

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 12-2830E
)
LEON COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

SUMMARY FINAL ORDER

In this case, the Petitioner alleges retaliation under the Individuals with Disabilities Education Act (IDEA). This Summary Final Order is issued pursuant to section 120.57(1)(h), Florida Statutes,^{1/} upon consideration of the pleadings, cross motions for summary final order, and attachments filed by Petitioner, ██████████ (██████████ or Petitioner), and Respondent, Leon County School Board (the School Board or Respondent).

APPEARANCES

For Petitioner: Rosemary Palmer, Esquire
5260 Pimlico Drive
Tallahassee, Florida 32309

For Respondent: Opal Mckinney-Williams, Esquire
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether the School Board retaliated against ██████ in violation of IDEA because ██████ parent withdrew consent for ██████ eligibility under IDEA.

PRELIMINARY STATEMENT

A request for a due process hearing under IDEA was filed on behalf of Petitioner with the School Board on August 17, 2012 (Due Process Request). The School Board forwarded the Due Process Request to the Division of Administrative Hearings for the assignment of an Administrative Law Judge on August 20, 2012. On September 18, 2012, an Order was entered dismissing Petitioner's claims asserted under section 504 of the federal Vocational Rehabilitation Act of 1973^{2/} (Section 504) and the American Disabilities Act (ADA),^{3/} for lack of jurisdiction.

Thereafter, on September 25, 2012, the School Board filed Respondent's Motion for Summary Final Order. On October 1, 2012, Petitioner filed Petitioner's Response to Motion for Summary Final Order and Petitioner's Motion for Summary Final Order on IDEA Retaliation Claim. Upon consideration of those cross motions and response, as well as the pleadings and exhibits attached to pleadings and motions in this case, it has been determined that no genuine issue as to any material fact exists and that the School Board is entitled to the entry of a final order as a matter of law.

FINDINGS OF FACT

1. Petitioner is a hearing-impaired student whom, in 2008, was determined by the School Board to be an "exceptional student" eligible for special education under the IDEA.

2. On August 18, 2010, Petitioner's mother wrote a letter to the School Board withdrawing her consent for Petitioner's services under IDEA. That letter states:

Dear Leon County Schools:

As you know [REDACTED] is hearing impaired and has executive function disabilities that impair [REDACTED]'s organization, planning and follow through (see earlier evaluations). We have just learned that FLDOE is not going to require Leon County Schools to develop an IEP with parental participation that is required by law and one that allows [REDACTED] to remain in regular classrooms, rather than be assigned to attend an ESE class. (Both [REDACTED]'S] step dad and I have experience in LCS ESE classes and the last thing [REDACTED] needs is a study hall ---- the "Learning Strategies" classroom label notwithstanding ---- where expectations are lower, and to have their peer group of others who also struggle in school.)

Therefore we are exercising our right under IDEA to withdraw consent for services under the Individual with Disabilities Education Improvement Act. Consider this our consent for withdrawal, and remove [REDACTED] from assignment to any ESE class assignment immediately.

Please also consider this our request for the following special education and related services under Section 504 so [REDACTED]'S] needs can be met as adequately as the needs of non-disabled students are met.

[redacted] needs to have an non-noisy, non-distracting environment (not at [a named school] where a building is being constructed in the middle of campus), be able to use a classroom FM system, and a LiveScribe Pen — it puts the sound directly into [redacted]'S ears, and allows [redacted] to return to what was said when [redacted] can't understand notes ---- when [redacted] needs to, receive class notes, to be shown what needs to be done, breaking down assignments, non-noisy environment, seating where [redacted] can see the teacher's lips, and teacher verification that [redacted] understands oral instructions, written copies of instructions put on the board (because when [redacted] is writing what is on the board, [redacted] isn't able to concentrate on hearing what is happening orally). [redacted] also needs to learn the SIM's Visual Imagery Strategy, Sentence and Paragraph Writing, Planning and Organizing Strategies. And [redacted] needs someone at school to check each evening to make sure [redacted] understands [redacted] homework assignment and has instructions written down.

Although [redacted] doesn't typically have behavioral problems that are not manifestations of [redacted] disabilities (not hearing or understanding, having trouble figuring out things and carrying through with what [redacted] is trying to do, and getting rattled by chaos), [redacted] does need an environment that emphasizes BPIS and [redacted] needs MORE school rather than suspension if [redacted] misbehaves.

