

Hillsborough County School District  
No. 01-0745E  
Initiated by: Parent  
Hearing Officer: Daniel Manry  
Date of Final Order: July 21, 2005

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████████, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 01-0745E  
 )  
HILLSBOROUGH COUNTY SCHOOL )  
BOARD, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted a pre-hearing conference in this proceeding on June 20, 2005, by telephone, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Gregory A. Hearing, Esquire  
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For Respondent: Scott W. Dutton, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether DOAH has jurisdiction, under 20 United States Code (USC), Sections 1400, et seq., the Individuals with Disabilities Education Act (IDEA), and relevant provisions in the Code of Federal Regulations (CFR), to require Respondent to provide special education and related services, as an incident of a free appropriate public education (FAPE), while Petitioner is in a full-time home education program, defined in Subsection 1002.01(1) and Section 1002.41, Florida Statutes (2004), and is enrolled as a part-time student in the Hillsborough County School District (the School District) for the purpose of receiving related services under a voluntary services plan.

PRELIMINARY STATEMENT

This case is the progenitor of six consolidated cases that have been recently resolved by the Second District Court of Appeal in ██████████ v. Hillsborough County School Board, 902 So. 2d 150 (Fla. 2d DCA 2005). The court affirmed a Final Order determining that Petitioner is not entitled to special education and related services while Petitioner is being educated at home pursuant to a home education program. ██████████ v. Hillsborough County School Board, Case No. 03-0828E (DOAH July 29, 2003).

After the appellate court decision, the undersigned scheduled this case for a pre-hearing conference on June 20,

2005. Respondent filed a Motion to Dismiss this case on June 16, 2005 (the motion). The motion effectively argues that any issues originally raised in this proceeding are now moot.

At the pre-hearing conference, Petitioner requested time to file a reply to the motion addressing those issues that Petitioner alleges are still ripe for determination. On July 15, 2005, Petitioner filed ██████████ Memorandum of Law in Opposition to Respondent's Motion to Dismiss (the reply).

Respondent was a full-time student in the School District from August 1998 through September 15, 2000, and had an Individual Education Plan (IEP) for each school year. The IEP originally at issue in this case was adopted on May 11, 2000, for the 2000-2001 school year that began sometime in August 2000.

Sometime after September 15, 2000, Respondent began a home education program and has continued that program through the date of this Final Order. The home education program is supplemented in relevant part by related services, in the form of speech-language therapy, that Respondent provides to Petitioner as a part-time enrollee in a local school.

The ALJ began the administrative hearing in the original case in March 2002, but recessed the hearing after one week pursuant to a request by the parties. The ALJ reconvened the due process hearing in March 2003, and conducted approximately

eight intermittent weeks of hearing before recessing for a final week scheduled for September 22, 2003.

On August 11, 2003, the ALJ placed this case in abeyance, pursuant to the agreement of the parties, pending the outcome of the appeal of a Final Order dismissing the six related cases.

██████. v. Hillsborough County School Board, Case No. 03-0828E (DOAH July 29, 2003). The Second District Court of Appeal has rendered its decision, and the time for the abeyance has expired.

The reply to the motion effectively asserts three issues to be determined in this proceeding. First, Petitioner contends that ██████ is entitled to special education services needed for a FAPE because Petitioner receives related services, in the form of speech-language and occupational therapy, as a part-time student in one of Respondent's public schools. Second, Petitioner alleges ██████ is entitled under the IDEA to the foregoing related services irrespective of ██████ entitlement to special education services. Third, Petitioner alleges that Respondent committed procedural violations under the IDEA and is now estopped from denying special education or related services to Petitioner. The Findings of Fact are based on an extensive evidentiary record developed during more than eight weeks of hearing in this and the related cases.

FINDINGS OF FACT

1. Petitioner is an autistic child born on [REDACTED]. From August 1998 through September 15, 2000, Petitioner was a full-time student in the School District.

2. Sometime after September 15, 2000, Petitioner began a full-time home education program, defined in Subsection 1002.01(1), Florida Statutes (2004). Respondent does not administer or deliver special education services to Petitioner in the home education program and does not otherwise control the content and delivery of services. Petitioner's [REDACTED] administers and operates the home education program in Petitioner's home.

