

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

████ BY AND THROUGH █████
Petitioner,

v.

DEKALB COUNTY SCHOOL
DISTRICT,
Respondent.

Docket No.: 2311416
2311416-OSAH-DOE-SE-44-Fry

Agency Reference No.: 2311416



**ORDER GRANTING CROSS MOTIONS FOR SUMMARY DETERMINATION IN
PART, DENYING THEM IN PART, DISMISSING PETITIONER'S MOTION AND DUE
PROCESS HEARING REQUEST AS MOOT IN PART**

FINAL DECISION

ORDER OF DISMISSAL

I. INTRODUCTION

Petitioner filed a Due Process Hearing Request (DPHR) on November 8, 2023 alleging that Respondent failed to commence Extended School Year (ESY) services for █████ at the beginning of the 2022-2023 school year. As the proposed remedy, Petitioner requested 30 hours of compensatory services for the late start of ESY services. Based on the filing date, a hearing was to be held and a decision issued by January 22, 2023. The hearing was scheduled by agreement of the parties for January 24, 2023. The Petitioner filed a Motion for Summary Determination on January 13, 2023, which Respondent moved to strike as untimely per Ga. Comp. R. & Regs. 616-1-2-.15(1)(b), which requires such motions be filed no later than thirty days prior to the hearing. In the alternative, Respondent also requested the hearing be continued. During a PHTC that occurred shortly thereafter Petitioner was given the choice to move forward with the hearing on January 24, 2023 or continue to hearing so the Respondent could respond to the Petitioner's Motion. The hearing was continued. Respondent filed a Response on February 2, 2023.

Respondent then filed a Motion for Summary Determination on February 7, 2023. Petitioner's response was due on February 27, 2023. The fact that a response was due was discussed during a status conference call on February 16, 2023, which was attended by Petitioner, [REDACTED]. A response has not yet been filed and would now be untimely in any event. While there are ancillary disputed facts that are not material, such as who is at fault for the failure to provide ESY services or who is at fault for the failure to present [REDACTED] for such services, disputes as to such facts that are not material do not need to be resolved when the undisputed facts render summary determination and dismissal appropriate. Indeed, since both parties filed motions for summary determination, they essentially agree that there is no disputed issue of fact for resolution by the fact finder.

Thus, the issues as presented by the DPHR are limited to the following:

1. Is the District currently providing ESY services as the District agreed to provide pursuant to [REDACTED]'s applicable IEPs? The Court concludes that it is.
2. Is the District's offer to agree to provide 45 hours of compensatory services plus transportation adequate to address the fact that ESY services did not start at the beginning of the school year, irrespective of when they were required to start by [REDACTED]'s IEP and irrespective who is at fault for the late start and/or missed sessions? The Court concludes that since Petitioner requested 30 hours as the proposed remedy in the DPHR, 45 hours as agreed to by the District is adequate.
3. Is the District providing transportation for ESY/compensatory services as it agreed to do per [REDACTED]'s IEP and per the offer to provide compensatory services? The Court concludes that it is.

4. Is there any genuine issue of material fact relating to conclusions 1, 2 and 3 above that precludes summary determination of those conclusions. The Court concludes that there is no genuine issue of material fact that precludes summary determination of the above, which disposes of the issues in this case.
5. Does the Petitioner's DPHR admit of any other relief that the Court could grant? The Court concludes that insofar as the issues for resolution that were presented by the DPHR filed in this case, the Court can grant no further or additional relief beyond what was requested, is being provided and as ordered herein. The Court concludes that what is being provided in terms of ESY services and what the Court has ordered herein as to compensatory services provides all relief required to fully satisfy the relevant material claims in Petitioner's DPHR

II. FINDINGS OF FACT

1. Student is a twelve (12) year-old sixth grader who attends [REDACTED] IEP-Implementation Date 1/5/2023, page 3, attached to Respondent's Motion for Summary Determination as Exhibit 1). [REDACTED] is eligible for services under Individuals with Disabilities Education Act ("IDEA") in the categories of specific learning disability and other health impairment. (Id., page 1) Services within Student's Individualized Education Plan ("IEP") include Science and Social Studies in a co-taught general education classroom, Math and English Language Arts in a small group special education classroom, and Occupational Therapy. (Id., pages 15-16) Student's IEP team met on July 7, 2022, and agreed to [REDACTED] [REDACTED] with fifty-four (54) hours of Extended School Year ("ESY") services in the areas of Math and Writing during Fall semester 2022. (Id., page 24). A start date for ESY services was not identified within the minutes. (Id.) Transportation from ESY was discussed, and Parent, [REDACTED] indicated that [REDACTED] could walk home after sessions. (Id.) Petitioner alleged

and Respondent does not dispute that ESY services did not start at the beginning of the fall semester 2022.

