Pinellas County School District
No. 05-1876E
Initiated by: Parent
Hearing Officer: Daniel Manry
Date of Final Order: June 22, 2005

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-1876E
	)	
PINELLAS COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
_____	)	
[redacted]	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-1877E
	)	
PINELLAS COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted a motion hearing in these cases on June 14 and 22, 2005, in St. Petersburg, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Linda D. Montalbano

Qualified Representative
3125 Elaine Drive
Lorida, Florida 33857

For Respondent: John W. Bowen, Esquire
Pinellas County School Board
301 Fourth Street, Southwest
Post Office Box 2942
Largo, Florida 33779-2942

STATEMENT OF THE ISSUE

The issue is whether DOAH has jurisdiction to hear the requests for a due process hearing that Petitioners filed with Respondent on May 17, 2005.

PRELIMINARY STATEMENT

By documents dated May 17, 2005, Respondent received two requests for due process hearings for [redacted] and [redacted]. By letter dated May 20, 2005, Respondent referred the matter to DOAH to conduct the due process hearings.

DOAH assigned the matters to ALJ Carolyn S. Holifield. By Notice of Telephonic Pre-hearing Conference dated May 24, 2005, Judge Holifield scheduled a pre-hearing conference for June 7, 2005.

DOAH subsequently transferred the matters to the undersigned. By Notice of Transfer dated June 3, 2005, the undersigned notified the parties of the transfer.

The Notice of Telephonic Pre-hearing Conference issued on May 24, 2005, required each party to telephone DOAH on June 7, 2005, to participate in the pre-hearing conference. A few

minutes before the scheduled pre-hearing conference, the parents telephoned an administrative secretary for the undersigned and informed her that the parents could not afford to pay the long distance charges for the pre-hearing conference. The parents requested that DOAH telephone the parents to initiate the telephone conference.

The undersigned instructed the administrative secretary to telephone the parents. However, the secretary was unable to telephone the parents because the line was busy for approximately 15 minutes.

The parents telephoned the administrative secretary approximately 30 minutes after the time scheduled for the pre-hearing conference expressing concern that they had not been contacted. At the direction of the ALJ, the secretary unsuccessfully attempted to contact counsel for Respondent.

In order to avoid further delays in the proceeding, the ALJ determined to conduct subsequent hearings in person at a neutral site. Neither party has waived the requirement in applicable rules to conduct the due process hearing within 45 days of the date that Respondent received the requests for hearing.

On June 7, 2005, the ALJ consolidated the two requests for due process hearing based on the parents' request that the two matters be heard by the same ALJ in the same proceeding. On June 7, 2005, the ALJ also issued a Pre-hearing Order and

scheduled the consolidated due process hearing for June 22, 2005.

On June 6 and 9, 2005, Respondent filed, respectively, a Motion for Summary Final Order and Affidavit; and an Amended Motion for Summary Final Order and Amended Affidavit. On June 7, 2005, the ALJ scheduled a hearing on the Motion for Summary Final Order for June 14, 2005. Due to scheduling conflicts with the court reporter, the hearing was completed on June 22, 2005, before convening the consolidated due process hearing.

At the hearing, the ALJ granted the request to accept the qualified representative for Petitioners. In response to a question by the ALJ at the outset of the hearing, the qualified representative stated that Petitioners did not agree to any of the factual allegations in the Amended Motion for Summary Final Order (Amended Motion). Accordingly, the scope of the hearing included all of the factual allegations in the Amended Motion.

Petitioners and their parents testified and submitted four exhibits for admission into evidence. Respondent presented the testimony of five witnesses, one of which was a rebuttal witness, and submitted 25 exhibits for admission into evidence.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the record of the hearing. Neither party requested a transcript of the hearing record.

FINDINGS OF FACT

1. [redacted] is a disabled [redacted] student born on [redacted] 19[redacted] [redacted] is a disabled [redacted] student born on [redacted], 19[redacted]. Each student suffers from a learning disability, but further findings concerning the disability suffered by each student are not material to the motion hearing.

2. [redacted] and [redacted] reside with their parents in Pasco County at [redacted] Florida 34691. Throughout the 2004-2005 school year, each student attended [redacted] High School ([redacted]) in Pinellas County, Florida, pursuant to a Special Attendance Permit (SAP) approved by Respondent for each student on July 19, 2004.

3. Each student attended [redacted] during the 2004-2005 school year pursuant to a program identified in the record as the John M. McKay Scholarships for Students with Disabilities Program (McKay Scholarship). The McKay Scholarship, in relevant part, transfers public funding to [redacted] for each so-called SAP student in accordance with Section 1002.39, Florida Statutes (2003).

