

Broward County School District
No. 04-0463E
Initiated by: Parent
Hearing Officer: Patricia Hart Malono
Date of Final Order: July 23, 2004

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)	
)	
Petitioner,)	
)	
vs.)	Case No. 04-0463E
)	
BROWARD COUNTY SCHOOL BOARD,)	
)	
Respondent.)	
_____)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on May 10, 2004, in Ft. Lauderdale, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stewart Lee Karlin, Esquire
Law Offices of Stewart Lee Karlin
The Advocate Building, Second Floor
315 Southeast Seventh Street
Ft. Lauderdale, Florida 33301

For Respondent: Edward J. Marko, Esquire
Broward County School Board
K. C. Wright Administration Building
600 Southeast Third Avenue, 11th Floor
Ft. Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

Whether the Petitioner is entitled to reimbursement from the Respondent for private school tuition.

PRELIMINARY STATEMENT

On January 29, 2004, [REDACTED] filed with the Broward County School Board ("School Board") a request for a due process hearing, in which [REDACTED] asserted that [REDACTED] was not receiving a free appropriate public education. Specifically, [REDACTED] asserted that the School Board's decision to transfer [REDACTED] from [REDACTED] ("[REDACTED]") to [REDACTED] ("[REDACTED]") in the middle of the school year constituted a change in [REDACTED] educational placement. In the letter, [REDACTED] also requested that the School Board allow [REDACTED] to continue at [REDACTED] as [REDACTED] "stay put" placement, pending disposition of the request for a due process hearing. The School Board forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge. In a Notice of Hearing issued February 11, 2004,¹ the due process hearing was scheduled for March 11 and 12, 2004.

On February 19, 2004, the School Board filed Respondent's Request to Dismiss, in which it requested that [REDACTED]'s request for a due process hearing be dismissed because, as a matter of law, a change in the location in which an exceptional education student's program is implemented does not constitute a change in

educational placement as long as there is no change in the student's Individualized Educational Program ("IEP").

█████ filed Petitioner's Response to Request to Dismiss on February 25, 2004, and argued that █████'s circumstances were exceptional and that the dislocation resulting from a change in █████'s placement would pose a substantial risk that █████ would regress. A telephone hearing was held on the motion, and the request to dismiss █████'s request for a due process hearing was denied. During the telephone hearing, however, counsel for █████ requested, ore tenus, a continuance of the due process hearing. The request was granted, and the due process hearing was rescheduled for May 10 and 11, 2004.

At the hearing, █████ presented the testimony of █████ █████'s █████; █████ █████'s █████; and Andres Pinaluga, a mental health counselor. Petitioner's Exhibits 1 through 6 and 9 through 11 were offered and received into evidence; Petitioner's Exhibit 7 for identification was offered into evidence but rejected. No proffer was made of this exhibit. The School Board presented the testimony of Elayne Brown; Ernest Carlton, Ph.D.; Catherine Schubert; Whitney Carr; Ingrid Skiff; Barbara Harned; and Saralyn Sargeant. Respondent's Exhibits 1 and 2 were offered and received into evidence. █████ presented the testimony of █████ █████, █████ on rebuttal.

The one-volume transcript of the proceedings was filed with

the Division of Administrative Hearings May 27, 2004. The parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of the Final Order. Prior to the due process hearing, the parties filed a Joint Pre-Hearing Stipulation that contained 13 stipulated facts, which are included in the findings of fact herein.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, on the stipulation of the parties, and on the entire record of this proceeding, the following findings of fact are made:

1. At the times material to this proceeding, the School Board was responsible for the evaluation, classification, and placement of students in need of special instruction, classes, and services pursuant to Sections 1003.02 and 1003.57, Florida Statutes (2003).²

Stipulated facts

2. [REDACTED] is a [REDACTED]-year-old [REDACTED], born [REDACTED], who has attended Broward County schools.

3. [REDACTED] was identified as a student with disabilities with eligibility for services under the classification of Specific Learning Disabilities.

4. In August 2003, [REDACTED] made the transition from elementary to middle school, registering at [REDACTED] based on [REDACTED] then-current residence.

5. [REDACTED]'s IEP was implemented at [REDACTED] from August 2003 through January 2004, when it was determined that [REDACTED] change of address placed [REDACTED] within the [REDACTED] boundary.

