

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREW M. and DEIRDRE M., et al. : CIVIL ACTION
: :
v. : :
: :
DELAWARE CO. OFFICE OF MENTAL : :
HEALTH AND MENTAL RETARDATION, : :
et al. : NO. 03-6134

ORDER AND OPINION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: January 4, 2005

I. Introduction

Andrew and Dierdre M. have filed this case on their own behalf and on behalf of their twin sons, now four years old, P.M. and R.M. They have asserted claims under the Individuals with Disabilities Education Act 20 U.S.C. § 1400, *et seq.* (“IDEA”); Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131-12134 (“ADA”); and Section 504 of the Rehabilitation Code of 1973, 29 U.S.C. § 794.

Defendants have filed a motion for summary judgment. Plaintiffs have also filed a motion for partial summary judgment. I will grant only that part of Defendants’ motion which seeks to dismiss Plaintiffs’ claim for compensatory education for the boys’ missing service hours. The other issues raised by Defendants’ motion, as well as those raised by Plaintiffs, are better resolved after a full hearing at trial.

II. Legal Standards

A. Summary Judgment

Summary judgment is warranted where the pleadings and discovery, as well as any affidavits, 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. Pr. 56. The moving party has the burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In response, the non-moving party must adduce more than a mere scintilla of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, supra at 325; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

When ruling on a summary judgment motion, the court must construe the evidence and any reasonable inferences drawn from it in favor of the non-moving party. Anderson v. Liberty Lobby, supra at 255; Tiggs Corp. v. Dow Corning Corp., 822 F.2d 358 , 361 (3d Cir. 1987). Nevertheless, Rule 56 “mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, supra, at 323.

B. The IDEA

All states receiving federal education funding under the IDEA must comply with federal requirements designed to provide a “free appropriate public education” (“FAPE”) for all disabled children, including special education as well as “related services” such as physical and speech therapies. 20 U.S.C. § 1412(1); Shore Regional High School Board of Education v. P.S., 381 F.3d 194, 198 (3d Cir. 2004).

Such special education and related services must be tailored to the unique needs of the handicapped child by means of an Individualized Education Program (“IEP”). 20 U.S.C. § 1414(d); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 173 (3d Cir. 1988),

cert. denied 488 U.S. 1030 (1989). The IEP consists of a detailed written statement arrived at by a multi-disciplinary team summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive. Polk, supra. In the case of a pre-school aged child, the IEP is referred to as an IFSP ("Individualized Family Services Program").

In order to provide a FAPE, an IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of his or her "intellectual potential." Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, 206-07 (1982); Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999).

Additionally, the IDEA imposes extensive procedural due process requirements. Complaints brought by parents or guardians are to be resolved at "an impartial due process hearing." 20 U.S.C. § 1415(b)(2); Polk, supra. Any party dissatisfied with the state administrative hearing may bring a civil action in state or federal court, in which the court must conduct an independent review based on the preponderance of the evidence, while giving "due weight" to the state administrative findings. Polk, supra, citing Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982).

III. Factual and Procedural Background

Minors P.M. and R.M. are fraternal twin boys, born on November 10, 2000, to Andrew and Dierdre M., the other plaintiffs in this case. P.M. has been diagnosed with Pervasive Developmental Disorder/Not Otherwise Specified (an autism spectrum disorder) which manifests with significant speech and language delays, and behavioral disorders. R.M., his brother, has been diagnosed with multiple developmental delays, low muscle tone, left hemiplegia and significant language and speech delays.

The boys began receiving services from Delaware County's Early Intervention Program on May 29, 2001. They continued receiving services through this department until they turned three on November 10, 2003, when their eligibility ceased because of their age, and a different state department became responsible for their special education needs.

Because both boys had significant delays in verbal communication, their IFSPs were amended in November 8, 2002, to provide for six hours per month of training in the Picture Exchange Communication System ("PECS"). This system permits a non-verbal individual to communicate by pointing to pictorial symbols. PECS training was to be provided by Pyramid Educational Consultants.

Pyramid's function is to train PECS consultants, who are then employed by the County to train the parents and others in the child's environment to deliver PECS training to the child. Andrew and Dierdre M. were trained in PECS by the Pyramid consultant, but claim that they had difficulty in implementing it. They hired an *au pair* to assist them in teaching PECS to the children. Also, the therapeutic support service aide provided to P.M. to help manage his behavioral issues was trained in PECS.

