BEFORE THE
IOWA DEPARTMENT OF EDUCATION

In re: C.Z., a child,	)	
	)	Dept. Ed. Docket No. SE-393
C.Z.'s Parents,	)	(DIA No. 13DOESE008)
	)	
Complainants,	)	
	)	
vs.	)	**ORDER : Granting Motion for Summary Judgment**
	)	
[ ] Community School District	)	**and Dismissing Complaint**
and Northwest Area Education Agency,	)	(Redacted for Publication)
	)	
Respondents.	)	

Background Proceedings

[Mr. & Ms. Z.] filed a Due Process Complaint with the Iowa Department of Education on behalf of themselves and their son [C.Z.] on September 18, 2013. The Complaint alleges that [C.Z.]'s Individualized Education Program (IEP) was ignored throughout the 2012-2013 school year and at the beginning of the 2013-2014 school year. Several specific incidents are listed in the complaint as examples of alleged violations of the IEP.

A Prehearing Scheduling Conference was held on November 13, 2013. [Ms. Z.] and representatives of the school district and area education agency participated. Neither party was represented by an attorney. The parties agreed to discuss mediation of the complaint and agreed to January 6th and 7th, 2014, as dates for the hearing, if needed. The Respondent school district and area education agency filed an Answer to the Complaint on November 19, 2013, generally denying many of the allegations, disagreeing with the Complainants' characterization of the specific incidents, and affirmatively alleging that the student had been withdrawn from special education services. A mediation session was held on December 3rd, but the parties were unable to reach an agreement.

On December 20th, the Respondents, through counsel, filed a *Motion for Continuance* and *Motion for Summary Judgment*, seeking dismissal of the complaint. An Order was issued on December 26th, granting a continuance of the hearing; scheduling a prehearing conference for January 6, 2014; and telling the Complainants that the deadline for filing a response or resistance to the motion for summary judgment was January 10th. The January 6th prehearing conference was cancelled, due to Ms. [Z.]'s unavailability. The Complainants and counsel for the Respondents agreed to convene for a conference call at 3:00 p.m. on January 29, 2014.

As of January 24, 2014, the Complainants had not filed a response to the *Motion for Summary Judgment*. In order to ensure all parties understood the importance of the January 29th conference call, an Order was issued on January 24th, notifying the parties that the summary judgment motion raised legitimate questions concerning the student's eligibility to receive special education services through the Respondent school district and AEA and the Complainants' ability to maintain this action and directing the parties to be prepared to address these issues during the January 29th conference call.

Representatives for the Respondent agencies – [ ] School District Superintendent [ ] and Northwest Area Education Agency Director of Special Education Jim Gorman – appeared for the conference call as scheduled at 3:00 p.m. on January 29, 2014. Attorney Katherine Beenken appeared as counsel for both Respondents. The Complainants did not appear and were not represented. No evidence was taken and the *Motion for Summary Judgment* was considered submitted for ruling.[1]

Issue Presented by Motion

Whether the Complaint should be dismissed because the Complainant is not entitled to pursue this IDEA Due Process Complaint against the [ ] School District and the Northwest Area Education Agency, the issues raised within the Complaint are moot, or the requested remedies are not available under the IDEA.

Undisputed Facts

Based on review of the pleadings, statement of uncontested facts within the Motion for Summary Judgment, and the attached supporting exhibits, the following facts are uncontested.

[C.Z.] was born [in the fall of] 2002. [C.Z.] lives with his parents within the [ ] School District and Northwest Area Education Agency. [C.Z.] is a child with a disability and was determined by the school district and AEA to be entitled to receive special education and related services, pursuant to the Individuals with Disabilities Education Act (IDEA). During the 2012-2013 school year, [C.Z.] attended 4th grade [in the district]. An Individualized Educational Program (IEP) and Behavior Intervention Plan were in place throughout the school year. [Ms. Z.] is dissatisfied with the school district's implementation of the IEP and treatment of [C.Z.] during the spring and fall of 2013.