6. [REDACTED]'s grades for the first and second marking period of the 2003-2004 school year at [REDACTED] were:

<u>Course</u>	<u>First Quarter</u>	<u>Second Quarter</u>
Health		B
Language Arts	B	A
Reading	C	C
Math	C	C
Critical Thinking	A	
Science	C	B
World History	C	C

7. Pursuant to the IEP, [REDACTED] was placed in general education classes, exclusively, and received special education services of consultation for Reading, Language Arts, and Math one time per week in the general education classroom.

8. The IEP also provided [REDACTED] with special assistance for Reading, Language Arts, and Math five times per week in the general education classroom.

9. At the time [REDACTED] registered at [REDACTED], [REDACTED]'s address was [REDACTED], Davie, Florida.

10. Subsequently, [REDACTED]'s residence was relocated to ***, [REDACTED], Florida.

11. [REDACTED]'s parents placed *** in a private school following notification of the change in school location.

12. [REDACTED] filed a request for a due process hearing on January 29, 2004, alleging that [REDACTED] was not receiving a free appropriate public education, and that due to [REDACTED] disability, [REDACTED] will regress because of the change in school locations in the middle of the year.

13. [REDACTED] is seeking private school reimbursement from the date of [REDACTED] enrollment until June 10, 2004.

Facts based on evidence presented at hearing

14. [REDACTED] has been receiving exceptional student education ("ESE") services from the School Board for a number of years. [REDACTED] attended *** and has been educated exclusively in the general education curriculum, with support provided in accordance with [REDACTED] IEPs.

15. [REDACTED] attended the fifth grade at *** during the 2002-2003 school year. ***was not working at grade-level in the fifth grade, and ***parents arranged for tutors from *** was tutored from February to June 2003, and *** was working at grade-level when *** completed fifth grade.

16. An IEP was developed for [REDACTED] on April 28, 2003, in contemplation of *** transition from *** to *** for the sixth grade, because *** was *** home school. As a result of *** change in residence to Davie, Florida, however, [REDACTED] enrolled at

█.

17. █ and █ have comparable ESE programs, and both have the support facilitation service that is the central feature of █'s IEP. Although █'s April 28, 2003, IEP was developed for implementation at █, based on █'s residence at the time the IEP was developed, the ESE coordinator for █ obtained █'s records and IEP from █, and █'s IEP was successfully implemented at █

18. In or about January 2004, it came to the attention of school personnel at █ that █ had moved back into the █ school zone. At some point in mid-January 2004, the principal of █ sent a letter to █'s parents advising them that █ no longer resided within the boundaries for █ and that they must withdraw █ from █ and enroll █ in █ neighborhood school. █'s parents were further advised that █ could not return to █ after January 22, 2004.

19. After receiving the letter from █'s principal, █ met with the principal, █'s ESE teacher, and other teachers from the school.³ █ told them that █ did not want █ transferred to █ because █ believed that it was not a good time for a change, that it would cause █ too much stress, and that █ would regress academically if █ were made to change schools in the middle of the school year. █

asked that, as a favor, [REDACTED] be allowed to stay at [REDACTED] through the end of the 2003-2004 school year.⁴

20. In a letter dated January 16, 2004, [REDACTED]'s principal advised [REDACTED]'s parents that the [REDACTED] Boundary Review Committee had determined that [REDACTED] did not reside within [REDACTED]'s boundaries and that [REDACTED] must be withdrawn from [REDACTED] no later than January 22, 2004.

21. [REDACTED]'s parents then contacted an attorney and withdrew [REDACTED] from [REDACTED]. [REDACTED]'s last day at [REDACTED] was January 20, 2004.

22. After they withdrew [REDACTED] from [REDACTED], [REDACTED]'s parents considered their options, and they decided to try to persuade the personnel at [REDACTED] to let [REDACTED] remain there for the rest of the 2003-2004 school year.