Pyramid also runs an intensive, two-week PECS day camp in the summer. According to Plaintiffs, Andrew and Dierdre M. repeatedly tried between September, 2002 and March, 2003, to convince the County's Early Intervention Unit to prescribe the PECS camp for both boys. The November, 2002, IFSPs do not include mention of the day camp, but Dierdre M. has testified that it was described as available to the twins at the time PECS was included in their IFSPs. However, the County continued to refuse to prescribe the camp.

Eventually, Andrew and Dierdre M. sought a due process hearing, which was held on June 20 and 25, and July 10, 2003. In a decision dated July 15, 2003, the Hearing Officer affirmed the County's refusal to provide the camp, on the basis that the boys' IFSPs were adequate as they stood: "The presence and implementation of an appropriate IFSP renders the question of the PECS summer camp moot", he wrote. Decision, attached as Exhibit G to Defendants' Motion. The M.s then sent P.M. to the two-week camp at their own expense.

The parties agree that it was after the due process hearing that the County and Pyramid conceded that R.M. had been shorted approximately 25 hours of PECS time as prescribed by his IFSP. The parents requested that the County provide music therapy to R.M. in order to make up these hours. However, the County refused to do this. Plaintiffs did not seek a second due process hearing to appeal this refusal. However, they filed this action, raising as issues both the County's refusal to send the boys to the Pyramid summer camp, and its refusal to provide music therapy for R.M. They now claim that P.M. was also missing service hours, but that they found this out only during discovery in this case.

IV. Discussion: The Twins' Unused Pyramid Service Hours

A claim under the IDEA must be exhausted at the state administrative level before it is heard in court, except where (a) exhaustion would be futile; (b) the agency has adopted policies contrary to law or (c) relief could probably not be obtained through administrative remedies. BD v. DeBuono, 130 F. Supp. 2d 401, 426 (S.D.N.Y. 2000). None of these possibilities applies here.

Plaintiffs argue that forcing them to go back to the agency to exhaust their administrative remedies would waste judicial resources, as well as their financial resources. They point out that, in Jeremy H. v. Mount Lebanon School District, the Third Circuit dismissed unexhausted claims

only “with some reluctance, as it could entail further delay in an already much-delayed case.” 95 F.3d 272, 284 (3d Cir. 1996).

However, the Jeremy H. court went on to explain:

[T]he [unexhausted] issue ... seems to be central to the Hunters’ complaint. Accordingly, the administrative process should be allowed an opportunity to address that central issue. A principal purpose of the IDEA’s administrative procedure is to permit “state and local education agencies[,] in cooperation with the parents or guardian of the child,” to take “primary responsibility for formulating the education to be accorded a handicapped child.” Board of Education v. Rowley, 458 U.S. 176, 207, 102 S. Ct. 3034, 3051, 73 L. Ed.2d 680 (1982); thus, we find that it is appropriate to permit the Commonwealth to address this issue before it is considered in the district court.

95 F.3d at 284. In a footnote, the court also explained that “specialized factfinding ... is an important function of the IDEA’s administrative hearing process.” *Id.* at n. 23.

As in Jeremy H., the County has the right to address disputed special education issues before they are raised in court. This is true of R.M.’s missing service hours, and even more true of P.M.’s alleged missing hours, which were never even the subject of discussion between the parties before this case was filed. Accordingly, I will dismiss as unexhausted Plaintiffs’ claims relating to compensatory education for the boys’ missing service hours.

V. Conclusion

For the reasons that follow, I now enter the following

ORDER

AND NOW, this 4th day of January, 2005, upon consideration of Plaintiffs’ Motion for Partial Summary Judgment, docketed in this case as Document No. 20, and the response thereto, and Defendants’ Motion for Summary Judgment, docketed in this case as Document No. 17, and

the response thereto, it is hereby ORDERED that

1. Defendants' Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims for compensatory education for missing service hours; and

2. Defendants' Motion for Summary Judgment is otherwise DENIED and

3. Plaintiffs' Motion for Summary Judgment is DENIED.

BY THE COURT:

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE