

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACKSON COUNTY SCHOOL BOARD,)
)
Petitioner,)
)
vs.) Case No. 12-2562E
)
[REDACTED] AND [REDACTED], PARENT OF)
)
)
Respondents.)
_____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Diane Cleavinger, held a formal hearing in the above-styled case on September 10, 2012, in Marianna, Florida.

APPEARANCES

For Petitioner: Bob Harris, Esquire
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and

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For Respondents: Rosemary N. Palmer, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the parent of [REDACTED], has a right to tape record IEP meetings involving [REDACTED] a student enrolled with the Jackson County School Board (JCSB or School Board).

PRELIMINARY STATEMENT

On April 6, 2012, Petitioner JCSB filed a Request for Administrative Hearing against Respondents, [REDACTED] and [REDACTED], with the Division of Administrative Hearings (DOAH). Petitioner's request for due process was based on the Petitioner's inability to hold an IEP meeting for the student [REDACTED] due to [REDACTED] insistence on recording such meetings. After a pre-hearing conference with all of the parties, a Notice of Hearing was entered on August 10, 2012, scheduling the hearing for September 10, 2012, in Marianna, Florida.

On August 13, 2012, Respondents filed Respondents' Notice of Insufficiency and Answer and Defenses to Petition and Counter Claims Against Petitioner and Individuals. By Order dated September 7, 2012, this Court dismissed Counts II and III of Respondents' Counterclaim, but allowed Counterclaim Count I to be raised during the Final Hearing in this matter to the extent the claims of discrimination and retaliation related to the provision of a "free appropriate public education" (FAPE) for [REDACTED]

During the hearing, Petitioner called two witnesses to testify and offered three exhibits into evidence. Respondents testified in their own behalf and called six witnesses to testify. Respondents also offered 15 exhibits into evidence. After input from the parties regarding this matter and the three other cases between these same parties pending before DOAH (10-10485E, 12-2386F, and 12-1273E), a schedule to file proposed final orders was established. Due to the complexity and multiplicity of issues raised between these parties, time for completion of this case was extended pending resolution of the other cases.

After the hearing, Petitioner filed a Proposed Final Order in this matter. However, even after several extensions of time to file, Respondents did not file a proposed final order.

FINDINGS OF FACT

1. The Jackson County School Board is the constitutional entity authorized to operate, control, and supervise the public schools in Jackson County, Florida, and is a "local educational agency" under the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. § 1401 et seq. As such, the Jackson County School Board is responsible for providing ██████ with FAPE, 20 U.S.C. § 1401(9).

2. [REDACTED] is the biological parent of [REDACTED] and is the parent who has undertaken primary responsibility for overseeing [REDACTED] educational needs.

3. [REDACTED] is the biological parent of [REDACTED]. In regards to [REDACTED] education, [REDACTED] has not attended an IEP meeting for [REDACTED] has not personally spoken with any of [REDACTED] teachers about [REDACTED] education, has not spoken to any Jackson County high school administrator about [REDACTED] education, has not requested to attend [REDACTED] IEP meetings, has not written any letters or emails to the School Board requesting information regarding [REDACTED] IEP meetings, is not aware of [REDACTED] IEP meeting dates, is not aware of [REDACTED] classes for the current semester, does not know the name of any of [REDACTED] teachers, has not spoken to any of [REDACTED] teachers since [REDACTED] has been in high school, and is not aware of [REDACTED] FCAT scores. Indeed, [REDACTED] has not significantly participated in or overseen [REDACTED] education, preferring to leave such matters to [REDACTED]

4. [REDACTED] is the step-parent of [REDACTED] In regard to [REDACTED] education, [REDACTED] has not asked to attend or attended an IEP meeting for [REDACTED] has not personally spoken with any of [REDACTED] teachers about [REDACTED] education, has not spoken to any Jackson County high school administrator about [REDACTED] education, has not written any letters or emails to the School Board requesting information regarding [REDACTED] IEP meetings over the past three

years, is not aware of [REDACTED] IEP meeting dates, is not aware of [REDACTED] classes for the current semester, does not know the name of any of [REDACTED] teachers, and is not aware of [REDACTED] FCAT scores. Overall, [REDACTED] parental role is to provide for the family. [REDACTED] is interested in [REDACTED] and does care about [REDACTED] well-being. For instance, [REDACTED] has escorted [REDACTED] and [REDACTED] to Colorado when [REDACTED] had [REDACTED] evaluated and tested by an expert for DOAH case number 10-10485. [REDACTED] has also escorted [REDACTED] to summer camps or seminars [REDACTED] has attended. However, like [REDACTED] [REDACTED] has elected not to be involved in the details of [REDACTED] education, preferring to leave such matters to [REDACTED]

5. In fact, both [REDACTED] and [REDACTED] have been satisfied with whatever information [REDACTED] has passed along to them regarding [REDACTED] education.