On September 17, 2013, [Ms. Z.] filed an unsigned Competent Private Instruction Report (Form A) with the school district. This is the form to be used by parents to notify a public school district that they are opting to home school their child or enroll the child in a competent private instruction (CPI) program. Dual enrollment options are available to parents who want their child to access special education programs or

[1] [Ms. Z.] left me a voice mail message shortly before 4:00 p.m. on January 29th, stating that she was fighting a migraine and got fouled up about the time of the call. The call had concluded and I did not respond to the message. [Ms. Z.] has filed no written response to the issues raised in the Respondents' motion.

services or to participate in academic or extracurricular activities at the local schools. [Ms. Z.] marked the form to indicate: that her child was currently identified as a child requiring special education; that she did not consent to a reevaluation of the child for receipt of special education services or programs; and that she desired to dual enroll her child in the public school for academics, but not for extra-curricular activities or special education. [Ms. Z.] did not select one of the five dual enrollment options listed on the attached Competent Private Instruction Worksheet, but did write a note asking "to use instructional materials used in the regular in school curriculum." (Exhibit B)[2]

Upon receipt of the CPI report form, the district considered [C.Z.] a dual-enrolled home school student. The district began making arrangements to provide instructional materials and homework assignments to [Ms. Z.], as she requested. (Exhibit B1)

On September 18, 2013, the Iowa Department of Education received a Due Process Complaint completed by [Ms. Z.] and dated September 13, 2013. The Complaint alleges that [C.Z.]'s IEP and Behavior Plan were ignored during the entire 2012-2013 school year and at the beginning of the 2013-2014 school year and describes a number of specific incidents during which [Ms. Z.] believes school staff reacted inappropriately to [C.Z.]' behavior, resulting in escalation of the behavior. The Complaint also alleges the school did not provide timely and accurate reports of the incidents to [C.Z.]'s parents. The Complaint states the following proposed resolution: "I need [C.Z.] to be treated with respect in all aspects of his educational & emotional needs. Superintendent needs to have consequences for faculty and staff." (Exhibit A) No other relief was requested.

The Complaint form instructs parents to "Send a completed form to each of the following: 1. The district that made the decisions with which you disagree; 2. The AEA special education director; 3. Director, Iowa Department of Education." [Ms. Z.] did not provide copies of the Due Process Complaint to the [ ] School District or the Northwest AEA. The department also failed to notify the district and AEA of the filing of the complaint, as required by 281 IAC 41.1003(3).

On October 7, 2013, [Ms. Z.] filed a second Competent Private Instruction Report with the school district. The second form was signed and was marked to indicate: that her child was currently identified as a child requiring special education; that she consented to a reevaluation of the child for receipt of special education services or programs; and that she desired to dual enroll her child in the public school for extra-curricular activities, but not for academic activities or special education. [Ms. Z.] attached a sample of the instructional materials she would be using to the form. (Exhibit B2) On October 9, 2013, [Ms. Z.] submitted a signed Home School Assistance Agreement to the district. On the same day, the [district] Home School Assistance Director signed the form acknowledging receipt of the Agreement. (Exhibit B2)

By choosing to home school her son and withdrawing him from the school district's special education program, [Ms. Z.] effectively revoked her consent for the district to

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[2] The exhibits referenced herein were attached to the Respondent's *Motion for Summary Judgment*.

provide [C.Z.] with special education and related services. The school district reacted by scheduling an IEP Team Meeting for October 15, 2013, to formally exit [C.Z.] from special education services. (Exhibit D) A Prior Written Notice of a Proposed or Refused Action, was prepared to document this action. The notice, dated October 15, 2013, included detail about the actions proposed. The notice clearly stated "[Mr. & Ms. Z.] are requesting their son, [C.Z.], be exited from special education." The notice explained the consequences of this action as follows:

> [C.Z.] will no longer receive the accommodations, modifications, and specially designed instruction that is written on his present IEP. [C.Z.] will remain an eligible individual for special education and maintains the right to return to the special education program. If the parents want him to resume services, the team at that time will review existing information to determine if the available information is sufficient enough or if further assessment is needed before an IEP can be written.

(Exhibit E) The proposed actions were to be implemented on October 15, 2013.

