

Before the
Administrative Hearing Commission
State of Missouri



and ,))	
ON BEHALF OF ,)	
)	
Petitioners,)	
)	
vs.)	No. 14-0053 ED
)	
SPECIAL SCHOOL DISTRICT OF)	
ST. LOUIS COUNTY,)	
)	
Respondent.)	

DECISION

We dismiss the due process complaint of and (“Parents”), on behalf of their minor child (“Student”) because we lack jurisdiction to grant the relief sought.

Procedure

Parents filed a due process complaint against the Special School District of St. Louis County (the “District”) on January 15, 2014. The District filed its response to the complaint on January 27, 2014. We scheduled a hearing on the complaint for February 13, 2014, and a pre-hearing conference for January 31, 2014. Following continuances requested by Parents that we granted, we held a pre-hearing conference on February 5, 2014.

On March 19, 2014, the parties filed a joint motion to continue the hearing to May 12, 2014, and to extend to June 20, 2014 the date to issue a decision in the case. We granted the

parties' motion the same date. On April 4, 2014, the District filed a motion for involuntary dismissal of the due process complaint pursuant to 1 CSR 15-3.436,¹ along with supporting affidavits. We gave the Parents until April 17, 2014 to respond to the motion; however, on Parents' motion, we extended that date to May 2, 2014. On that date, Parents filed their response.

*Parents' Challenge to District's Authority to
File Motion for Involuntary Dismissal*

As a preliminary matter, we must address Parents' challenge to the District's motion. Parents argue that such dispositive motions are not permitted by the Individuals With Disabilities in Education Act ("IDEA"), other than challenges to the sufficiency of a due process complaint under 34 CFR § 300.508. While the IDEA and its implementing regulations found at 34 CFR 300 et seq. specify some, but not all, procedural rules governing due process hearings such as this one, states retain some authority to enact procedural rules for due process hearings as long as those rules are consistent with the hearing rights of the parties under the IDEA and its regulations. Missouri has adopted the procedural rules and statutes applicable to hearings before this Commission unless they conflict with the federal regulations or state statutes implementing the IDEA.²

Our regulations provide that we may consider and decide complaints without a hearing pursuant to 1 CSR 15-3.446, and may order the involuntary dismissal of a complaint pursuant to 1 CSR 15.436. Such procedures in administrative hearings are not inconsistent with the hearing rights of parties in IDEA cases³, and have been relied on routinely by hearing officers in

¹ All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

² Section 162.961(8); *see also* Missouri State Plan, Regulation V, State-level Due Process Hearings, p. 69. Missouri statutory references are to RSMo Supp. 2013.

³ In fact, we find it not inconsequential that the State Plan makes specific reference to a party filing a motion for decision without hearing. *See* Regulation V, *Withdrawal of Complaint*, p. 66.

Missouri as well as in other states pursuant to similar administrative procedure rules. Parents point to no cases or other authority in support of their argument, and we find none. Therefore, we find no impediment to our consideration of the District’s motion.

We may grant a motion for involuntary dismissal based on a preponderance of the admissible evidence. “Admissible evidence” includes an allegation in the complaint, affidavit, or other evidence admissible under the law.⁴ Because the District’s motion relies on matters other than the complaint, we treat it as one for summary decision.⁵ A motion for summary decision will be granted if a party establishes fact entitling that party to a favorable decision, and no party genuinely disputes such facts.⁶ Those facts may be established by stipulation, pleading of the adverse party, or other evidence admissible under the law.⁷ Here, our findings of fact are based on the complaint, the affidavits accompanying the District’s motion, and the affidavits accompanying the Parents’ response to the motion.

We find the following facts to be uncontroverted.

Findings of Fact for Purposes of the Motion

1. Student, born February 10, 2005, resides with his mother in Webster Groves, Missouri. His father resides in Atlanta. Student was determined to be eligible for special education services under the category of autism.
2. Prior to August 2012, Student was enrolled in the Webster Groves Public Schools, which is served by the District.
3. The District provided special education services to Student pursuant to an individualized education plan (“IEP”).

⁴ 1 CSR 15-3.436(3).

⁵ 1 CSR 15-3.436(4).

⁶ 1 CSR 15-3.446(5)(A).

⁷ 1 CSR 15-3.446(6)(B).

4. On August 31, 2011, following an incident involving Student at Clark Elementary School, Student suffered what his psychiatrist termed a “psychotic break” and was hospitalized.

5. Following his release from the hospital, Student remained out of school for approximately one month, then was placed in a homebound program for about two months. In December 2011, Student was placed at Edgar Road Elementary School in the Webster Groves Public Schools.

6. In early December 2011, an IEP meeting was conducted concerning Student. Student’s father participated in the meeting, along with Student’s IEP team.

