

Broward County School District
No. 04-3642E
Initiated by: Parent
Hearing Officer: J. D. Parrish
Date of Final Order: February 1, 2005

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 04-3642E
)
BROWARD COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case by video teleconference on November 18, 2004, with the parties appearing from Fort Lauderdale, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████, by ██████████. parents, pro se
(Address of record)

For Respondent: Edward J. Marko, Esquire
Mary S. Lawson, Esquire
Broward County School Board
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

Whether the Petitioner is entitled to reimbursement for expenses incurred to attend a summer school program in order to be promoted to ■■■ grade. Inherent in the issue is the jurisdictional authority of the Division of Administrative Hearings (Division) to address the matter. The Respondent, Broward County School Board (Respondent or School Board), maintains the Division does not have jurisdiction to address the issue presented.

PRELIMINARY STATEMENT

This case began on August 16, 2004, when the Petitioner's parents filed a Due Process Hearing Request Form. The parents sought reimbursement for \$800.00 they had incurred in placing the student, ■■■, in a summer school program operated by ■■■ Preparatory School. The instant claim is based upon the allegation that the School Board failed to properly notify the Petitioner's parents that ■■■ would be retained at the end of the 2003-2004 school year. The claim further alleged that the Petitioner is an under-achieving gifted student and that the plan of action adopted by the parties (dated April 30, 2004) had not been followed. It is the parents' position that had they known in time the Petitioner was in danger of being retained they could have taken steps to assist Petitioner in being more successful. Had that occurred, arguably, the Petitioner could

have avoided the summer school expenses.

The School Board has disputed the facts and maintains that the Division does not have jurisdiction to consider the issue of retention when, as a matter of law, the promotion or retention of students is not governed by Individuals with Disabilities Education Act (IDEA). It is the Respondent's position that since the Petitioner does not dispute the educational plan or services provided for this student, the Division does not have jurisdiction in this cause.

Because there were issues of fact essential to the resolution of this matter, ruling on the School Board's Motion to Dismiss for Lack of Subject Matter Jurisdiction was reserved. Additionally, the parties were granted leave to further address the jurisdictional matters in their proposed final orders.

At the hearing, the Petitioner's parents testified on the student's behalf. Christine Zabko and Jewel Vessell testified for the School Board. Portions of the exhibits filed by the Respondent were admitted into evidence. Those items are more fully identified in the transcript as both the Petitioner and the Respondent utilized the same documents. Typically, the parties identified the documents by exhibit number and page. The transcript of the proceeding was filed with the Division on December 6, 2004. The parties timely filed Proposed Final Orders that have been fully considered in the preparation of

this Final Order.

The issues and findings addressed by this Order do not relate to the Petitioner's current placement, program, services, or educational plan. None of those matters have been placed in issue.

FINDINGS OF FACT

1. The Petitioner, ■■■, is a student enrolled in the public schools of Broward County, Florida. As such the Respondent is responsible for the student's general education.

2. Additionally, the Petitioner is "gifted" as that term is used in educational parlance and, as such, ■■■ is entitled to receive an educational plan (EP) designed to address ■■■ educational needs.

3. At all times material to this case, the Petitioner was enrolled at ■■■ School (■■■). ■■■ attended gifted classes there during ■■■ grade (the 2002-2003 school year) but was withdrawn in the spring of 2003.

4. When the Petitioner returned to the public school in January 2004, ■■■ was not placed in gifted classes. In fact, the parent had some issue with the gifted class and wanted the student placed in an advanced (but not "gifted") setting.

5. The Petitioner's EP at that time was dated for the period February 2002 through February 2004. The Respondent typically adopts an EP for a two-year period. Arguably, in

February 2004 a new EP should have been developed.

6. Nevertheless, since the parent requested that the student not be placed in gifted classes and did not request a new EP, the issue of formulating a new EP was not addressed. The parent did not request a new EP from January 2004 through June 2004.

7. What the parent did express, however, was a continuing concern over the Petitioner's poor academic performance. ■■■ behavior and grades after ■■■ re-enrolled at ■■■ deteriorated. ■■■ made numerous contacts with the school staff regarding the Petitioner's poor performance.

8. In April 2004, the Petitioner's dad met with the school staff and understood that the student's grades were pretty low. The parent believed that there was still time to pull the averages up so that the Petitioner would pass ■■■ grade.

9. The parents maintain that despite their weekly efforts to check with the school to verify the Petitioner's academic progress that they did not know ■■■. was in danger of not being promoted.

10. As late as June 4, 2004, the parents maintain they did not understand that their child was in danger of not being promoted. On that date the parent met with the school guidance counselor to attempt to verify the student's status.

11. On June 10, 2004, the Petitioner discovered ■■■ had,

in fact, failed to achieve enough credit to be promoted to [REDACTED] grade.

12. In contrast, the Respondent maintains that appropriate notice was provided to the Petitioner. According to the Respondent documents were mailed to the parents' address of record.

13. Specifically, on May 5, 2004, a notice directed to Petitioner's parent or guardian was sent to the student's address of record. Such notice provided, in pertinent part:

There is a strong possibility that your child will have to repeat the current grade.