3. Petitioner's parents unilaterally withdrew Petitioner from public school, without prior notice to Respondent, and thereafter provided written notice to the School District of the parents' intent to establish and maintain a home education program. The home education program complies with the requirements of applicable state statutes, including the maintenance of a portfolio of the materials covered in the program and annual reviews.

4. After September 15, 2000, Petitioner has received speech-language therapy (speech therapy) from Beth Ingram & Associates. The School District provides some of the speech therapy as a related service (public speech therapy), and the

parents pay for additional speech therapy (private speech therapy).

5. The public speech therapy includes both regular and compensatory therapy for Petitioner. The School District began providing regular speech therapy to Petitioner some time in September 2000, and continues to provide regular speech therapy to Petitioner at an average rate of three hours a week.

6. The School District provided compensatory speech therapy to Petitioner from September 2000 until August 2002 at an average rate of two hours a week. The School District provided the therapy to compensate Petitioner for pretermitted speech therapy required in various IEPs.

7. Petitioner is not entitled to additional compensatory speech therapy. Respondent has provided more speech therapy hours than those claimed by Petitioner's parents to be due from Respondent as compensatory speech therapy.

8. The School District provided occupational therapy to Respondent from September 2000 through April 2002, equal to two 30-minute sessions twice a month. The School District stopped providing occupational therapy to Respondent after April 2002. The reply to the motion does not address occupational therapy.

9. Pursuant to School District policy, the School District allows residents of Hillsborough County who are being home schooled, including Petitioner, to enroll in a public school in

the School District on a limited basis and at the discretion of the School District. The purpose of this limited, part-time enrollment is to enable students such as Petitioner to supplement their home education program.

10. The School District assigns Petitioner to a public school to receive funding for the related services provided to Petitioner. After September 15, 2000, Petitioner has received speech and occupational therapy, as previously described, at various public schools.

11. Petitioner is not enrolled in public school for any purpose other than funding and administrative convenience. Respondent lists Petitioner as an enrolled student to obtain funding for related services that Respondent voluntarily provides pursuant to a discretionary services plan. Respondent has no legal authority to compel Petitioner's attendance.

12. Petitioner's reply to Respondent's motion, in substance, asserts three issues to be determined in this proceeding. First, Petitioner contends that [REDACTED] is entitled to special education services needed for FAPE because Petitioner is enrolled in the School District as a part-time student and receives related services, in the form of speech-language therapy and occupational therapy, as a part-time student in one of Respondent's public schools. Second, Petitioner alleges [REDACTED] is entitled to related services irrespective of [REDACTED] entitlement

to special education services. Third, Petitioner alleges that Respondent committed procedural violations under the IDEA and that Respondent is now estopped from denying Petitioner's entitlement to special education and related services.

#### CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the parties to this proceeding. DOAH provided adequate notice of the administrative hearing, and the parties waived the requirement for a final order within 45 days of the request for hearing.

14. DOAH has jurisdiction to determine whether it has authority to order the remedy requested by Petitioner. § 1003.57(5), Fla. Stat. (2004); Fla. Admin. Code R. 6A-6.03311. Petitioner is not entitled under the IDEA to special education and related services, in the form of speech and occupational therapy, while Petitioner is in a full-time home education program and in public school as a part-time student. DOAH has no authority to require Respondent to provide the requested relief. ██████████ v. Hillsborough County School Board, Case No. 03-0828E (DOAH July 29, 2003), aff'd per curiam, ██████████ v. Hillsborough County School Board, 902 So. 2d 150 (Fla. 2d DCA 2005).

15. Legal requirements in the IDEA and accompanying federal regulations for Respondent to provide special education and related services to disabled children are limited to those



children in public schools, those placed in private schools by a public agency, and children unilaterally placed in private school by their parents. Hooks v. Clark County School District, 228 F.3d 1036, 1039 (9th Cir. 2000). Unless Petitioner is enrolled in public school, placed in a private school by a public agency, or unilaterally placed in a private school by [REDACTED] parents, Petitioner is not entitled to special education or related services. 34 CFR §§ 300.454(a) and 300.457.