6. [REDACTED] has been enrolled as a student with the Jackson County School District since approximately 2001.

7. As of the date of the hearing, [REDACTED] was enrolled in a county high school and is currently in the [REDACTED] grade. As such, [REDACTED] is within the time period for development of transition services leading into life after high school and/or postsecondary education.

8. [REDACTED] is identified by the County School District as a student with a disability who is eligible to receive special education and related services pursuant to IDEA.

9. Under IDEA, the School Board and [REDACTED] have held formal IEP meetings, Extended School Year (ESY) meetings and evaluation meetings involving the educational needs of [REDACTED] . since approximately 2001.

10. These formal meetings are official meetings and are attended by the parent, a number of school personnel and other professionals. All the attendees provide input into the status of [REDACTED] education and plan the course of that education.

Jackson County does not generally record these meetings, but does have notes taken during these formal meetings to memorialize the discussions and decisions made during those meetings. These notes become part of the educational record of a student.

Importantly, such formal meetings are confidential as is the educational record of all students. Additionally, these meetings are not subject to the Government in the Sunshine laws of the State of Florida. However, the evidence did not demonstrate that these meetings were private (as opposed to confidential) meetings in which the participants had any reasonable expectation of privacy. Indeed, decisions and discussions during these meetings frequently become the subject of review by both the state and federal government, as well as, the subject of IDEA due process hearings. As such, participants do not have a reasonable expectation of privacy in the discussions and/or decisions which occur during such formal meetings.^{1/}

11. On the other hand, the School Board is charged with the responsibility of ensuring the confidentiality of these meetings and a student's educational record, as well as, the responsibility to conduct such meetings and establish reasonable rules for such meetings.

12. Additionally, [REDACTED] has met with a variety of teachers and Board personnel in less formal meetings regarding [REDACTED] education. Official notes are not taken at such meetings. However, personal notes may be taken by any of the parties to the meetings. Depending on the facts, participants in these meetings may have a reasonable expectation of privacy in the conversations that occur during these meetings. Further, as with the formal meetings, the School Board is charged with the responsibility of ensuring the confidentiality of a student's educational record, and may establish reasonable rules for such meetings.

13. Towards that end, the School Board does not permit recordation of formal or informal meetings if any meeting participant objects to being recorded. The Board's position was based on informal discussions among various school districts and DOE personnel about balancing IDEA parental participation requirements with an individual's right of privacy reflected, in part, in chapter 934, Florida Statutes, which provides civil and criminal penalties for the nonconsensual interception of certain oral communications in which a participant in the conversation

has a reasonable expectation of privacy. Further, the School Board, also, wanted to maintain a less adversarial and tense atmosphere during such meetings. However, in order to comply with IDEA, the School Board also permits recordation of formal meetings over participant objections when such recordation is necessary to mitigate some impairment of a participant in the meeting that interferes with that person's ability to participate in such meeting or the planning of the relevant student's education. The School Board's position is a reasonable means to exercise its duty to establish rules for these meetings and keep these meetings confidential. Further, the School Board's position meets IDEA requirements.

14. In the past, [REDACTED] at times, has insisted on tape recording some IEP meetings, evaluation meetings, parent-teacher conferences involving [REDACTED] and other meetings with staff of the School Board.

15. However, the evidence showed that [REDACTED] has provided meaningful input at [REDACTED] IEP meetings, ESY meetings, evaluation meetings, and parent-teacher/staff conferences and has generally actively participated in such meetings. More importantly, [REDACTED] participation or opportunity to participate has been meaningful irrespective of whether such meetings were recorded or not recorded. There was no convincing or credible evidence that electronically recording meetings with school personnel or

administrative staff was necessary to either Respondents' participation in or understanding of such meetings. Further, there was no convincing or credible evidence that electronically recording these meetings was necessary to informing [REDACTED] other parent and step-parent regarding the education of [REDACTED]. Indeed, the evidence was clear that [REDACTED] was fully capable of and did communicate any necessary information to [REDACTED] biological parent and step-parent irrespective of whether the meetings were recorded or not recorded.