23. A meeting was held at [REDACTED] on February 6, 2004, to discuss [REDACTED]'s transfer to [REDACTED]; this meeting was not convened to address changes to [REDACTED]'s IEP. In attendance were [REDACTED] [REDACTED]'s [REDACTED]; Stewart Karlin, the attorney retained by [REDACTED]'s parents; the principal of [REDACTED]; Whitney Carr, [REDACTED]'s ESE support facilitator at [REDACTED]; Catherine Shubert, the ESE specialist at [REDACTED]; Ernest Carlton, a school psychologist with the Broward County School Board; and [REDACTED]'s sixth-grade teachers.⁵

24. During the meeting, [REDACTED] and [REDACTED]'s attorney discussed [REDACTED]'s parents' concern that [REDACTED] would have serious problems if

████ were forced to change schools in the middle of the school year, and a letter dated January 19, 2004, written by Andres Pinaluga was reviewed and discussed by the persons attending the meeting.⁶

25. █████ began therapy with Mr. Pinaluga, a licensed mental health counselor, in March 2003, because █████'s parents perceived that █████ was depressed and had low self-esteem. Mr. Pinaluga has met with █████ and █████ periodically, beginning on March 26, 2003, and has met both with █████ and █████ in joint counseling sessions and in counseling sessions alone with █████ █████ arranged for Mr. Pinaluga to see █████ as needed, whenever █████ was experiencing stress or had migraine headaches. Although █████ is Mr. Pinaluga's patient, Mr. Pinaluga has met with and spoken on the telephone with █████ a number of times to help █████ acquire parenting skills and techniques for dealing with █████ █████ provides Mr. Pinaluga with information regarding █████'s mood and behavior at home, and Mr. Pinaluga observes █████ during therapy sessions.

26. Mr. Pinaluga had a session with █████ on January 16, 2004, during which █████ discussed █████ concern about █████'s having to transfer from █████ to █████; the problems █████ perceived that █████ was having at school with erratic grades and other difficulties; and of "the desire to complete the school year at the same school."⁷ During this session, █████ told Mr. Pinaluga

that [REDACTED] was having problems sleeping; that he was crying, anxious, and nervous; and that [REDACTED] needed parenting skills to cope with [REDACTED] behavior.

27. Mr. Pintaluga included in [REDACTED] notes of a session with [REDACTED] and [REDACTED] on January 17, 2004, [REDACTED] diagnosis that [REDACTED] suffered from attention deficit hyperactivity disorder ("ADHD"), with primarily the inattentive rather than the hyperactive manifestation; depressive disorder, not otherwise specified; and generalized anxiety disorder. During the January 17, 2004, session, Mr. Pintaluga observed that [REDACTED] was very irritable, oppositional, and anxious.

28. On January 28, 2004, Mr. Pintaluga had a joint counseling session with [REDACTED] and [REDACTED]. During the session, they discussed [REDACTED]'s anxiety and parenting skills for [REDACTED] when [REDACTED] was non-compliant and exhibited irritable behavior. Mr. Pintaluga also provided [REDACTED] with a letter [REDACTED] had prepared for the School Board, dated January 19, 2004. In the letter, which [REDACTED] provided to the School Board, Mr. Pintaluga stated:

Please be informed that the above captioned student has been my patient since March 2003.

During this period, [REDACTED] has been working on managing [REDACTED] anxiety; fidgety; distractibility; difficulty concentrating; difficulty adjusting to changes; mild sadness; irritability; managing academic performance, including anticipatory and performance anxiety. In addition, [REDACTED] has

been working on socialization, assertiveness and effective communication skills.

In order for the patient to continue progress on all the above[-]described areas, it is recommended that [REDACTED] continue at the current school site until year[-]end. Changes during the school year will negatively impact the student's satisfactory progress.

29. Prior to writing the January 19, 2004, letter, Mr. Pinaluga had not spoken with [REDACTED]'s teachers or observed [REDACTED] in the school environment, and he also had not done so as of the date of the due process hearing.⁸

30. During the February 6, 2004, meeting, [REDACTED]'s teachers and [REDACTED] support facilitator discussed their observations and impressions of [REDACTED] in the school setting.

31. As an ESE support facilitator at [REDACTED], Ms. Carr works with a group of seven or eight ESE students that are assigned to regular classrooms and are in the general education curriculum. Her duties include adapting curriculum to meet the needs of the ESE students, modifying tests for the ESE students as needed, and arranging for the ESE students to take tests in her office as an accommodation. Ms. Carr helps the ESE students in her group keep their school work organized, she encourages the ESE students to come to her whenever they have problems of any sort at school, and she has made her office a "break room" where her students can come if they need some quiet time away from the

classroom.

