

Hillsborough County School District
No. 04-4070E
Initiated by: Parent
Hearing Officer: Daniel Manry
Date of Final Order: December 9, 2004

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

█,)
)
Petitioner,)
)
vs.)
) Case No. 04-4070E
HILLSBOROUGH COUNTY SCHOOL)
BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the due process hearing of this case on November 22, 2004, in Tampa, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Gregory A. Hearing, Esquire
Allison E. Rehmeyer, Esquire
Thompson, Sizemore & Gonzalez, P.A.
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For Respondent: Scott W. Dutton, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent must provide compensatory speech therapy to Petitioner pursuant to 20 U.S.C. Sections 1400, et seq., the Individuals with Disabilities Education Act (IDEA), and relevant provisions in the Code of Federal Regulations, 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), but is also a part-time student in the Hillsborough County School District (the District), so that the District can obtain state and federal funds the District needs to provide speech therapy under a discretionary services plan.

PRELIMINARY STATEMENT

Respondent received a request for due process hearing from Petitioner on November 9, 2004. The ALJ scheduled the due process hearing for November 22, 2004.

Respondent filed Respondent's Motion to Dismiss on November 19, 2004. In relevant part, the motion asserts that the request for due process hearing in this proceeding should be dismissed based on the judicial doctrines of res judicata and collateral estoppel. It is undisputed that this proceeding involves the same parties as those in eight other cases, seven

of which are pending appeal, that are the progeny of [REDACTED]. v. Hillsborough County School Board, DOAH Case No. 01-0745E (in abeyance pending appeal of the seven other cases)([REDACTED]). The eight other cases spawned by [REDACTED] are identified in record by DOAH Case Nos. 03-0828E, 03-0964E, 03-1265E, 03-1271E, 03-1271E, 03-1272E, 03-2540E, and 03-3200E. Petitioner asserts the facts in this proceeding are different from those addressed in previous final orders.

The identity of the witnesses and exhibits and the rulings regarding each are set forth in the Transcript to the hearing filed with DOAH on December 8, 2004. The court reporter retained the exhibits for inclusion with the Transcript. Petitioner and Respondent timely filed their respective proposed final orders on November 30 and 29, 2004.

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 District.

2. Respondent provided Petitioner with an IEP for each school year in which [REDACTED] was enrolled as a full-time student in the District. The IEP at issue in the original case was adopted on May 11, 2000, for the 2000-2001 school year that began sometime in August 2000.

3. Petitioner did not attend a public school in the District after September 15, 2000. Sometime after September 15, 2000, Petitioner began a full-time home education program, defined in Subsection 1002.01(1) and Section 1002.41, Florida Statutes (2004), and has continued that program through the date of the due process hearing. Petitioner's mother administers and operates the home education program in Petitioner's home.

4. The District, by policy, allows residents of Hillsborough County who are being home-schooled in a full-time home education program, including Petitioner, to voluntarily enroll in the District on a part-time basis in order to receive services to supplement their home education program. The District assigns such students to a public school in order to obtain funding for services related to the home education program.

5. Petitioner's part-time enrollment status has not changed after September 15, 2000. Petitioner's parents have not attempted to enroll Petitioner as a full-time student in the District. The District currently provides speech therapy to Petitioner for 1.5 hours each week.

6. Respondent did not provide speech therapy services to Petitioner from August 5, 2004, through the week of September 7, 2004. In addition, the level of speech therapy services

provided by Respondent in 2004 was less than the level of services required in the IEP dated May 11, 2000.

7. Petitioner seeks compensatory speech therapy services in an amount equal to the omitted services from August 5 through September 7, 2004, and for an increase in the level of services equal to that required in the May 11, 2000, IEP. Petitioner concedes that the only factual difference between the issue in this case and in DOAH Case No. 04-3200E is that the relief sought is for a subsequent chronological period than the period at issue in the earlier case.

8. On September 29, 2003, a Final Order in DOAH Case No. 04-3200E determined that Petitioner is not entitled to the same type of compensatory speech therapy, but for a different time period. Petitioner did not appeal the Final Order.

CONCLUSIONS OF LAW

9. DOAH has jurisdiction over the parties to this proceeding. DOAH provided adequate notice of the due process hearing. The parties did not waive the requirement for a final order within 45 days of November 11, 2004.

10. Respondent's Motion to Dismiss is denied in part. Petitioner is not barred by the doctrines of res judicata or collateral estoppel from re-litigating the merits of [REDACTED] entitlement to compensatory speech therapy. The Final Order in DOAH Case No. 04-3200E did not address the merits of

Petitioner's entitlement to compensatory speech therapy services. Rather, the Final Order in the earlier case was limited to subject matter jurisdiction.

11. Respondent's Motion to Dismiss is granted in part. Petitioner is barred by the doctrines of res judicata and collateral estoppel from re-litigating the issue of subject matter jurisdiction. That issue has been previously litigated between the parties and was not appealed.

12. If it were determined that Petitioner is not barred from re-litigating the issue of jurisdiction in this case, 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-6.0331. For reasons stated hereinafter, DOAH does not have jurisdiction over the subject matter of this proceeding.

13. DOAH has no authority to require Respondent to provide the requested relief. The IDEA and accompanying federal regulations require Respondent to provide special education services to disabled children, including Petitioner, if the child is in a public school, placed in private schools by a public agency, or, in certain circumstances, 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 his parents, Petitioner is not entitled to FAPE or related services. See 34 C.F.R. §§ 300.454(a) and 300.457.

14. 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).

15. 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).

Subsection 1002.01(2), Florida Statutes (2004), expressly excludes a home education program from the definition of a private school.

16. Petitioner is not enrolled in public school for any purpose other than funding and administrative convenience. Respondent lists Petitioner as an enrolled student in order to obtain funding for the related services that Respondent voluntarily provides pursuant to a discretionary services plan.

17. Respondent has no legal control over Petitioner, and Petitioner has no legal obligation to attend public school. 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 Statute (2004).

18. Petitioner may, or may not, have a cause of action for an alleged breach of contract. However, jurisdiction for such an action is the exclusive province of the circuit courts.

ORDER

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

ORDERED that Petitioner's request for a due process hearing is dismissed based on the doctrines of res judicata and collateral estoppel and for lack of jurisdiction. The file of the Division of Administrative Hearings is closed.

DONE AND ORDERED this 9th day of December, 2004, in Tallahassee, Leon County, Florida.

S

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of December, 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.