., Hyde Park v. Frank G.*, 2007 WL 2982269, _____ U.S. _____ (2007) to buttress his challenge to Respondent's use of the word "enroll." In that case, an equally divided U.S. Supreme Court's deadlock resulted in the affirmation of a 2nd Circuit Court of Appeals' decision which held that enrollment is not a threshold requirement in order for a child to be entitled to receive private education paid for by a school district when the district cannot provide appropriate education.

Respondent's position is the more persuasive, however, because it addresses the most important issue: Whether the Student ever received actual services from HISD. Mr. **'s affidavit made it clear that the Student never received services from HISD. Mr. ** described his frustration with the HISD Admission Review Dismissal Committee meeting ("ARD") process, HISD's allegedly inadequate services, and even HISD's lack of a definite offer of a nearby school within HISD in which the Student would have been placed. He testified that, based on his experiences, he concluded:

"I am absolutely certain that HISD could not have provided and cannot provide the necessary environment that it needed for proper education of [the Student]"

See, Exhibit A, Petitioner's Motion to Strike p. 2

Additionally, Mr. ** testified that he considered the recessed March 29, 2007 ARD as completed because: "HISD has come up with nothing else that would have been addressed at the 2007 ARD." (Ex. A, p.3) Finally, Mr. ** unconditionally states in his affidavit: "However, HISD could not provide neither an appropriate education nor environment for my children to attend school. So, they did not attend school in HISD." (Ex. A, p.4)

Therefore, based on Petitioner's uncontroverted testimony regarding the child with a disability's failure to attend school in HISD, it cannot be reasonably disputed that Petitioner failed to receive special education services from HISD as is required by IDEIA. The plain terms of 20 U.S.C. §1412(a)(10)(c)(ii) prevent the Petitioner from being reimbursed for his ** School expenses.

Neither party cited additional statutory authority that makes the disposition of this case even clearer. The portion of 20 U.S.C. §1412 (a)(10)(c) not discussed in the proceedings is 20 U.S.C. §1412 (a)(10)(c)(i), which provides:

(i) IN GENERAL - Subject to subparagraph (A), this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency *made a free appropriate public education available* to the child and the parents elected to place the child in such private school or facility.

(Emphasis supplied)

Therefore, by the plain terms of this section, a parent is not entitled to Local Education Agency ("LEA") payment for private education of a child if the LEA made a FAPE *available* and the parent elected private school placement.

The way that any school district "makes a FAPE available" to any student is by the completion of the process set out in IDEIA and its implementing regulations. A student is identified, and then evaluated; the evaluation is considered by a duly convened ARD Committee in an ARD meeting; the ARD Committee develops an individualized education plan ("IEP") for the student that the school district then has a meaningful opportunity to *implement*. Unless this process, as summarized, is completed, then a school district has not been given the opportunity to offer a student a FAPE.

Such is the holding of *M.M. v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002). In that case, the parents of a four year old autistic student became frustrated with the

IEP Team and the proposed placement of their daughter by the district. The student's parents preferred the one-on-one instruction afforded by the Lovaas Program, as opposed to the school district's offer of classroom services, five days a week, plus two, twenty-five minute sessions of speech therapy. The two sides had multiple ARD meetings that had not resulted in an agreed special education program. The district scheduled a final IEP Team meeting to address the stalemate and requested permission to do another assessment of the student. The parents refused to attend the meeting or allow the district to assess the child.

Subsequently, the parents filed a due process hearing request and sought reimbursement for the private Lovaas Program. The state education agency, through the decisions of two tiers of hearing officers, declined to award reimbursement. The parents appealed. The Court ultimately denied reimbursement because the parents failed to complete the IEP process. This case was cited by the Court in *Loren F. v. Atlanta Independent School System*, 349 F.3d 1309, 1311 (11th Cir. 2003), which also cited *Doe v. Defendant I*, 898 F.2d 1186, 1189 (6th Cir. 1990). See also the decision in *Patricia P. v. Board of Education*, 203 F.3d 462, 469 (7th Cir. 2006) which held that a parent was not entitled to reimbursement when the parent's own actions, in refusing to present her son for an evaluation, denied the school district the opportunity to implement an IEP.