32. In her role as [REDACTED]'s ESE support facilitator, Ms. Carr did everything possible to ensure [REDACTED]'s success in the general education curriculum. During the time [REDACTED] attended [REDACTED], Ms. Carr met with [REDACTED] once a week to go over [REDACTED] homework assignments and to chat with [REDACTED] and find out how [REDACTED] was doing in [REDACTED] classes. She developed a good relationship with [REDACTED] that improved as the school year progressed. [REDACTED] never came to her with any particular problems and did not ask to take any tests in her office. In Ms. Carr's interactions with [REDACTED] [REDACTED] impressed her as a charming, very nice [REDACTED] who got along well with [REDACTED] classmates. [REDACTED] never presented any behavior problems, and it was Ms. Carr's observation that [REDACTED] was doing well both academically and socially.

33. Ms. Carr also met weekly with [REDACTED]'s teachers to discuss [REDACTED] progress and to make sure [REDACTED] was turning in [REDACTED] homework assignments. Had any of [REDACTED]'s teachers had any concerns about [REDACTED] they would have discussed them with her during these weekly meetings. [REDACTED]'s teachers at [REDACTED] never brought to Ms. Carr's attention any academic or behavior problems with [REDACTED] and [REDACTED] academic performance was satisfactory in all of [REDACTED] classes.

34. Based on her knowledge of [REDACTED] and [REDACTED] academic and social progress at school, Ms. Carr believed that [REDACTED] would

handle the transfer to [REDACTED] without serious problems.

35. [REDACTED]'s sixth-grade mathematics, social studies, and reading teachers did not observe [REDACTED] exhibiting any of the characteristics described in Mr. Pintaluga's January 19, 2004, letter; rather, they described [REDACTED] as a happy, motivated student who participated in class and regularly turned in [REDACTED] homework. Based on their knowledge of [REDACTED]'s academic and social progress at school, these three teachers believed [REDACTED] would handle the transfer to [REDACTED] with no serious problems.

36. Before attending the February 6, 2004, meeting, Dr. Carlton reviewed [REDACTED]'s cumulative file and [REDACTED] ESE file, including a psychological evaluation conducted in 2001. [REDACTED] found nothing in these materials to indicate that [REDACTED] would have serious problems transferring from [REDACTED] to [REDACTED]. The 2001 psychological evaluation did not indicate that [REDACTED] has problems in social, behavioral, or emotional functioning or that [REDACTED] had difficulty with transitions.⁹

37. Dr. Carlton also reviewed Mr. Pintaluga's January 19, 2004, letter. Dr. Carlton found nothing in [REDACTED]'s school or ESE records to indicate that [REDACTED] exhibited in the school environment any of the characteristics described by Mr. Pintaluga in his letter.

38. Based on his review of [REDACTED]'s school records and

particularly the information provided by Ms. Carr and [REDACTED]'s teachers at the February 6, 2004, meeting, Dr. Carlton concluded that [REDACTED] would not have serious academic, social, or behavioral problems were [REDACTED] to be transferred from [REDACTED] to [REDACTED] in the middle of the school year.

39. Based on the information shared at the February 6, 2004, meeting, the school personnel declined to allow [REDACTED] to remain at [REDACTED] for the remainder of the 2003-2004 school year.

40. [REDACTED] remained adamantly opposed to [REDACTED]'s transfer to [REDACTED], and [REDACTED]'s attorney advised the school personnel attending the meeting that [REDACTED]'s parents intended to hire tutors to provide home schooling for [REDACTED] and would look to the School Board for reimbursement.

41. [REDACTED]'s parents ultimately decided to enroll [REDACTED] in a private school. They felt that [REDACTED] would adjust better to a new school that was small rather than a new school that was large, like [REDACTED]. They chose to enroll [REDACTED] in the [REDACTED], which is a small school approximately two blocks from their home. There are 16 students in [REDACTED]'s class. [REDACTED] does not have an IEP at the [REDACTED] [REDACTED], and [REDACTED] does not know the areas in which [REDACTED]'s teacher is certified.

42. According to [REDACTED] [REDACTED] had a difficult time adjusting to [REDACTED] [REDACTED] [REDACTED], although by the time of the due process hearing [REDACTED] conduct was showing some improvement. According to

██████ did not want to be at the ██████████
██████, and ██████ was rebellious.