16. Of more recent note and even though the automatic stay under IDEA was in effect, an IEP meeting was scheduled for August 19, 2011, to attempt to develop a new IEP for [REDACTED]. Prior to the August IEP meeting, the required participants, as well as [REDACTED] were advised that they could not record the IEP meeting of August 19, 2011, because there were required participants who did not want to be recorded. Also, prior to the August IEP meeting, [REDACTED] advised the School Board that [REDACTED] would be recording the meeting and insisted that necessary IEP team members who did not consent to be recorded not be invited to participate in the meeting. [REDACTED] demand regarding the participation of team members was unreasonable.

17. The required participants for the IEP meeting for [REDACTED] were present in a meeting room at the county high school on August 19, 2011, and were prepared to discuss the IEP for [REDACTED].

18. [REDACTED] came to the county high school to attend the IEP meeting but left the premises and did not participate when [REDACTED] was again advised that the meeting would not be recorded. As a consequence, the August 19, 2011, IEP meeting was cancelled when [REDACTED] refused to participate.

19. Later on May 31, 2012, and while the automatic stay under IDEA was in effect, the School Board scheduled a meeting to consider [REDACTED] educational needs during the summer of ESY 2012. [REDACTED] had earlier advised the School Board that [REDACTED] would be recording the meeting and insisted that the School Board only invite persons who consented to be recorded to the May 31st ESY meeting. [REDACTED] demand regarding invitees was unreasonable.

20. On May 31, 2012, [REDACTED] brought [REDACTED] recorder to the ESY meeting and insisted on recording the meeting. [REDACTED] school team members who were in the room to discuss [REDACTED] summer 2012 ESY program were polled and did not consent to be recorded. [REDACTED] refused to participate in the meeting if [REDACTED] could not record the meeting. As a consequence, [REDACTED] left the meeting. The meeting was then reasonably cancelled.

21. After coordinating the time with [REDACTED] and required staff, the School Board also scheduled a meeting on July 16, 2012, to discuss conducting a re-evaluation of [REDACTED]. The purpose of the re-evaluation meeting was to gather information on [REDACTED] present levels of performance. [REDACTED] and [REDACTED] were

given notice and invited to participate in the re-evaluation meeting.

22. Prior to the meeting, [REDACTED] provided a list of tests and areas for testing that [REDACTED] desired to be tested in a re-evaluation of [REDACTED]. [REDACTED] and [REDACTED] did not attend the re-evaluation meeting on July 16, 2012. However, [REDACTED] instructed School Board Exceptional Student Education Director Shawn Larkin to proceed with the meeting and to consider the list that [REDACTED] provided.

23. The re-evaluation meeting was held by the School Board team members on July 16, 2012. During the meeting, the IEP team considered the written input of [REDACTED] at the July 16, 2012, re-evaluation meeting. Notes were kept of the re-evaluation meeting, but the meeting was not electronically recorded.

24. As justification for the demand that [REDACTED] be allowed to record IEP and other meetings involving [REDACTED] [REDACTED] claims that [REDACTED] needs an accurate record of the meetings for [REDACTED] and [REDACTED] other parent and step-parent. This desire is rooted in [REDACTED] mistrust of School Board personnel. However, [REDACTED] is not hearing impaired and does not have a language impairment. [REDACTED] understands what is being said at IEP meetings. Further, [REDACTED] is not disabled and is able to and has taken notes during IEP meetings. [REDACTED] does not have a memory problem that would prevent [REDACTED] from meaningful participation in or understanding

of the IEP process. Moreover, [REDACTED] has not identified any disability or limitation [REDACTED] has which would prevent [REDACTED] from meaningful participation in or understanding of the IEP process. In fact, [REDACTED] has been and remains capable of understanding IDEA regulations, the IEP, and the IEP development process, without electronically recording such meetings. Indeed, there was no credible evidence that such electronic recordation of meetings was necessary for accuracy, participatory or informational purposes.