2. Student's IEP team reconvened on September 26, 2022, to address parental concern that ESY services had not been initiated during the first five (5) weeks of the school year. (Id., page 21) The process for human resources approval of the assigned ESY tutor was explained to the parent, as recounted within the minutes:

An ESY tutor at [REDACTED] was identified and approval sought on August 8, 2022. Approval document was submitted to Human Resources (HR) for Extra Activity Approval on August 10, 2022, received by HR on August 11, 2022 and approval received from HR on September 6, 2022. Teacher then contacted the parent to arrange for the start of services, which was agreed to begin September 12, 2022, on every Monday and Thursday for 90-minute sessions (4:30-6:00pm).

(Id., page 21; see also, Affidavit [REDACTED], ¶ 7, attached to Respondent's Motion for Summary Determination as Exhibit 3) The IEP team agreed to extend the time frame for provision of the ESY services through May 24, 2023, until the fifty-four (54) hours have been completed. (Ex. 1, page 21)

3. On or about November 8, 2022, Petitioners filed the present DPHR. Pursuant to the IDEA, under which the present action is filed, a parent or a public agency may file a due process complaint on any of the matters described in 34 C.F.R. § 300.503(a)(1) through (2) relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child. See 34 C.F.R. §300.507(a)(1). Within their filed DPHR, Petitioners indicated that it was filed to address Petitioners' disputes related to [REDACTED]'s receipt of free and appropriate public education ("FAPE") under 34 C.F.R. §300.507(a)(1).

(Petitioners' DPHR, page 2)

4. Within the brief description of facts and details related to Petitioners' concerns, the filed DPHR states:

██████████ failed to provide ██████ Extended School Year Services from weeks 1-5 of the current school year per his operative IEP. ██████ failed to notify parent via meeting notice for amendment meeting on 10/27/22. The IEP team was not able to meet and had to reschedule for 11/3/22. On 11/3/22 the IEP team failed to convene all requested meeting participants for the rescheduled ammendment [sic] meeting.

(Petitioners' DPHR, page 2).

5. Within the requested resolution section of the DPHR, Petitioners' request for relief was as follows:

DCSD will provide ██████ with compensatory service hours equal to the missed school Extended School Year Services. DCSD will also offer 30 additional compensatory service hours to remedy the deficit ██████ has endured by and through the District refusal to render ESY services per ██████s] current IEP. DCSDS will offer transportation to and from the service site where ESY services are to be rendered.

(Petitioners' DPHR, page 3).

6. Student has received and continues to currently receive ESY services pursuant to his IEP. (Ex. 3, ¶5) Although Student was offered in-home services during Fall 2022 semester to allow ESY services to continue, Parent declined. (Ex. 3, ¶8)
7. Student's IEP team met again on November 10, 2022, to address parental concerns and ESY transportation. (Ex. 1, page 18; Ex. 3, ¶9) Parent requested ESY transportation for ██████ (Ex. 1, page 19) Transportation from ESY was agreed to by Student's team. (Id.) Student has received transportation from ESY services, pursuant to his IEP amendment since that time. (Ex. 3, ¶6)
8. The Parties convened an Early Resolution Session ("ERS") on November 28, 2022. (Ex. 3, ¶10) Respondent offered to provide forty-five (45) hours of compensatory services and transportation therefrom. (Id.) Respondent understood the parties had reached agreement. (Id., ¶11) Petitioner thereafter communicated to the Respondent and to the Court that

Petitioner would not enter into agreement as it concluded it had to exhaust its administrative remedies. (Id., ¶12)

9. In her Motion for Summary Determination, Petitioner requested the following relief:

Given the presentation of these undisputed facts, Petitioner humbly request that the court grant a summary or partial summary determination relating to whether the DCSD provided [REDACTED] with ESY services from weeks 1-5 of the current 2022/2023 school year and award the remedy sought in the original DPHR.