4. A SAP is effective for only one school year. [redacted] and [redacted] each applied for a SAP for the 2005-2006 school year on September 24, 2004. On February 23, 2005, the director of student assignment for [redacted] approved the SAP for each student. [redacted] grants applications for SAPs from the

students who reside in Pinellas County before approving applications for SAPs from the students who reside outside of Pinellas County, including [redacted] and [redacted]

5. Relevant statutes and rules contemplate that students on McKay Scholarships will continue on those scholarships in order to ensure continuity in their education. However, the Florida Department of Education (Department) requires scholarship recipients to renew their scholarships annually by submitting to the Department a notice of intent to renew (Notice of Intent) within a window of time that may vary each year and is prescribed annually on the Department's web site.

6. For the 2004-2005 school year, Petitioners included copies of their respective Notice of Intent with their respective application for a SAP. Each Notice of Intent was dated June 10, 2004, and each application for SAP was dated June 22, 2004.

7. For the 2005-2006 school year, [redacted] and [redacted] each submitted an application for a SAP on September 24, 2004. However, neither student filed a Notice of Intent with the Department until May 22, 2005.

8. On May 16, 2005, the director of assignment for [redacted] rescinded the SAPs for Petitioners for the 2005-2006 school year pursuant to a request from the principal of [redacted] dated May 13, 2005. The rescission has the

effect of a transfer of Petitioners from Pinellas County, Florida, to their home school district in Pasco County.

9. The director of assignment for [redacted] based the rescission on the request of the principal at [redacted]. The request for rescission states that the relationship between the parents and school personnel "has deteriorated to the point that we cannot effectively serve these children." Respondent's Exhibit 8 (R-8). Petitioners allege that the principal requested the rescission in retaliation for the assertion of procedural safeguards by the parents at a meeting concerning the Individual Education Plan (IEP) for each student.

10. A determination of jurisdiction in this proceeding does not turn on the factual dispute between the parties over the purpose for the rescission of the SAPs for the 2005-2006 school year. The trier of fact has made no findings concerning this factual dispute.

11. On May 17, 2005, Petitioners requested a due process hearing. Each request was made for the following reasons:

> 1. Impeding our rights to procedural safeguards.
>
> 2. Refusing to file our Mediation request. All the issues in our Mediation request are to be included in this Due Process Hearing request.

> 3. Retaliating against our children because we invoked our procedural safeguards.
>
> 4. Violated our rights and our children's rights under 504, 1983, and ADA.

R-19.

12. In relevant part, each request for due process hearing states that a due process hearing would not be necessary if the principal of [redacted] would "[s]top the retaliation . . . ." and Respondent would "Comply with the settlement agreement we agreed to on May 16, 2005." Id. The ALJ rejected any evidence of the Mediation or settlement agreement between the parties.

13. Neither request for due process hearing expressly challenges an existing or proposed IEP for either student or expressly alleges that an existing or proposed IEP is designed or implemented in a manner that fails to provide either student with a free appropriate public education (FAPE) within the meaning of 20 U.S.C. §§ 1400 et seq., the Individuals With Disabilities Education Act (IDEA). It is undisputed that neither request for due process hearing impliedly, or effectively, alleges the denial of FAPE to either student. During cross-examination, the mother of Petitioners testified that neither request for due process hearing challenges an IEP or alleges that an IEP denies FAPE to either of her children.[1]

14. The transfer to Pasco County, Florida, will not change the educational placement of either student. The qualified representative stipulated in the record during the hearing that the IEP for each student can be implemented by the school that each student will attend in Pasco County. The transfer to Pasco County will not delay the high school graduation of either student by preventing either student from earning the credits necessary to graduate.[2]

CONCLUSIONS OF LAW

15. DOAH does not have subject matter jurisdiction in this proceeding pursuant to Subsection 1003.57(5), Florida Statutes (2004); Florida Administrative Code Rule 6A-6.03311; and the IDEA. The allegations in each request for due process hearing that are cognizable under the IDEA are limited to allegations of procedural violations. Neither request for due process hearing expressly or impliedly alleges that purported procedural violations deprived either student of FAPE. Procedural violations that do not impact FAPE do not entitle Petitioners to relief. School Board of Collier County, Florida v. K.C., 285 F.3d 977, 982-983 (11th Cir. 2002). Compare Independent School District Number 283 v. S.D., 88 F.3d 556, 562 (8th Cir. 1996); W.G. v. Board of Trustees of Target Range School District No. 23, Missoula, Mont., 960 F.2d 1479, 1484 (9th Cir. 1992); Roland M. v. Concord School Committee, 910 F.2d 983, 994 (1st Cir. 1990); Doe v. Alabama State Department of Education, 915 F.2d 651, 662 (11th Cir. 1990); and Daniel R.R. v. State Board of Education,

874 F.2d 1036 (5th Cir. 1989)(each holding, in relevant part, that procedural inadequacies resulting in the loss of educational opportunity or causing a deprivation of educational benefits undermine the very essence of the IDEA and result in the denial of FAPE).

16. Allegations in each request for due process hearing also address purported retaliation and discrimination by the principal of [redacted]. However, the authority of the ALJ in this proceeding is limited to determining whether an existing or proposed IEP denies either student his or her right to FAPE. School Board of Martin County v. A.S., 727 So. 2d 1071, 1074 (Fla. 4th DCA 1999); Hendry County School Board v. Kujawski, 498 So. 2d 566, 568 (Fla. 2d DCA 1986).