The AEA Regional Facilitator, Don Tisthammer, wrote to Mr. and Mrs. [Z.] on October 22, 2013, acknowledging and approving their request to provide competent private instruction (home schooling) to their son. Mr. Tisthammer reminded the parents that [C.Z.] could receive all or some special education services through dual enrollment, encouraged them to consider this option, and provided an information sheet with detail about the various dual enrollment options. (Exhibit F) On December 17, 2013, the AEA Director of Special Education, James Gorman, wrote to Mr. and Mrs. [Z.] and offered to meet, discuss, and work with them to determine the best way to prepare for [C.Z.]'s return to [the school district]. (Exhibit G)

The Due Process Complaint remained pending. On October 31, 2013, the Respondents were contacted by the Iowa Department of Education and, for the first time, were informed of the existence of the Due Process Complaint filed by Ms. [Z.]. (Correspondence in file) A preliminary conference call with the presiding Administrative Law Judge and the parties to the complaint was held on November 13, 2013. Neither party was represented by counsel during the call. The parties agreed to attempt mediation of the complaint and a due process hearing was tentatively scheduled to be held on January 6th and 7th, 2014. An unsuccessful mediation session was held on December 3, 2013.

The Respondents filed an Answer to the Due Process Complaint on November 19, 2013. On December 20, 2013, the Respondents filed the Motion for Summary Judgment at issue here. The Complainants filed no response and have not denied any of the factual allegations underlying the Motion for Summary Judgment.

Conclusions of Law

The federal Individuals with Disabilities Education Act (IDEA) is designed to "ensure that all children with disabilities have available to them a free appropriate public

education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *see Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034, 73 L.E.2d 690 (1982).

In exchange for accepting federal money to assist in educating children with disabilities, state and local education agencies must agree to make a free appropriate public education (FAPE) available to all qualifying children in their jurisdiction and must ensure that children with disabilities and their parents are provided with guaranteed procedural safeguards with respect to the provision of FAPE. 20 U.S.C. §§ 1412(a)(1); 1415(a).

The procedural safeguards mandated by the IDEA include the ability to file a complaint requesting an administrative due process hearing. 20 U.S.C. § 1415(b)(6). A parent may file a due process complaint on any of the matters relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child. 34 C.F.R. § 300.507; *see also* 281 Iowa Admin. Code (IAC) 41.507(1)(a); *see Fort Osage R-1 Sch. Dist. v. Sims,* 641 F.3d 268, 1002 (8th Cir. 2011) ("Parents and guardians of a disabled child may challenge the procedural and substantive reasonableness of an IEP by requesting an administrative due process hearing, …").

The purpose of summary judgment is to avoid useless trials or hearings when the case can be decided as a legal matter. *Sorenson v. Shaklee Corp.*, 461 N.W.2d 324, 326 (Iowa 1990). "When the only controversy concerns the legal consequences flowing from undisputed facts, summary judgment is the proper remedy." *Weddum v. Davenport Comm. Sch. Dist.*, 750 N.W.2d 114, 117 (Iowa 2008).

I begin my analysis by acknowledging that the use of a motion for summary judgment is somewhat unusual in the context of an IDEA due process proceeding. However, I find nothing within the statute, regulations, or rules precluding the grant of summary judgment when appropriate. Further, the administrative rules governing this proceeding explicitly allow the presiding administrative law judge to grant an appropriate request or motion to dismiss a due process complaint under a number of circumstances, including: when the issues raised are moot or the relief sought is beyond the scope of authority of the judge to provide. 281 IAC 41.1003(7)(b), (d). I conclude that a motion for summary judgment is an appropriate way for Respondents to make a request for dismissal of a due process complaint.

A motion for summary judgment is properly granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); Iowa R. Civ. P. 1.981(3). "The non-moving party receives the benefit of all reasonable inferences supported by the evidence, but has the obligation to come forward with specific facts showing there is a genuine issue for trial. . . . A complete failure by the non-moving party to make a showing sufficient to establish the existence of an element essential to that party's case . . . necessarily renders all other facts immaterial." *Miller v. South Callaway R-II School Dist.,* 732 F.3d 882, 886 (8th Cir. 2013) (citations omitted).

The Complainants in this case are not attorneys and are not represented by counsel. They may not have fully understood the nature of the Respondents' motion, but the requested relief was unmistakable – the motion sought dismissal of the complaint. The Complainants were given ample opportunity and additional time to resist the Respondents' motion. They failed to do so. Therefore, I have no choice but to assess the pending motion based on the allegations in the Complaint. *Stringer v. St. James R-1 School Dist.,* 446 F.3d 799, 802 (8th Cir. 2006), citing *Cunningham v. Ray,* 648 F.2d 1185, 1186 (8th Cir. 1981) ("Pro se litigants must set a claim forth in a manner which, taking the pleaded facts as true, states a claim as a matter of law."); *see also* 34 C.F.R. § 300.511(d); 281 IAC 41.511(4) (unless the parties otherwise agree, "the party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint").