(Petitioner’s Motion for Summary Determination, p. 4)

10. Under the circumstances, given that ESY services are being provided and compensatory services have been offered and will be provided, whether the District failed to provide ESY during weeks 1-5 of the first semester is not relevant and not material.
11. The offered 45 hours of compensatory services including transportation exceeds the 30 hours plus transportation requested in the DPHR. The offer of the 45 hours of compensatory services and transportation that was proposed to Petitioner by the District, was agreed to in the context of a settlement that was never consummated. The offer is couched as an agreement in [REDACTED] affidavit. Yet again, however, that “agreement” was made in the context of a settlement that was not finalized. There is reference to a writing, but it too makes reference to a settlement that was not finalized.
12. Respondent has argued that the District’s offer of compensatory services coupled with providing the ESY services, renders the case moot. Respondent, however, did not produce a document in connection with the cross motions for summary determination, or otherwise, in which the District formally makes a commitment to Petitioner that it will provide those compensatory services and transportation without reference to the agreement that was not finalized. The arguments concerning the agreement in the District’s submissions along with the District’s providing such services, evidence a willingness to undertake a formal

commitment to provide those services. In and of themselves however, they do not constitute a formal commitment on the part of the District to Petitioner to provide such services.

13. Since Petitioner did not file a response to Respondent's Motion for Summary Determination and did not respond to the Respondent's statement of facts and the supporting affidavit and evidence, those facts are deemed to have been admitted.

III. CONCLUSIONS OF LAW

1. Petitioners bear the burden of proof in this matter. Schaffer v. Weast, 546 U.S. 49 (2005); Ga. Comp. R. & Regs 160-4-7-.12(3)(l); Ga. Comp. R. & Regs. 616-1-2-.07(1). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 161-1-2-.21(4).
2. The pertinent laws and regulations governing this matter include IDEA, 20 U.S.C. § 1400 et seq.; federal regulations promulgated pursuant to IDEA, 34 C.F.R. § 300 et seq.; and Georgia Department of Education Rules, Ga. Comp. R. & Regs. 160-4-7-.01. -.21.
3. Under IDEA, students with disabilities have the right to a free appropriate public education ("FAPE"). 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1, 300.100; Ga. Comp. R. & Regs. 160-4-7-.02(1)(a). "The purpose of the IDEA generally is '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'" C.P. v. Leon County Sch. Bd., 483 F.3d 1151 (11th Cir. 2007), quoting 20 U.S.C. § 1400(d)(1)(A).

A. Standard on Summary Determination

4. Summary determination in this proceeding is governed by OSAH Rule 15, which provides, in relevant part:

(1) Any party may move, based on supporting affidavits or other probative evidence, for a summary determination in its favor upon any of the issues being

adjudicated on the basis that there is no genuine issue of material fact for determination.

GA. COMP. R. & REGS. r. 616-1-2-.15(1).

5. On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party “is entitled to a judgment as a matter of law on the facts established.” *Pirkle v. Envtl. Prot. Div., Dep’t of Natural Res.*, OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (OSAH 2004) (citing *Porter v. Felker*, 261 Ga. 421 (1991)); *see generally Piedmont Healthcare, Inc. v. Ga. Dep’t of Human Res.*, 282 Ga. App. 302, 304-305 (2006) (noting that a summary determination is “similar to a summary judgment” and elaborating that an administrative law judge “is not required to hold a hearing” on issues properly resolved by summary adjudication); *G.J. v. Muscogee County Sch. Dist.*, 2010 U.S. Dist. LEXIS 28764 (N.D. Ga. 2010); *A.B. v. Clarke County Sch. Dist.*, 2009 U.S. Dist. LEXIS 47701 (N.D. Ga. 2009).
6. Further, pursuant to OSAH Rule 15:

(3) When a motion for summary determination is made and supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination in the hearing.

GA. COMP. R. & REGS. r. 616-1-2-.15(3). *See Guy Lockhart v. Dir., Envtl. Prot. Div., Dep’t of Natural Res.*, OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at *3 (OSAH 2007) (citing *Leonaitis v. Stateke Farm Mutual Auto Ins. Co.*, 186 Ga. App. 854 (1988)).

B. Petitioner’s DPHR and Motion for Summary Determination

7. As noted above, the only material issues raised by Petitioner’s DPHR is whether ESY services are being provided and were compensatory services to include transportation awarded for the late start ESY services in the fall of 2022. These are also the only material issues raised by Petitioner’s Motion for Summary Determination. Under the circumstances,

since the District is providing ESY services and transportation as requires by [REDACTED]'s IEP, Petitioner's Motion for Summary Determination regarding the failure to start ESY at the beginning of the school year is **HEREBY DENIED** on that issue.