Florida law states that students can not be promoted unless they have learned what they need to know to succeed in the next grade. The School Board of Broward County has approved the following promotion rules:

At the middle School level:

students must meet the Florida Sunshine Standards and Minimum test levels in reading and mathematics

and

students must pass 4 of 6 courses with a minimum of one point earned in the final quarter for each of the four courses.
[Emphasis in original]

14. A second notice dated June 1, 2004, was also sent to the Petitioner's parents/guardian at the address of record. The second notice confirmed the Petitioner was still in danger of being retained based upon [REDACTED] fourth quarter interim report.

The notice further identified the courses that required improved grades. By that time, however, it is unclear whether any effort from the Petitioner could have salvaged the academic year.

15. One of the chief problems encountered in achieving academic success was the Petitioner's failure to timely complete assignments. Petitioner represented to [REDACTED] parent that [REDACTED] had no homework when [REDACTED], in fact, did have assignments to complete.

16. [REDACTED] sought extra credit work for the Petitioner in order to make up for poor performance.

17. The Respondent's guidelines for middle school promotion are set forth in Policy 6000.1: Student Progression Plan (Exhibit 3 at page 35). The policy does not allow assignment based solely on age or "social promotion." The policy also notes that parents "must be notified on or before May 31 when it appears that a student may be retained." The Respondent complied with this provision of their policy.

18. In April and May 2004, the parents were apprised of the Petitioner's need to improve [REDACTED] academic performance. In fact, the student did improve. Regrettably, the effort was too little, too late.

19. When the student failed to achieve sufficient credits to be promoted, the parents enrolled the Petitioner in a private school for the summer session. The cost of the summer program incurred by the parents was \$800.00. After successfully

completing the summer program, the Petitioner was promoted to the ■■■ grade.

20. The parents filed a request for a due process hearing at the suggestion of the school staff in order to attempt to recoup the cost of the summer program. The parents believe that had they known the student would be retained, additional help could have assured a successful ■■■ grade.

CONCLUSIONS OF LAW

21. This case was referred to the Division for formal proceedings on October 6, 2004. The Petitioner's mother completed the Due Process Hearing Request Form on August 16, 2004. Prior to the referral to the Division, the parties agreed to and did participate in a state-sponsored mediation. Apparently, only when that process failed, did the matter get transferred to the Division.

22. The Division has jurisdiction over the subject matter of proceedings brought pursuant to Section 1003.57(5), Florida Statutes (2004). That law provides:

No student be given special instruction or services as an exceptional student until after he or she has been properly evaluated, classified, and placed in the manner prescribed by rules of the State Board of Education. The parent of an exceptional student evaluated and placed or denied placement in a program of special education shall be notified of each such evaluation and placement or denial. Such notice shall contain a statement informing the parent that he or she is entitled to a due process hearing on the identification, evaluation,

and placement, or lack thereof. Such hearings shall be exempt from the provisions of ss. 120.569, 120.57, and 286.011, except to the extent that the State Board of Education adopts rules establishing other procedures and any records created as a result of such hearings shall be confidential and exempt from the provisions of s.119.07(1). The hearing must be conducted by an administrative law judge from the Division of Administrative Hearings of the Department of Management Services. The decision of the administrative law judge shall be final, except that any party aggrieved by the finding and decision rendered by the administrative law judge shall have the right to bring a civil action in the circuit court. In such an action, the court shall receive the records of the administrative hearing and shall hear additional evidence at the request of either party. In the alternative, any party aggrieved by the finding and decision rendered by the administrative law judge shall have the right to request an impartial review of the administrative law judge's order by the district court of appeal as provided by s. 120.68. Notwithstanding any law to the contrary, during the pendency of any proceeding conducted pursuant to this section, unless the district school board and the parents otherwise agree, the student shall remain in his or her then-current educational assignment or, if applying for initial admission to a public school, shall be assigned, with the consent of the parents, in the public school program until all such proceedings have been completed.

23. In the instant case the parties do not dispute the eligibility of the student, the placement or the program of instruction being provided. Instead, the parents dispute that notice was provided regarding the student's poor academic performance and potential for retention. Additionally, the parents maintain that the cost of completing a summer school program should be borne by the Respondent for its failure to

provide the notice. Such issues are not governed by or encompassed within Section 1003.57(5), Florida Statutes (2004).

24. The Petitioner is a gifted student. Federal law related to exceptional student education does not mandate guidelines for retention or promotion of gifted students. In fact, the education of gifted students is a matter of state law. See Student Roe v. Commonwealth of Pennsylvania, 638 F. Supp. 929 (E.D. Pa.), aff'd, 813 F. 2d 398, cert. den., 438 U.S. 1021 (1986).

25. The Petitioner has failed to establish subject matter jurisdiction over the issues set forth in this case. Accordingly, the Division does not have jurisdiction to impose sanctions or penalties associated with the alleged lack of notice. Moreover, it is concluded that the parents were sufficiently aware of the student's potential to be retained.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that this case is dismissed for lack of subject matter jurisdiction.

DONE AND ORDERED this 1st day of February, 2005, in Tallahassee, Leon County, Florida.

S

J. D. PARRISH

Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of February, 2005.

COPIES FURNISHED:

Dr. Franklin L. Till, Jr., Superintendent
Broward County School Board
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

Daniel J. Woodring, General Counsel
Department of Education
1244 Turlington Building
325 West Gaines Street
Tallahassee, Florida 32399-0400

Eileen L. Amy, Administrator
Exceptional Student Education Program
Administration and Quality Assurance
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

Edward J. Marko, Esquire
Broward County School Board
K. C. Wright Administrative Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301



(Address of record)

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(5), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.