43. The ██████████ grading sheet from the end of the third grading period for the 2003-2004 school year shows that ██████'s classroom behavior, attitude towards other students, and attitude towards work were satisfactory and that ██████ attitude towards authority was outstanding. ██████ received an A in Bible study; B's in reading, spelling, penmanship, science/health, and history; and D's in language and arithmetic.

44. Had ██████'s parents not withdrawn ██████ from the Broward County public school system, the IEP developed for ██████ on April 28, 2003, would have been implemented at ██████████.

Summary

45. The evidence presented is not sufficient to establish that the proposed transfer of ██████ from ██████ to *** constituted a change in ██████'s educational placement. ██████'s IEP could be implemented at ██████████ just as successfully as it had been at ██████████. Although ██████ had developed good relationships with ██████ classmates, ██████ teachers, and ██████ ESE support facilitator at ██████████, there was insufficient evidence to show that there were special circumstances in ██████'s case that would make the change in schools the equivalent of a change in ██████ IEP.

46. Mr. Pinaluga's opinion that "[c]hanges during the school year will negatively impact the student's [REDACTED]'s] satisfactory progress" has been considered but has been given little weight. Mr. Pinaluga formulated his opinion that [REDACTED] would regress were [REDACTED] transferred from [REDACTED] to [REDACTED] without having spoken with [REDACTED]'s teachers or observed [REDACTED] in the school environment. Mr. Pinaluga, therefore, could not have based this opinion on a professional assessment that [REDACTED] had a special relationship with the [REDACTED] or with [REDACTED] teachers such that a transfer would negatively impact or alter in any way the delivery of [REDACTED]'s educational program.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

48. The Individuals with Disabilities Education Act ("IDEA"), Title 20, Section 1400, et seq., United States Code, requires that the various states provide a free appropriate public education to students with disabilities. In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 203-04 (1982), the United States Supreme Court stated:

Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

The Court also observed in Rowley that, in determining whether a school district is providing a student with a disability a free appropriate public education, a court must inquire, first, into whether the school district has complied with the procedures set forth in the IDEA and, second, whether the student's IEP is "reasonably calculated to enable the child to receive educational benefits." Id. at 206-07.

49. Section 1001.41, Florida Statutes, which sets forth the powers of a district school board, provides in pertinent part:

The district school board, after considering recommendations submitted by the district school superintendent, shall exercise the following general powers:

* * *

(4) ESTABLISHMENT, ORGANIZATION, AND OPERATION OF SCHOOLS.--Adopt and provide for the execution of plans for the establishment, organization, and operation of the schools of the district, including, but not limited to, the following:

* * *

(1) *Exceptional students*.--Provide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable in accordance with the provisions of s. 1003.57.

50. Section 1003.57, Florida Statutes, provides as follows:

Exceptional students instruction.--Each district school board shall provide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable, including provisions that:

(1) The district school board provide the necessary professional services for diagnosis and evaluation of exceptional students.

(2) The district school board provide the special instruction, classes, and services, either within the district school system, in cooperation with other district school systems, or through contractual arrangements with approved private schools or community facilities that meet standards established by the commissioner.

(3) The district school board annually provide information describing the Florida School for the Deaf and the Blind and all other programs and methods of instruction

available to the parent of a sensory-impaired student.

(4) The district school board, once every 3 years, submit to the department its proposed procedures for the provision of special instruction and services for exceptional students.

(5) 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.

(6) In providing for the education of exceptional students, the district school superintendent, principals, and teachers shall utilize the regular school facilities and adapt them to the needs of exceptional students to the maximum extent appropriate. Segregation of exceptional students shall occur only if the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(7) In addition to the services agreed to in a student's individual education plan, the district school superintendent shall fully inform the parent of a student having a physical or developmental disability of all available services that are appropriate for the student's disability. The superintendent shall provide the student's parent with a summary of the student's rights.

51. The rules of the Florida Department of Education that govern the programs and services available for exceptional students are found in Florida Administrative Code Rule Chapter 6A-6. Rule 6A-6.03311 provides in pertinent part:

The school board policy and procedures for procedural safeguards . . . shall include adequate provisions for the following:

(1) Prior notice. Prior written notice shall be given to the parent a reasonable time before any proposal or refusal to initiate or change the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student.

* * *

(2) Content of notice.