8. The District has represented that had offered to agree to provide 45 hours of compensatory services plus transportation in the context of a settlement discussion. It has not, however, formally made such a commitment in writing to Petitioner to provide those services without reference to the settlement agreement. Accordingly, Petitioner's Motion for Summary Determination as to the compensatory services issue is **HEREBY GRANTED** on that issue.

C. Respondent's Motion for Summary Determination and Motion to Dismiss as Moot

9. As noted above Respondent filed a Motion for Summary Determination and also seeking dismissal as moot on the grounds that since it was providing everything Petitioner requested, no case or controversy remains. As such, the case should be dismissed as moot. Respondent argued that "in the present case, dismissal for mootness is appropriate where the District has unquestionably agreed to each of Petitioners' demands." Citing Worcester County Public Schools, 111 LRP 57189 (Maryland SEA 2010). In Worcester, the administrative law judge dismissed a DPHR seeking four (4) weeks of ESY services sought by family, finding that the district had notified the parents *in writing* of its agreement to provide the services after the DPHR was filed but prior to the hearing. The Court held that: "The matter is moot and a Motion to Dismiss is appropriate, there being no justiciable issues remaining. The Parents fail to state a claim upon which relief can be granted." *Id.* In the findings of fact, the Court there noted that the parents were notified as follows:

On June 14, 2010, WCPS notified the Parents that it agreed to provide the Student with ESY services for the 2010 school year for a period of four weeks from June 23, 2010 through July 21, 2010. The ESY services will be implemented consistent with the goals, objectives and services contained in the May2010 IEP and the primary service providers will be a special educator, a general educator, an

occupational therapist, a speech and language pathologist and instructional assistants.

Worcester, 111 LRP 57189 at 2.

This detailed notification was included in a letter signed by a representative of the school district, which documented the agreement to provide those services in writing. There is no comparable document memorializing the Respondent's commitment to Petitioner to provide the compensatory services offered.

10. Accordingly, the Court does not agree with Respondent's argument that simply because the District agreed during a settlement meeting to provide compensatory services plus transportation in excess of what was requested by Petitioner, that the Court cannot grant meaningful relief. [REDACTED] affidavit and the arguments of counsel in the motion and response are not adequate to document, in writing, a commitment on the District's part to the Petitioner that going forward the District will provide the compensatory services. Thus, there is a subtle difference between the ESY services which are embodied in [REDACTED]'s IEP signed by the District and Petitioner and the statement by the District that it had agreed to provide compensatory services as part of an agreement which was never signed. Unlike the situation in Worcester, there is no separate undertaking in this case. Thus, this case is distinguishable from Worcester. Thus, the grant of summary determination in favor of Petitioner—and denial of Respondent's Motion—as to the compensatory services requested by Petitioner and offered by Respondent, is a form of meaningful relief that renders this case not moot as to such claim. Respondent's Motion for Summary Determination on the issue of compensatory services is **HEREBY DENIED**.

11. Petitioner's Motion for Summary Determination and the claims in the DPHR that Respondent did not provide ESY services for the first five weeks of school in the fall,

however, seek relief regarding an issue that is irrelevant at this stage. In light of the fact that the District is currently providing those services per [REDACTED]'s IEP, the District's Motion for Summary Determination and the request for dismissal as moot is **HEREBY GRANTED** on the issue of the commencement of ESY services and the claim in the DPHR on which it is based is **HEREBY DISMISSED** as moot.

12. Accordingly, the parties have essentially reached "agreement" that this case can be resolved on the basis set forth above and there is no genuine issue of material fact that precludes a final decision on that basis.

IV. DECISION

Based upon the foregoing, Petitioner's Motion for Summary Determination on the provision ESY services with transportation in accordance with [REDACTED]'s IEP and the provision of 45 hours of compensatory services with transportation as agreed to by Respondent through its representation to the Court in its Motion for Summary Determination on essentially the same grounds, is **HEREBY GRANTED in part** as to compensatory services. It is **HEREBY DENIED in part**, as to ESY services **and DISMISSED as moot in part** as to ESY services. Similarly, Respondent's Motion for Summary Determination is also **HEREBY GRANTED in part**. Respondent is **HEREBY ORDERED** to provide 45 hours of compensatory services with transportation as offered to Petitioner by the District. Having ordered that the District provide the compensatory services it offered to agree to provide, which exceed Petitioner's request, Petitioner's DPHR claim on that basis is also now moot and is **HEREBY DISMISSED** as such. There being no other issues to be decided, this case is **HEREBY DISMISSED**.

SO ORDERED, this 10th day of March, 2023.



John Fry
Administrative Law Judge