16. Federal law does not determine whether a home education program is a public or private school. Each state has the authority to make that determination under state law. Hooks, 228 F.3d at 1040; Office Special Education Programs Memorandum 00-14, May 4, 2000; Letter to Williams, 18 IDELR 742 (OSEP Opinion Letter, January 22, 1992).

17. The home education program Respondent attends is neither a public nor private school under Florida law. The home education program is not a public school described in Subsection 1003.01(2), Florida Statutes (2004); and Subsection 1002.01(2), Florida Statutes, expressly excludes a home education program from the definition of a private school.

18. Respondent has no legal control over the special education services that Petitioner receives in the home education program, and Petitioner has no legal obligation to attend public school to receive related services. Respondent

has no legal authority to enforce the school attendance provisions in Section 1003.26, Florida Statutes (2004), and Petitioner has no legal obligation to comply with the school attendance provisions in Section 1003.21, Florida Statutes. Respondent has no legal obligation to provide Petitioner with the required instruction set forth in Section 1003.42, Florida Statutes (2004).

19. Petitioner is not entitled under the IDEA to related services from Respondent, in the form of speech and occupational therapy, while Petitioner receives special education in a home education program. The IDEA expressly defines related services, in relevant part, as those services "required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A) (July 1, 2005). The speech therapy provided to Petitioner as a part-time enrollee in public school does not satisfy the statutory definition of a related service. Nor would occupational therapy if it were provided in the public school. Neither service is required for Petitioner to benefit from any special education that the IDEA requires Respondent to provide to Petitioner. Respondent does not provide special education services to Petitioner and is not required to do so under the IDEA. [REDACTED] v. Hillsborough County School Board,

Case No. 03-0828E (DOAH July 29, 2003), aff'd per curiam, [REDACTED].  
v. Hillsborough County School Board, 902 So. 2d 150 (Fla. 2d DCA  
2005).

20. Petitioner alleges that Respondent committed procedural violations under the IDEA, including the failure to notify the parents that the withdrawal from public school and placement in a home education program would result in the loss of entitlement to FAPE. Assuming arguendo that Respondent committed all of the procedural violations alleged in the record of this and the related cases, the procedural violations did not result in any lost educational opportunity because the alleged lost educational opportunity was the result of the parent's unilateral action in withdrawing Petitioner from public school without prior notice. Cf. Loren F. v. Atlanta Independent School System, 349 F.3d 1309, 1312-1313 (11th Cir. 2003)(request for reimbursement of private school expense for procedural violation that results in denial of FAPE denied where parental action frustrated school's efforts); M.M. v. School District of Greenville County, 303 F.3d 523, 533-535 (4th Cir. 2002)(improper to hold school liable for procedural violation caused by parental inaction).

21. Petitioner also argues that the alleged procedural violations by Respondent estop Respondent from now denying special education and related services to Petitioner. The

judicial doctrine of equitable estoppel is an equitable remedy. Equity is the exclusive province of the state courts. Fla. Const., Art. V, § 1. DOAH is not a court and has no authority to grant equitable relief.

22. If Petitioner were otherwise entitled to the relief sought, the remaining challenges to the IEP dated May 11, 2000, for the 2000-2001 school year, are now moot. For reasons previously stated, a home education program is not a school under state law. Petitioner no longer receives special education services in the School District. Any ruling in this proceeding concerning the challenged IEP would have no effect for the special education that Petitioner now receives in the home education program. Cf. Board of Downers Grove Grade School District No. 58 v. Steven, 89 F.3d 464, 467 (7th Cir. 1996)(dismissing as moot challenge to fifth grade IEP when student was in the eight grade in a different school district).

ORDER

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

ORDERED that Respondent is not required by the IDEA to provide Petitioner with special education and related services while Petitioner is in a home education program. Petitioner's request for a due process hearing is dismissed for lack of jurisdiction. The DOAH file is closed.

DONE AND ORDERED this 21st day of July, 2005, in  
Tallahassee, Leon County, Florida.

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DANIEL MANRY  
Administrative Law Judge  
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Filed with the Clerk of the  
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this 21st day of July, 2005.

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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.