25. Additionally, other members of the IEP team for [REDACTED] have taken notes during IEP meetings and provided those written notes to [REDACTED]

26. Unfortunately, [REDACTED] continues to refuse to attend IEP meetings, evaluation meetings, or parent-teacher conferences when [REDACTED] is denied the ability to tape-record such meetings. However, there is no general right to record any conversation or meeting. Further, there is no need to record demonstrated by the evidence in this case. As such, [REDACTED] did not identify or produce any evidence of any protected activities under IDEA in which [REDACTED] was engaged in and in response to which the School Board retaliated. Further, [REDACTED] did not identify or produce any evidence of discrimination or retaliation by the School Board related to the provision of FAPE for [REDACTED].

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to and the IDEA subject matter claims of this proceeding. § 1003.57(1)(b), Fla. Stat. (2010); Fla. Admin. Code R. 6A-6.03311(9) (2012).

28. Florida Administrative Code Rule 6A-6.03311(9)(a) provides:

A due process hearing request may be initiated by a parent or a school district as to matters related to the identification, evaluation, or educational placement of a student or the provision of FAPE to the student.

29. Courts have held that issues related to recording of IEP meetings are the proper subjects for a due process complaint. In Gardner v. School Board Caddo Parish, plaintiff parents unsuccessfully sought an order enjoining implementation of a district's prohibition on recording IEP meetings. 958 F.2d 108, 111 (5th Cir. 1992). The court held that the plaintiffs were required to raise their contention in an administrative proceeding -- i.e., via a due process complaint. Id. at 109; See also Horen v. Bd. of Educ. of City of Toledo Pub. Sch. Dist., 655 F. Supp. 2d 794, 803 (N.D. Ohio 2009) (question concerning recording IEP meeting was properly decided by hearing officer).

30. Respondent, Jackson County School Board is a "local educational agency or LEA" under the IDEA, and is therefore

responsible for the identification, evaluation, and educational placement of [REDACTED] as well as the provision of FAPE to [REDACTED] § 1003.57(1)(a) and (b), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9). The resolution of this matter is necessary to allow the School Board to continue to meet its responsibilities under the IDEA and provide [REDACTED] with FAPE.

31. Further, school districts must assist students with disabilities in developing appropriate goals and transition plans for life after high school. In this case, [REDACTED] will be entering [REDACTED] junior year of high school which necessitates planning for transition issues to post-high school life. As such, participation by parties having knowledge of [REDACTED] educational needs is essential and should include staff of the District, [REDACTED], and [REDACTED]. However, the disagreement between the parties regarding the recording issue has made the scheduling and attendance of IEP meetings and related matters difficult, including the development of [REDACTED] IEP for [REDACTED] junior year. [REDACTED] unreasonably refuses to attend such meetings if [REDACTED] is not permitted to record, despite attempts by the School Board to convene such meetings. Thus, an actual present controversy exists between the parties regarding whether the Respondent has a right to tape-record meetings involving the educational placement and progress of [REDACTED] and whether the School Board violates the

IDEA and/or accompanying federal and State regulations by refusing to allow such recording.

32. Notably, states must comply with IDEA in order to receive federal funding for the education of handicapped children. As such, IDEA requires states to establish policy which ensures that children with disabilities will receive FAPE through an IEP that accounts for the educational needs of each disabled child.

33. As part of an educational program, IDEA provides the opportunity for parent participation in the process of identifying, evaluating, and programming for students with disabilities. See C.F.R. §§ 300.501(b), 300.344(a)(1), and 300.517. However, there is no provision in IDEA or its implementing regulations that requires or authorizes the School Board to record meetings regarding the student as part of this process, nor is there any provision that provides for a parental right to record these proceedings.

34. Like its federal counterpart, the State of Florida has adopted procedural safeguards consistent with 34 C.F.R. §§ 300.500-300.529, providing eligible students and their parents with certain procedural safeguards, including due process protections. 34 C.F.R. §§ 300.121 and 300.129; OSEP Letter to William L. Librera, Ed.D., (Dec. 20, 2004); Fla. Admin. Code R. 6A-6.03311. These procedural safeguards do not include a

parental right to require recording of student IEP meetings or other meetings involving the student.