7. In e-mails exchanged between a member of the IEP team and Student’s father on December 13 and 16, 2011, modified IEP goals were approved by Student’s father. Student’s father made no written objection to the IEP goals or to Student’s placement in the Webster Groves Public Schools.

8. Student’s last IEP at the District was in effect for the period January 2012 through May 2012, during which time Student remained at Edgar Road Elementary School.

9. During the time Student attended Edgar Road Elementary, informal monthly meetings were held with District staff and Student’s parents to discuss Student’s programming and progress. Among those attending these meetings were Student’s resource room teacher, his teacher, speech/language pathologist, occupational therapist, and the area coordinator for the District.

10. In late 2011, Parents contacted the District’s administrative offices to complain about what they perceived was Student’s lack of progress. An administrator advised Parents that if the placement at Edgar Road Elementary did not work out for Student, the next step was Southview Elementary School, a school serving students with severe disabilities.

11. At one of the informal monthly meetings in spring, 2012, Parents told District staff they were not interested in Southview. Student's future school placement was not discussed at any IEP meeting in 2012.

12. At some point after April 2012, Parents informed District staff they were considering placing Student at Miriam School, a private school in Webster Groves that specializes in serving students with disabilities. No written notice of Parents' decision was given, nor did Parents inform the District that they intended the private placement of Student would be at public expense.

13. In May 2012, Parents signed a contract with Miriam School. They unilaterally withdrew Student from the District at the end of the 2011-2012 school year, and Student began attending Miriam School full time in August 2012, at Parents' expense. Student continues to attend that school.

14. Parents, through counsel, filed their due process complaint on January 15, 2014, claiming the District failed to provide Student with a free and appropriate public education ("FAPE"), and seeking reimbursement of Student's private school tuition at Miriam School from August 2012 to present.

Conclusions of Law

This Commission has jurisdiction over due process complaints with respect to any matter relating to identification, evaluation, educational placement, or the provision of a FAPE of a child in this state.⁸ A due process hearing request must conform to the requirements of the IDEA.⁹ The District asserts the Parents' due process complaint entitles them to no relief or remedy under the IDEA because Parents failed to provide clear notice to the school district of

⁸ Section 162.961.1.

⁹ Section 162.961.6.

their intention to seek reimbursement for Student's private tuition at Miriam School prior to withdrawing him from public school as required, and because Parents' due process complaint was not filed until well after Student had already left the District. We examine each argument in turn.

Is Parents' Relief Barred by 34 CFR § 300.148 or Parents' Failure to Provide Prior Notice of Withdrawal?

The District argues that Parents' failure to provide notice of their intention to withdraw Student from public school and place him at Miriam School at public expense bars their recovery of any reimbursement, citing 34 CFR § 300.148 and *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762 (8th Cir. 2011). In relevant part, 34 CFR § 300.148 provides:

(c) *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...without the consent of or referral by the public agency, a court or a 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 FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

(d) *Limitation on reimbursement.* The cost of reimbursement described in paragraph (c) of this section **may be reduced or denied**—

(1) If—

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concern and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section[.]

(Emphasis added.)

Parents' complaint alleges the District failed to provide Student with a FAPE because his IEP lacked appropriate social and emotional goals and services to address his autism and other diagnoses, and that his placement at the Miriam School is appropriate. Taking these allegations as true for purposes of our consideration of the District's motion, we conclude that § 300.148 does not bar Parents reimbursement. The regulation states we "may" deny or reduce such relief if the parents removed the child without prior notice to the IEP Team, but does not *require* that we deny reimbursement in every instance.

The District asserts its position is supported by *Park Hill School District v. Dass*, but we find its holding inapplicable to this case. *Park Hill* involved the court's de novo review of a hearing panel's determination that a Missouri school district failed to provide students with a FAPE. The parents enrolled the students in a private school, rejecting the school district's offer to place them in a public school autism program. Noting that the IDEA allows reimbursement of private placement costs only upon a finding that a school district failed to make a FAPE available to the child in a timely matter, the court focused on the issue of whether the students' IEPs were adequate.¹⁰ The court found students' IEPs did not violate the IDEA, and overturned the district court's decision ordering the parents reimbursed for the students' private placement.

While the court in *Park Hill* noted that the IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations, the case was not decided on that basis, but based on the determination that the IEPs did not fail to provide students a FAPE. In the case before us, Parents have alleged that Student was denied a FAPE by the District because of the inadequacy of the 2011-2012 IEP and thus are entitled to reimbursement of their tuition at Miriam School. *Park Hill* does not suggest such recovery would be barred.

¹⁰ 655 F.3d 762, 766.

Is Parents' Claim Barred by the "Thompson Rule"?