In this case, Mr. **'s affidavit does no more than describe a situation where he, frustrated with what he *suspects* his son will receive from HISD, interrupts the process and refuses to finish it. He is not entitled to be reimbursed for the private expense that he incurred because of his actions made because of his frustration.

Moreover, Petitioner's case is based on the flawed assumption that a valid question of FAPE can be prosecuted in a due process hearing with theoretical, wholly speculative evidence. Petitioner states that he is certain that HISD *could not have* provided his son with a FAPE. Such opinions by any witness in a due process hearing are worthless to a determination of whether HISD *did or did not* provide FAPE to the Student, when it was *given the chance*.

Previously, in a case involving HISD, TEA Docket No. 035-SE-1006, ** v. *Houston Independent School District*, in a dispute regarding the special education program of a student with a disability, the parent placed the student in a nearby school district, believing that HISD could not provide FAPE. HISD argued in that case that IDEIA's implementing regulations relieved it of the responsibility for providing FAPE if the parents refused to enroll the student in HISD, citing 34 C.F.R. §300.300(4):

(4) If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency -

(i) Will not be considered in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent; and

(ii) is not required to convene an IEP team meeting or develop an IEP under 300.320 and 300.324 for the child for the special education and related services for which the public agency requests such consent.

In granting HISD's Motion to Dismiss in this case, I found no right to a due process hearing on the question of the school district's failure to provide FAPE, stating:

"Upon reconsideration and review of the existing IDEIA regulations, however, it is clear that a school district is relieved of the responsibility to provide a free, appropriate public education if the parent refuses to consent to initial placement in special education. The school district is not even required to convene an ARD before parental consent to placement in special education is given. In this case, the parent has refused consent to initial placement and has enrolled the student in a special education program in another school district. Yet, Petitioner still holds Respondent Houston ISD responsible for special education and services for the student. While not consenting to place the student in special education in Houston ISD, Petitioner also wishes the Hearing Officer, via this due process hearing, to find that Respondent has failed to provide appropriate special education and services in Petitioner's least restrictive environment. If a hearing were to be held, Respondent would have no effective opportunity to argue that its proposed special education program did provide FAPE. Consequently,

under applicable law and regulations, Petitioner must agree to the student's initial special education placement, and place the student in special education in Houston ISD, in order to request a due process hearing on the Respondent's provision of FAPE. Existing regulations clearly preclude the parent's ability to refuse initial special education and related services from the public agency while requesting a due process hearing on the district's provision of FAPE."

(Order Reconsidering Respondent's Motion to Dismiss, p. 2)

Therefore, pursuant to IDEIA, its implementing regulations, and controlling judicial precedents, Petitioner is not entitled to a due process hearing in this case.

For the reasons stated herein, the Hearing Officer is of the opinion that there are no disputed issues of fact which need to be presented and decided in a hearing on this matter. On the basis of the undisputed facts admitted by the Petitioner, Respondent is entitled to summary judgment as a matter of law.

Respondent Houston Independent School District's Motion for Summary Judgment is hereby GRANTED and this case is hereby DISMISSED.

ISSUED in Austin, Texas this 13th day of December, 2007.

Gwendolyn Hill Webb
Special Education Hearing Officer

SERVICE LIST

For Petitioner, STUDENT:

Thomas Swanson
Attorney at Law
Pmb 383, 1302 Waugh Dr.

Houston, TX 77019
Phone: 713/447-7926
Fax: 713/523-2715

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For Respondent, Houston ISD:

Mr. Chris Borreca

Bracewell & Giuliani, LLP

711 Louisiana Street, Ste 2300

Houston, TX 77002-2770

Phone: 713/221-1408

Fax: 713/221-1212