35. The Office of Special Education (OSEP) statements regarding the right of a school board and a parent to record IEP meetings are not binding on this tribunal but are highly persuasive. Since 1991, OSEP has taken the position that neither a school board nor a parent has a right to record. OSEP Memorandum 91-24, (July 18, 1991). In its 1991 memorandum, OSEP stated that a school district has the option to require, prohibit, limit, or otherwise regulate the use of tape recorders at IEP meetings. OSEP Memorandum 91-24, (July 18, 1991). Subsequently, just nine years ago, in Letter to Anonymous, the Office of Special Education Programs confirmed that the IDEA "does not address the use of audio or video recording devices at IEP meetings, and no other federal statute authorizes or prohibits the recording of an IEP meeting by either a parent or a school official" and that "[t]herefore, an SEA or public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings." OSEP Letter to Anon., 40 IDELR 70 (June 4, 2003).

36. Moreover, IDEA was revised in 2004, 13 years after OSEP first stated its position on audio recording in 1991. However, Congress did not include a right of either the parent or a school board to record meetings. Individuals with Disabilities

Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004), effective July 1, 2005. Further, no general right to record exists. See Horen v. Bd. of Educ. of City of Toledo Pub. Sch. Dist., 655 F. Supp. 2d 794, 803 (N.D. Ohio 2009).

37. Indeed, cases which have allowed parental recording have so held based on some impairment which prevented the parent from participating in the IDEA process and are factually distinguishable from the case here. E.H. v. Tirozzi, 735 F. Supp. 53, 53 (D. Conn. 1990); V.W. v. Favolise, 131 F.R.D. 654, 654 (D. Conn. 1990). In E.H. v. Tirozzi, a parent needed to record meetings because she was a native Danish speaker, and had trouble understanding and following written and spoken English. 735 F.Supp. 53, 57 (D. Conn. 1990). In V.W. v. Favolise, a parent sought to record IEP meetings because a disabling injury to her hand made note taking difficult. 131 F.R.D. 654, 658 (D. Conn. 1990). However, █████ failed to produce any evidence which demonstrated that █████ was not able to understand or participate in the IDEA process. In fact, the evidence was clear that █████ is very capable of and does participate in the IDEA process when █████ elects to do so. Accordingly, █████ has no right to record █████ IEP meetings or other meetings.

38. Further, the School Board has taken adequate steps to ensure parent and student participation at █████ IEP meetings, absent recording. OSEP Memorandum 91-24, (July 18, 1991). The

evidence did not demonstrate that it is necessary that [REDACTED] IEP meetings be recorded in order for [REDACTED] and [REDACTED] to meaningfully participate in the IEP process and otherwise exercise their rights under IDEA. OSEP Letter to Anon., 40 IDELR 70 (June 4, 2003).

39. As such, the School Board's refusal to allow the recording of [REDACTED] IEP meetings has not denied [REDACTED] FAPE and has not impeded or otherwise affected [REDACTED] or [REDACTED] ability or right to meaningfully participate in [REDACTED] IEP meetings or otherwise exercise their rights under the IDEA.

40. Further, retaliation by a school district would have to include evidence of the assertion of a right to which the School Board retaliated in some form. Elk Grove (Cal.) Unified School District, 36 IDELR 160 (OCR 2001). As stated herein, [REDACTED] did not have the right to record meetings. Accordingly, there has been no retaliation against the parent for asserting a recognized right.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Count I of Respondents' counterclaim is dismissed and the parents of [REDACTED] and the School Board should participate in IEP meetings involving [REDACTED] even if either the parents or the required participants choose not to have the meeting recorded.

DONE AND ORDERED this 13th day of February, 2013, in
Tallahassee, Leon County, Florida.

S

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of February, 2013.

ENDNOTE

^{1/} See Dep't of Agric. & Consumer Servs. v. Edwards, 654 So. 2d 628 (Fla. 1st DCA 1995) and Fla. Agric. & Mech. Univ. v. Barnes, Case No. 06-027 (Fla. DOAH Aug. 2 2006; FAMU Oct. 24, 2006). Moreover, the School Board could record these formal meetings in lieu of note-taking and is encouraged to do so in this case. However, recordation is not required by IDEA and does not impact either the parent's participation or the provision of FAPE.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

- a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(b), Florida Statutes (2011), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).