17. If an alleged denial of FAPE were alleged in the requests for due process hearing, and therefore properly before DOAH, the ALJ arguably would be authorized to make findings concerning the alleged retaliation and discrimination if such acts were relevant and material to the alleged denial of FAPE. However, neither request for due process hearing alleges that the purported procedural violations, retaliation, and discrimination impact a student's entitlement to FAPE.

18. The transfer of each student from Pinellas County to Pasco County, Florida, does not deprive either student of his or her right to FAPE. A learning-disabled high school student in

Florida, including either [redacted] or [redacted] does not have a right to remain in a particular school during the pendency of a proceeding under the IDEA where the transfer does not change the educational placement of the student. Hill v. School Board of Pinellas County, 954 F. Supp. 251, 253-254 (M.D. Fla. 1997), aff'd 137 F.3d 1355 (11th Cir. 1998)(unpublished opinion).

19. Neither the transfer of [redacted] nor that of [redacted] will result in a change of educational placement. Educational placement includes a student's entire educational program and is not limited to the physical location where the program is implemented. Weil v. Board of Elementary & Secondary Education, 931 F.2d 1069 (5th Cir. 1991), cert. denied, 502 U.S. 910 (1991); and Concerned Parents and Citizens for Continuing Education at Malcolm X (PS 79) v. New York City Board of Education, 629 F.2d 751 (2nd Cir. 1980); noting that no change to student's IEP or educational placement occurred).

20. It is undisputed that the existing IEP for each student can be implemented in Pasco County and that courses offered in Pinellas County, but not available in Pasco County, are not part of the IEP of either student. The preponderance of evidence shows that the transfer of [redacted] and [redacted] will not delay each student's respective graduation.

21. The disparity in available courses between [redacted] and the home-district school in Pasco County, Florida, does not deny FAPE to Petitioners. The IDEA entitles Petitioners to "some educational benefit." The benefit need not

be maximized to be adequate. Devine v. Indian River County School Board, 249 F.3d 1289, 1292-1293 (11th Cir. 2001); JSK v. Hendry County School Board, 941 F.2d 1563 (11th Cir. 1991).

22. Petitioners may, or may not, have a valid claim for violations of the requirements of either the McKay Scholarship program or the SAP process. However, DOAH has no jurisdiction to conduct a proceeding involving those allegations in the absence of allegations that the purported violations denied either student's right to FAPE. A.S., 727 So. 2d at 1074; Kujawski, 498 So. 2d at 568.

23. Even if either request for due process hearing were to allege a denial of FAPE, such a request is moot after a student transfers to a different school. C.f. Board of Education of Downers Grove Grade School District No. 58 v. Steven, 89 F.3d 464, 467 (7th Cir. 1996). In Downers Grove, the court denied jurisdiction over a challenge to a fifth-grade IEP when the student was in a different school district with a new IEP at the time of the appellate decision.

24. [redacted] and [redacted] like the student in Downers Grove, are no longer enrolled in the high school that designed and implemented the current IEP. That IEP will follow the students to their new school. Like the student in Downers Grove, Petitioners have not challenged the IEP at the new school. If Petitioners wish to challenge the design or implementation of either IEP at the new school in Pasco County, Florida, they are

entitled to file a request for due process hearing with the Pasco County School District.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that this proceeding is dismissed for lack of jurisdiction and because the allegations against Respondent are now moot.

DONE AND ORDERED this 22nd day of June, 2005, in Tallahassee, Leon County, Florida.

S

DANIEL MANRY
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 22nd day of June, 2005.

ENDNOTES

1/ Petitioners presented conflicting evidence concerning their educational progress at [redacted]. When refuting the stated ground that the deteriorating relationship between the parents and school personnel prevented the school from effectively serving the children, the mother and children testified that the children earned grades of "A" and "B" and had no issues with their teachers. When challenging the educational progress of the children under their respective IEPs, the mother testified that the "A" and "B" grades were based on extra credit not available to other students. The trier of fact disregarded this conflicting evidence as neither credible nor persuasive.

2/ The trier of fact accepts the testimony of the mother and students that a transfer to Pasco County will prevent the students from taking certain courses needed to complete the last sequence in a specific course of classes available at [redacted], but not in Pasco County. However, this issue is not material because the courses are not part of the IEP of either student, and both students will be able to complete other courses that provide them with sufficient credits to graduate on time.

COPIES FURNISHED:

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

John W. Bowen, Esquire
Pinellas County School Board
301 Fourth Street, Southwest
Post Office Box 2942
Largo, Florida 33779-2942

Linda D. Montalbano
3125 Elaine Drive
Lorida, Florida 33857

[redacted]
(address of record)

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

Dr. Clayton M. Wilcox, Superintendent
Pinellas County School Board
Post Office Box 2942
Largo, Florida 33779-2942

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.