

Broward County School District
No. 04-2997E
Initiated by: Parent
Hearing Officer: Daniel Manry
Date of Final Order: November 5, 2004

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. 04-2997E
)
ORANGE COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Administrative Law Judge Daniel Manry conducted the administrative hearing of this case on October 11 and 12, 2004, in Orlando, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: ██████████ pro se
(Address of record)

For Respondent: Andrew B. Thomas, Esquire
1625 Lakeside Drive
Deland, Florida 32720-3037

STATEMENT OF THE ISSUES

The issues are whether DOAH has jurisdiction to determine whether an Individual Education Plan (IEP) that Respondent

proposed on September 14, 2001, violates 20 United States Code (USC) Sections 1400 et seq., the Individuals With Disabilities Education Act (IDEA), by denying Petitioner a free appropriate public education (FAPE).

PRELIMINARY STATEMENT

Petitioner's mother requested a due process hearing on August 18, 2004. Respondent referred the matter to DOAH to conduct the due process hearing. The parties requested several continuances and waived the requirement that a final order be entered within 45 days of the request for hearing.

At the hearing, Petitioner's mother testified and submitted no exhibits for admission into evidence. Respondent presented the testimony of four witnesses and submitted three 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, and neither party submitted proposed final orders.

FINDINGS OF FACT

1. Petitioner is a disabled [REDACTED] student who was born on [REDACTED]. Petitioner is mentally handicapped and is speech and language impaired. Petitioner has an overall intelligence score of 50 on the Stanford-Benet Intelligence Scale.

2. Petitioner has significant delays in language comprehension and perceptual/fine motor skills. Petitioner also has a reduced functional mobility caused by poor balance, stability, and sensory motor integration. Petitioner has an engaging personality and relates well socially. [REDACTED] is attentive, expressive, and attends appropriately to the circumstance.

3. Sometime prior to September 14, 2001, Petitioner was being educated in Georgia pursuant to a Georgia IEP (Georgia IEP). Thereafter, Petitioner and [REDACTED] mother moved to Orlando, Florida, and Petitioner enrolled in [REDACTED] School ([REDACTED]) in the Orange County School District (the District). On September 14, 2001, Petitioner's mother met with the appropriate staff at [REDACTED] in an IEP team meeting. The [REDACTED] staff proposed an IEP to which Petitioner's mother objected (the challenged IEP).

4. Petitioner's mother objects, in relevant part, to a psychological evaluation by a school psychologist. Petitioner's mother wants an independent psychological evaluation as well as other modifications to the challenged IEP and wants Respondent to educate Petitioner pursuant to the Georgia IEP until Respondent develops an IEP that is acceptable to Petitioner's mother.

5. On September 26, 2001, Petitioner's mother provided staff at [REDACTED] with a written Notice of Intent to withdraw Petitioner from school. On the same date, Petitioner's mother withdrew Petitioner from school. Petitioner's mother has educated Petitioner in a home education program since September 26, 2001.

6. Petitioner's mother now seeks to enroll Petitioner in public school in the District and has requested a due process hearing to determine whether the challenged IEP violates the IDEA. It is undisputed that Respondent must enroll Petitioner in [REDACTED] School ([REDACTED]) rather than [REDACTED]. The IEP team at [REDACTED] is different from that at [REDACTED], and the IEP team at [REDACTED] must have an opportunity to evaluate Petitioner and propose a new IEP. If Petitioner's mother objects to the new IEP, Petitioner's mother may request a due process hearing to determine whether the new IEP violates the IDEA.

CONCLUSIONS OF LAW

7. DOAH has jurisdiction over the parties to this proceeding pursuant to Subsection 1003.57(5), Florida Statutes (2004); Florida Administrative Code Rule 6A-6.03311; and the IDEA. DOAH provided the parties with adequate notice of the due process hearing.

8. DOAH does not have jurisdiction over the subject matter of this proceeding because the mother's objections to the challenged IEP are moot. 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 in eighth grade with a new IEP at time of the appellate decision.

9. Petitioner, like the student in Downers Grove, would now be enrolled in a [REDACTED] school that is a different school from the [REDACTED] school that proposed the challenged IEP. Unlike the student in Downers Grove, Petitioner's mother has not agreed to a new IEP at the new school. The [REDACTED] school has not proposed a new IEP because Petitioner's mother has not yet enrolled Petitioner in [REDACTED] and has not met with the IEP team at [REDACTED].

10. The so-called "stay put" provisions of the IDEA do not require the IEP team at [REDACTED] to implement the Georgia IEP until they develop a new IEP. First, Petitioner's mother withdrew Petitioner from [REDACTED] on the same day of the Notice of Intent before the IEP team had a reasonable opportunity to correct the challenged IEP. Second, Petitioner's mother did not enroll Petitioner in another school, either

public or private. Rather, Petitioner's mother began educating Petitioner in a home education program.

11. Requirements for Respondent to provide special education 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's mother enrolled Petitioner in a public or private school after withdrawing Petitioner from [REDACTED], Petitioner is not entitled to FAPE, related services, or a due process hearing. See 34 CFR §§ 300.454(a) and 300.457.

12. 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).

13. The home education program Respondent attends is neither a public school nor a private school under Florida law. The home education program is not a public school defined 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.

14. During the time that Petitioner's mother has educated Petitioner in a home education program, Respondent has had no legal control over Petitioner, and Petitioner has had no legal obligation to attend public school. Respondent has had no legal authority to enforce the school attendance provisions in Section 1003.26, Florida Statutes (2004), and Petitioner has had no legal obligation to comply with the school attendance provisions in Section 1003.21, Florida Statutes. Respondent has had no legal obligation to provide Petitioner with the required instruction set forth in Section 1003.42, Florida Statutes (2004).

ORDER

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

ORDERED that DOAH lacks jurisdiction over the subject matter of this proceeding, and this proceeding is dismissed as moot.

DONE AND ORDERED this 5th day of November, 2004, in Tallahassee, Leon County, Florida.

S


DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of November, 2004.

COPIES FURNISHED:

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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.