The District also contends Parents' failure to file their due process complaint until eighteen months after Student was unilaterally withdrawn from public school bars any recovery under the IDEA, relying on the holding of the Eighth Circuit Court of Appeals in *Thompson by and through Buckhanon v. Bd. of Special Sch. Dist. No. 1 (Minneapolis)*, 144 F.3d 574 (8th Cir. 1998). Parents remind us the holding in *Thompson* is unique to the Eighth Circuit, and urge us to follow precedents established in other circuits. We find *Thompson* is still good law in this circuit, and apply its holding here.

The facts in *Thompson* are similar to the case before us: following an assessment, an IEP was developed for a student diagnosed with emotional behavioral disturbance ("EBD"). The parent reluctantly agreed to the student's placement in a program tailored for children with EBD. Student initially made progress in the program, but still had behavior problems. Before a new meeting was convened to reconsider the student's placement, the parent removed the student and placed him in a private charter school. At the end of the school year, the parent requested a due process hearing to challenge the district's assessment of the student. A hearing officer dismissed the due process complaint because the student no longer attended a school within the district. While waiting for administrative review of the hearing officer's decision, the parent placed the student in another charter school outside the district.

The parent in *Thompson* filed suit against the school district, alleging, among other things, that the dismissal of the due process complaint denied her a hearing to challenge student's IEP and overall education with the district. The district court granted the school district's motion to dismiss that claim, and the parent appealed. *Thompson* held the parent had not stated a cause

of action under the IDEA because her request for a review came after the student left the school district previously responsible for his education.¹¹

The *Thompson* court noted:

Contrary to [the parent's] assertions, her need to preserve the right to challenge [the student's] prior educational services is not simply a procedural barrier. The purpose of requesting a due process hearing is to challenge an aspect of a child's education and to put the school district on notice of a perceived problem. Once the school district receives notice, it has the opportunity to address the alleged problem[.¹²]

Since *Thompson*, Eighth Circuit courts have held that a due process challenge may not be lodged against a former school district when the student and his/her parent failed to request a due process hearing before the student was withdrawn. See, e.g., *C.N. Willmar Pub. Sch., Indep. Sch. Dist. No. 347*, 591 F.3d 624, 631, n.6 (8th Cir. 2010); *Barron ex rel. D.B. v. South Dakota*, No. 09-4111, 2010 U.S. Dist. LEXIS 105886, at *22 n.3 (D.S.D. Sept. 30, 2010).

Outside of the Eighth Circuit, the “*Thompson* rule” has met with controversy, as the majority of federal district courts have, instead, held that a student who leaves a school district that failed to provide a FAPE is nevertheless entitled to a due process hearing to consider the issue of compensatory relief, including reimbursement. Parents argue that the *Thompson* rule must be re-examined in light of the Supreme Court's decision in *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009). In that case, a special needs student who never received special education services and was not enrolled in the school district was nevertheless entitled to a due process hearing, despite Section 1412(a)(10)(C)(ii) of the IDEA (parents of a child with a disability who previously received special education services from district could seek reimbursement of private school tuition if district failed to provide a FAPE). The Supreme Court rejected the school district's argument that parents were not entitled to a hearing because student had not been

¹¹ *Thompson*, at 578.

¹² *Id.* at 579.

previously served by the district as inconsistent with the IDEA's "child find" provisions. The facts in *Forest Grove* and the Court's consideration of the "child find" requirement easily distinguish it from the issue before us, as is borne out by the continued application of the *Thompson* rule in the Eighth Circuit after *Forest Grove*.

Parents suggest that we should permit them to present evidence and argument at a hearing that an equitable exception to the *Thompson* rule applies here, but we decline to do so. Although the Eighth Circuit opened the door for equitable exceptions to the application of the *Thompson* rule where the student's immediate removal from the district was warranted by the threat of physical or serious emotion harm to the child,¹³ the Parents' due process complaint raises no such issues. Parents voiced concerns about Student's progress at Edgar Elementary in December 2011, but they allowed Student to remain there through the end of the school year. We find no urgency in Parents' actions, as alleged in the pleadings or established by the admissible evidence in the record, to support consideration of an equitable exception to the *Thompson* rule.

When Parents elected to remove Student from the District without first filing a due process complaint to give notice of their specific concerns about Student's IEP, they eliminated any opportunity for the District to address those concerns and to implement a remedy. Because the Parents' due process complaint was filed eighteen months after Student voluntarily left the District and was enrolled in Miriam School, we find their request for relief is barred by the *Thompson* rule.

Summary

The District's motion for involuntary dismissal of Parents' due process complaint is granted. We cancel the hearing.

¹³ *C.N. v. Willmar Pub. Sch.*, 591 F.3d 624, 632 n. 8 (8th Cir. 2010).

Appeal Procedure

This is the final decision of the Administrative Hearing Commission in this matter. A party has the right to request a review of this decision by filing a civil action in federal or state court pursuant to the IDEA. *See* 20 U.S.C. § 1415(i).

SO ORDERED on May 6, 2014.

MARY E. NELSON
Commissioner