* * *

(c) The notice shall include:

1. A full explanation of all the procedural safeguards available to the parents as provided in Rule 6A-1.0955, 6A-6.03311, 6A-6.0333, FAC.; and Section 230.23(4)(m)4., Florida Statutes [now Section 1003.57(5)].

2. A description of the action proposed or refused by the district, an explanation of why the district proposes or refuses to take the action, and a description of any options the district considered and the reasons why those options were rejected;

3. A description of each evaluation procedure, test, record, or report the district used as a basis for the proposal or refusal; and

4. A description of any other factors relevant to the district's proposal or refusal.

* * *

(5) Due process hearings.

(a) Such hearings may be initiated by a parent or a school district on the proposal or refusal to initiate or change the identification, evaluation, or educational placement of the student or the provision of a free appropriate education to the student.

52. In this case, [REDACTED] is not asserting that the educational program set forth in [REDACTED] April 28, 2003, IEP denied him a free appropriate public education, nor is he contending that the School Board failed to follow the procedural guidelines set forth in the IDEA, in the Florida Statutes, and in Florida Administrative Code Rule 6A-6.03311. Rather, [REDACTED] asserts that, because of [REDACTED] specific educational and social needs, the School Board's decision to transfer [REDACTED] from [REDACTED] to [REDACTED] in January 2004 constituted a change in [REDACTED] educational placement. [REDACTED] contends that, had [REDACTED] been transferred in the middle of the school year, [REDACTED] would have regressed socially and academically even though [REDACTED] IEP could have been implemented at Plantation; that, because of the possibility of regression, the School Board would deny [REDACTED] a free appropriate public education if [REDACTED] were transferred; and that [REDACTED] parents were, therefore, justified in removing [REDACTED] from [REDACTED] and enrolling [REDACTED] in the [REDACTED] and should be reimbursed by the School Board for the cost of tuition at the [REDACTED].

53. As noted above, Florida Administrative Code Rule 6A-

6.03311(1) requires the School Board to give notice to parents before a change in educational placement is made and an opportunity for the parents to request a due process hearing to challenge the proposed change. Generally, however, a change in the location in which the special education services are being provided does not constitute a change in educational placement sufficient to require prior notice. See Hale v. Poplar Bluff R-I Sch. Dist., 280 F.3d 831, 834 (8th Cir. 2002)("A transfer to a different school building for fiscal or other reasons unrelated to the disabled child has generally not been deemed a change in placement, . . ."); Weil v. Board of Elementary & Secondary Educ., 931 F.2d 1069, 1072 (5th Cir. 1991)("We are not persuaded that the cited notice provisions were mandated in the instance of Kimberly's transfer from Cooley to Kiroli because that transfer did not constitute a change in "educational placement" within the meaning of 20 U.S.C. § 1415(b)(1)(C). The programs at both schools were under OPSB supervision, both provided substantially similar classes, and both implemented the same IEP for Kimberly."); Concerned Parents & Citizens for the Continuing Educ. at Malcolm X v. New York City Board of Educ., 629 F.2d 751, 753-54 (2d Cir. 1980)("[T]he term 'educational placement' refers only to the general type of educational program in which the child is placed. So construed, the prior notice and hearing requirements of s. 1415(b) would not be triggered by a decision,

such as that made by the Board in this case, to transfer the special education classes at one regular school to other regular schools in the district.").

54. Nonetheless, there may be circumstances in which the transfer of an exceptional education student from one school to another does constitute a change in educational placement, even when the student's IEP does not change and the IEP can and will be fully implemented at the new school. The court in Hill v. School Board for Pinellas County, 954 F. Supp. 251, 253 (M.D. Fla. 1997), observed:

In the typical case, educational placement means a child's educational program and not the particular institution where that program is implemented. (Citations omitted.) Because his IEP did not change upon his transfer to Countryside, Andres remains in the "then current educational placement" for the purposes of the IDEA and, therefore, no change in his educational placement has occurred. (However, this Court does not dismiss as implausible the prospect of circumstances under which attributes of an institution, a location, a teacher-student relationship, or the like, might become so pronounced and valuable to the student and his or her IEP, that a change in the school is tantamount to a change in the IEP. . . .