The Due Process Complaint filed by [Mr. and Ms. Z.] challenges the implementation of their son's IEP during the 2012-2013 school year and the beginning of the 2013-2014 school year. The Respondents' Motion for Summary Judgment seeks dismissal of the complaint arguing that the claims raised here are moot because the student ceased to be a child with a disability entitled to use the procedural safeguards of the IDEA when his parents opted to provide home schooling and withdrew him from the district's special education programming. Alternatively, the Respondents assert that the complaint should be dismissed because the requested remedies are beyond the scope of relief available under the IDEA.

The Respondents first argue that this case is moot, because the child was withdrawn from the public school district before the school district was notified of due process complaint and the parents have revoked consent for the child to receive special education services. The first aspect of this argument is based upon *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574 (8th Cir. 1998). In *Thompson* the court held that an IDEA complaint filed against a public school district after the student had left the district failed to state a cause of action under the IDEA. "If a student changes school districts and does not request a due process hearing, his or her right to challenge prior educational services is not preserved." *Id.* at 578-79; *see also C.N. v. Willmar Public Schools, Independent School Dist*rict *No.* 347, 591 F.3d 624, 630-32 (8th Cir. 2010) (holding that an IDEA claim was appropriately dismissed where the proceeding was initiated after the student left the public school and while the student was enrolled in another public school, even though parent alleged immediate transfer from the public school was necessary to protect students physical and psychological safety); *M.P. v. Independent School District No. 721,* 326 F.3d 975, 980-81 (8th Cir. 2003) (holding an IDEA due process complaint seeking compensatory education was properly dismissed because it was filed after student transferred through open-enrollment to a new public school district that assumed responsibility for providing him with appropriate educational services). [3]

[3] A number of federal district courts have disagreed with this line of cases and have held that a parent may maintain an IDEA due process claim seeking compensatory relief against a former school district. *See Lomax v. District of Columbia,* 896 F.Supp.2d, 69, 80-83 (D.C. Dist. Ct.

[Ms. Z.] notified the school district on September 17th that she intended to withdraw her son from the school and provide home schooling. The district received a signed version of the CPI form on October 7th. The parents' due process complaint was received by the state department of education on September 18th. The school district did not receive notice of the complaint until the end of October.

Even though the due process complaint in this case was filed after [C.Z.]'s parents began the process of withdrawing him from school, I believe the facts here are distinguishable from the situation addressed by the court in the *Thompson, M.P.,* and *C.N.* cases. The student in each of those cases had been withdrawn from the public school named in the IDEA complaint and enrolled in another public school district before the complaint was filed. The new school was responsible for the current and ongoing education of the student in each case. The same is not true here. First, the complaint was filed before [C.Z.] was formally withdrawn from the public school. Second, and more importantly, [C.Z.]'s family continues to live within the Respondent school district and AEA and the district has an ongoing obligation to provide special education and related services to [C.Z.], if his parents opt to reenroll him in the district and consent to these services.

The issue of consent brings us to the second aspect of the Respondents' mootness argument and the question of what effect the rejection of special education services has on the parents' ability to maintain this action. The IDEA requires parental consent for initial evaluation and prior to providing special education and related services to a child. 20 U.S.C. § 1414(a)(1)(D). The act also allows parents to revoke consent for services and waive their child's right to benefits under the IDEA at any time. 34 C.F.R. § 300.300(b)(4); 441 IAC 41.300(2)(d).

Upon revocation of consent, the school district may not continue to provide special education and related services and "[w]ill not be considered in violation of the requirements to make FAPE available to the child because of the failure to provide the child with further special education and related services." 34 C.F.R. § 300.300(b)(4)(iii); 441 IAC 41.300(2)(d)(3).

"When parents waive their child's right to services, school districts may not override their wishes." *Fitzgerald v. Camdenton R-III School Dist.,* 439 F.3d. 773, 775 (8th Cir. 2006). Functionally, "once a parent revokes consent for a child to receive special education and related services, the child is considered a general education student . . . ." *Lamkin v. Lone Jack C-6 School District*, 58 IDELR 197, 2012 WL 896906 (W.D. Mo. 2012) (quoting comments to regulation 300.300(b), 73 Fed. Reg. 73006, at 73011 – 73013).

