STATE OF VERMONT

AGENCY OF EDUCATION

Special Education Due Process Case # DP-15-08

ORDER GRANTING SUPERVISORY UNION'S MOTION FOR SUMMARY JUDGMENT

On November 11, 2014, the Supervisory Union filed a Motion for Summary Judgment. The Amended Scheduling Order required Parent to file her response to the motion by November 25, 2014. Parent did not file a response to the motion.

For the reasons set forth below, the Supervisory motion for summary judgment is hereby granted.

1. UNDISPUTED FACTS

Student attended the School, a member school of the Essex-Caledonia Supervisory Union until June 2014. While attending the School, student received accommodations under a § 504 plan.

In winter 2012, Student was evaluated for special education. Since Student did not fall into the lowest fifteen percent in any basic skill, Student failed to demonstrate the necessary adverse effect to qualify for special education. On December 6, 2012, Student's evaluation and planning team determined that she was not eligible for special education. Based on several evaluations and assessments, Student continued to receive accommodations under a § 504 plan.

During the 2013-2014 school year, Student was bullied at school. In the late fall,

Student's behavioral difficulties and aggression escalated. Responding to these behavioral difficulties, Student was referred, with Parent's consent, for further assessments to inform the development and implementation of any additional accommodations and supports.

On July 2, 2014, Parent sent an email to the principal at the ! School informing the school that Student would not be returning to School.

On October 27, 2014 Parent filed a due process complaint seeking reimbursement for Student's tuition at the , a private school in St. Johnsbury, Vermont.

2. LEGAL ISSUES RAISED IN THE MOTION

The Supervisory Union's motion raises the following legal issues:

* Whether tuition reimbursement is a remedy for alleged violations of § 504 where the student is not eligible for special education ;

* Whether the Supervisory Union has failed to provide specific § 504 accommodations for Student;

* Whether Parent has shown that Student receives any § 504 accommodations at Student's new school;

* Whether the claim for tuition reimbursement is time-barred;

* Whether Parent provided adequate notice to the School before enrolling Student at her new school.

3. STANDARD OF REVIEW

Summary judgment should be granted when the record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *City of Burlington v. Hartford Steam Boiler Inspection and Ins. Co,* 190 F. Supp. 2d 663 (D.Vt. 2002). To decide such a motion, the adjudicator must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party, and decide whether a fact-finder could decide in favor of that party under applicable law. *Scott v. Harris,* 550 U.S. 373, 378 (2007).

4. CONCLUSIONS OF LAW

The question presented in this case is whether a parent is entitled to tuition reimbursement for an alleged § 504 violation when the student has not been found to be eligible for special education services under the provisions of the Individuals with Disabilities Education Act ("IDEA").

In the typical case, a parent seeks reimbursement for private school tuition under IDEA because the school district has failed to provide a free appropriate public education (FAPE). *See, e.g., C.L. v. Scarsdale Union Free School District*, 744 F.3d 826 (2d Cir. 2014). Tuition reimbursement under IDEA is an equitable remedy, available "where parents have unilaterally obtained special education and related services in situations where the school district has failed to provide an appropriate education or program." *Wenger v. Canastota Cent. Sch. Dist.,* 979 F.Supp. 147, 152 (N.D.N.Y. 1997).

Monetary damages, however, are not available under IDEA. *See Polera v. Board of Educ. of Newburgh Enlarged City School Dist.,* 288 F.3d 478, 486 (2d Cir. 2002) ("The purpose of the IDEA is to provide educational services, not compensation for personal injury, and a damages remedy - as contrasted with reimbursement of expenses - is fundamentally inconsistent with this goal").

Section 504 of the Rehabilitation Act provides for different remedies. Thus, when a violation of § 504 can be demonstrated, "[a]n individual aggrieved by a violation of the Rehabilitation Act may seek ...compensatory damages." *C.L. v. Scarsdale Union Free School District*, 744 F.3d at 831. But to prevail under the Rehabilitation Act, a party must also prove that the school district acted in bad faith or demonstrated gross misjudgment. *Id.* at 841. *See Wenger v. Canastota Cent. Sch. Dist.,* 979 F.Supp. 147, 152 (N.D.N.Y. 1997) ("[S]omething

more than a mere violation of the IDEA is necessary in order to show a violation of Section 504 in the context of educating children with disabilities, i.e., a plaintiff must demonstrate that a school district acted with bad faith or gross misjudgment").

The differences in the remedies available under IDEA and § 504 are reflected in Vermont's Special Education Rules.

Rule 2224.2 states:

> Tuition shall not be paid from public funds to any independent elementary or secondary school in Vermont for any Vermont student who has been determined eligible for special education unless:
>
> (a) The school is approved for special education purposes pursuant to Rule 2228 et seq;
>
> (b) There is an order from a court or from a due process hearing pursuant to Rule 2365.1.6 requiring such payment, or
>
> (c) The Secretary has approved an exception for placement in an independent school pursuant to Rule 2228.2(2).

In addition, Vermont State Department of Education Rule § 1253 provides as follows:

> Conflicts and alleged violations under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 may be resolved through due process hearings in the same manner as for a special education due process hearing according to Rule 2365.1.6 ... The hearing officer may award declaratory and injunctive relief but not damages, costs or attorney's fees.

In this case, Parent alleges in the complaint that Student's rights under § 504 were violated and seeks tuition reimbursement to remedy that violation. While Student qualified for accommodations under § 504, Student was not qualified for special education services and did not have an Individualized Education Plan (IEP) while attending the School.

Assuming for the purposes of the Supervisory Union's motion for summary judgment that Parent might be able to prove a § 504 violation, tuition reimbursement is not a remedy under Section 504. *See Janet G. v. Hawai'i Dept. of Educ.*, 410 F.Supp 2d 958, 967 (D. Ha. 2005)

("Because neither the federal regulations nor Hawaii's regulations implementing IDEA and Section 594 indicate that reimbursement is available under Section 504, the Court finds that reimbursement for private school placement as provided in 34 C.F.R. § 300.403(C) is not available in a claim brought under Section 504 of the Rehabilitation Act").

As the Supervisory Union points out in its motion, Vermont's rules implementing IDEA and § 504 (like Hawaii's) do not authorize private school tuition reimbursement as a remedy for violations of Section 504.

And even if the request for tuition reimbursement could be categorized as "damages", Vermont law specifically provides that a due process hearing officer cannot award damages in the event a Section 504 violation has been established. *See State Board of Education Manual of Rules and Practices, § 1253.*

Since neither federal nor state law to authorizes the remedy requested in the complaint, i.e., tuition reimbursement for an alleged violation of § 504, the Supervisory Union's motion for summary judgment is granted.[1]

NOTICE OF APPEAL RIGHT

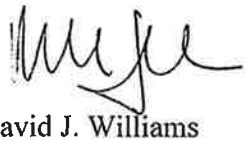
Pursuant to Vermont Department of Education Rule 2365.1.8:

"(a) The decision of the hearing officer is final unless appealed to a state or federal court of competent jurisdiction.

(b) Parties have the right to appeal the hearing decision by filing a civil action in a federal district court or a state court of competent jurisdiction in accordance with Rule 2365.1.9."

[1] Since the ruling on this issue is dispositive, this order will not address the other issues raised in the Supervisory Union's motion for summary judgment.

Dated at Burlington, Vermont this 3rd day of December 2014.



David J. Williams

Due Process Hearing Officer

Vermont Agency of Education