55. [REDACTED] claims that, under the special circumstances of [REDACTED] case, [REDACTED] proposed transfer from [REDACTED] to [REDACTED] in the middle of the school year would have been a change in [REDACTED] educational placement. Based on the findings of fact, however,

████ has failed to prove by a preponderance of the evidence that any such special circumstances exist in █████ case. Based on the requirements of the IDEA and Florida law, █████ was not, therefore, entitled to prior notice of the proposed transfer or any opportunity for a due process hearing.

56. Even if prior notice was required in this case, █████'s parents have failed to establish a legal basis for the relief they request: Reimbursement for the expenses of sending █████ to a private school. In School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359, 369 (1985), the Court held that a School Board must "reimburse parents for their expenditures on private special education for a child" if it is ultimately determined that the School Board did not "provide a free appropriate public education to the child and that the child did receive an appropriate education in the private facility." The unilateral placement of a child in a private facility is, however, made at the parents' "own financial risk" because, if it is determined that the School Board had provided a free appropriate public education to the child, the parents would not be entitled to reimbursement. Id. at 374.

57. Based on the findings of fact herein, █████ has failed to prove that the School Board failed to provide him a free appropriate public education. Indeed, █████ did not challenge either the adequacy of the IEP or the ability of the staff at

Plantation to implement the IEP. It appears from the evidence that the sole reason [REDACTED]'s parents objected to [REDACTED] transfer to [REDACTED] in January 2004 was their perception that [REDACTED] social and academic progress would be interrupted were [REDACTED] transferred to another school. Yet, rather than invoking the "stay-put" provision of Florida Administrative Code Rule 6A-6.03311(5)(1)¹⁰ after they requested a due process hearing, [REDACTED]'s parents enrolled [REDACTED] in a small community school; they were unaware of the qualifications of [REDACTED] teacher, and [REDACTED] had no IEP at the [REDACTED]. Therefore, even if [REDACTED]'s parents had proven that the School Board's plan to transfer [REDACTED] to [REDACTED] would have denied [REDACTED] a free appropriate public education, they failed completely to prove that [REDACTED] was receiving a free appropriate public education at the [REDACTED].

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that [REDACTED]'s Emergency Request for a due process hearing is dismissed.

DONE AND ORDERED this 23rd day of July, 2004, in Tallahassee, Leon County, Florida.

S

PATRICIA HART MALONO
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 23rd day of July, 2004.

ENDNOTES

^{1/} The cover letter from the School Board transmitting the request for a due process hearing is dated February 10, 2004.

^{2/} References to the Florida Statutes in this Final Order shall be to the 2003 edition unless otherwise specified.

^{3/} [REDACTED]'s parents attended the open house at [REDACTED] in the fall of 2003 and met [REDACTED]'s teachers. This was the only contact [REDACTED]'s parents had with school personnel at [REDACTED] between August 2003 and the meeting in January 2004.

^{4/} Although [REDACTED]'s parents were strongly opposed to [REDACTED]'s being transferred to [REDACTED] in the middle of the 2003-2004 school year, they did not oppose [REDACTED] transfer to [REDACTED] for the 2004-2005 school year, when he would be in the seventh grade.

^{5/} [REDACTED] did not attend the meeting because [REDACTED] was out of the country with [REDACTED] at the time.

^{6/} The record does not reflect the date on which Mr. Pinaluga's letter was provided to the School Board. Mr. Pinaluga gave the letter to [REDACTED] and [REDACTED] gave the letter to the School Board.

⁷/ Neither Mr. Pinaluga nor [REDACTED] clarified whether [REDACTED] did not want [REDACTED] to change schools or whether [REDACTED] did not want to change schools.

⁸/ And, although Ms. Shubert suggested that Mr. Pinaluga's input would be appreciated at the February 6, 2004, meeting, Mr. Pinaluga was not available to participate in the meeting by telephone.

⁹/ [REDACTED] was scheduled to have his three-year psychological evaluation in the spring of 2004. School personnel did not order an earlier psychological evaluation because no school personnel had observed deterioration in [REDACTED]'s academic performance, social interactions, or behavior at school.

¹⁰/ That rule provides: "During the time that an administrative or judicial proceeding regarding a complaint is pending, unless the district and the parent of the student agree otherwise, the student involved in the complaint must remain in the present educational assignment."

COPIES FURNISHED:

Stewart Lee Karlin, Esquire
Law Offices of Stewart Lee Karlin, P.A.
6363 Northwest 6th Way, Suite 420
Fort Lauderdale, Florida 33309

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

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

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

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

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.