2012) (discussing *Thompson, C.N.,* and cases from district courts outside of the Eighth Circuit and noting that "the majority of federal district courts to consider this issue have concluded that when a student leaves a school district, which allegedly failed to provide a FAPE, the school district may not avoid its obligations under the IDEA and must provide a due process hearing to consider the issue of compensatory education."). However, Iowa is in the Eighth Circuit and cases from that court are controlling precedent for interpretation of the IDEA in this state.

Although the student's disability may be unchanged, a student whose parents have revoked consent for special education is not eligible to receive services or benefits under the IDEA, unless the revocation is itself withdrawn. "After revoking consent for special education and related services for his or her child, a parent maintains the right to subsequently request an initial evaluation to determine if the child is a child with a disability who needs special education and related services." *Letter to Cox*, 54 IDELR 60 (OSEP 8/21/2009).

In mid-September of 2013, [C.Z.]'s mother decided to withdraw him from classes at the [school] district and began providing home school instruction. She initially requested dual-enrollment for academic activities and asked to use the instructional materials used in the school's regular fifth grade curriculum. On the signed CPI Report that [C.Z.]'s mother filed with the school district on October 7, 2013, she consented to an initial or reevaluation of [C.Z.] for receipt of special education services or programs; but chose not to dual enroll him for academic or special education services. [C.Z.]'s parents did not consent to the delivery of special education services to him at any time after he was withdrawn from the public school.

The district reasonably interpreted these actions as a parental withdrawal of consent for the ongoing delivery of special education and related services. An IEP team meeting was scheduled to discuss the student's exit from special education services and Prior Written Notice was issued on October 15, 2013, notifying the parents that special education services were being discontinued at their request. Two AEA representatives wrote to the parents on October 22nd and December 17th, and explained that [C.Z.] would be eligible for continuing special education services, through dual enrollment, if requested. The December 17th correspondence also addressed options for [C.Z.]'s return to [the school district] and the need for further evaluation of his challenging behaviors to identify appropriate services and response. A draft reevaluation consent form was enclosed. The parents did not respond to the Prior Written Notice or the AEA correspondence, did not return the reevaluation consent form, and did not file a response to the Motion for Summary Judgment.

Based on the undisputed facts here, I must conclude that [C.Z.]'s parents have voluntarily withdrawn him from the public school district and revoked consent for special education services. *See Hupp v. Switzerland of Ohio Local School Dist.,* 912 F.Supp.2d 572 (S.D. Ohio 2012). When consent for IDEA services was revoked, the school district and AEA were obligated to stop providing special education services to [C.Z.]. Prospective relief cannot be granted, because the school district and AEA are no longer responsible for providing special education services to [C.Z.].

The Due Process Complaint initiating this action was filed with the state department of education before consent for special education services was revoked. Arguably, the proceeding could move forward as a challenge to the adequacy of past implementation of [C.Z.]'s IEP, if the requested relief could be granted. But the complaint initiating this case does not seek compensatory relief for past actions. Rather, only the following prospective relief is requested: "I need [C.Z.] to be treated with respect in all aspects of

his educational & emotional needs. Superintendent needs to have consequences for faculty and staff."

I lack authority to direct the school district how to manage and whether to discipline faculty and staff. State hearing officers acting under the IDEA have broad discretion to order educational remedies, including compensatory education, reimbursement of educational expenses, and prospective corrective action. *C.f. J.B. ex rel. Bailey v. Avilla R-XIII School Dist.*, 721 F.3d 588, 593-94 (8th Cir. 2013); *Doe ex rel. v. Todd County School Dist.*, 625 F.3d 459, 465 (8th Cir. 2010). State hearing officers are not, however, empowered to direct a school district how to assign, manage, or discipline school personnel. These decisions rest exclusively with school district administrators.

The remedies requested by the parents in this case are beyond the scope of relief available under the IDEA. A request for dismissal of an IDEA due process complaint shall be granted upon determination that the relief sought is beyond the scope and authority of the administrative law judge to provide. 281 IAC 41.1003(7)(d). Therefore, the request of the school district and AEA for dismissal of this case must be granted.

Order

The relief sought by the Complainant is beyond the scope of relief available under the IDEA and the Complaint is DISMISSED in its entirety.

Issued on May 19th, 2014.

Christie J. Scase
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