We hope someday Leon County Schools will provide in its ESE classes the research proven instruction that students with disabilities need, and we would welcome the additional support that eligibility under IDEA provides. But until LCS offers an appropriate IEP, then we cannot allow [redacted] to be harmed by assignment to classes [redacted] will not learn anything in and will miss out

on the content that non-disabled students receive, because LCS refuses/fails to implement research proven interventions with fidelity.

This withdrawal from IDEA eligibility will be effective immediately. I want you to coordinate the 504 plan meeting with [REDACTED]'S grandmother, [REDACTED], [TELEPHONE NUMBER], [E-MAIL ADDRESS] and we can have it this week to start school of right.

Sincerely,
[REDACTED]

cc: [REDACTED]

3. Subsequently, the School Board provided Petitioner's mother with a form to sign verifying her decision to revoke her consent for [REDACTED] to receive special education and related services under IDEA. Petitioner's mother signed the form and the School Board received it on August 23, 2010.

4. Although it did not agree with [REDACTED]'s mother's decision to discontinue special education and related services available under IDEA for [REDACTED], on August 24, 2010, the School Board acknowledged her decision and provided her with written notice of its decision to honor her request.

5. Thereafter, Petitioner's mother requested services under Section 504. In a letter to Petitioner's mother dated October 4, 2012, the School Board denied her request for a plan for [REDACTED] under Section 504, and explained its position as follows:

The Leon County Schools (district) is in receipt of your electronic mail, dated September 28, 2010 regarding your [child], [REDACTED]. In this electronic mail you have requested a "plan" under Section 504 of the Rehabilitation Act of 1973. This request is being denied. On August 23, 2010, you provided a signed letter to the district indicating that you wanted to revoke your informed consent for [REDACTED]'s placement in special education classes, and indicated that you no longer wanted [REDACTED] to be considered a student with a disability. The district provided you with an "Informal Notice to Take a Specific Action" form and honored this request. Since August 23, 2010, [REDACTED] has been considered a general education student.

Upon the revocation of consent, the district is no longer required to provide a free, appropriate public education (FAPE) under the Individuals with Disabilities Education Act. Regulations at 34 CFR 300.300(b)(4)(ii) state that the district will not be in violation of the requirement to make FAPE available to the child because of its failure to continue providing services. In addition, the Letter to McKethan (OCR 1996) states that "by rejecting the services developed under the IDEA, the parent would essentially be rejecting what would be offered under Section 504." Therefore, the district is not under an obligation to provide FAPE under Section 504 of the Rehabilitation Act of 1973.

6. Petitioner's Due Process Request identified the following three issues:

[1] Whether [the School Board] retaliated against [REDACTED] under IDEA for withdrawing from eligibility as the law allows?

[2] Whether [the School Board] retaliated against [] under Section 504/ADA because [] Mother engaged in protected activities under IDEA?

[3] Whether [the School Board] failed to conduct child find and provide FAPE under Section 504 from August 17, 2010 to present[?]

7. The September 18, 2012, Order dismissing Petitioner's claims asserted under section 504 and the ADA for lack of jurisdiction eliminated Petitioner's issues [2] and [3], leaving only Petitioner's alleged claim of retaliation under the IDEA for determination in this proceeding.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties of this proceeding pursuant to subsection 1003.57(1)(e), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9) (as amended December 22, 2008).

9. Petitioner, as the party seeking relief, has the burden of proof in this case. Schaffer v. Weast, 546 U.S. 49 (2005).

10. As previously determined in the Order entered September 18, 2012, dismissing Petitioner's claims asserted under section 504 and the ADA, the Division of Administrative Hearings (DOAH) does not have jurisdiction to consider alleged violations of section 504 or the ADA in the absence of a contractual grant of authority to hear such claims from the

School District in question. No evidence was presented that DOAH has such a contract with the Leon County School Board.

11. Petitioner concedes that the claim for retaliation under IDEA for revoking consent is "new." Aside from its novel aspect, the undersigned concludes that, under the facts and circumstances of this case, Petitioner's claim for retaliation under IDEA is incompatible with Petitioner's mother's decision to revoke consent for continued special education and related services available to [REDACTED] under IDEA.

12. 34 Code of Federal Regulations, section 300.300(b)(4), provides:

(4) If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency--

(i) May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with § 300.503 before ceasing the provision of special education and related services;

(ii) May not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;

(iii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the

failure to provide the child with further special education and related services; and

(iv) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child for further provision of special education and related services.

13. The School Board's decision to stop providing benefits for Petitioner after consent was revoked was not retaliation. Rather, the School Board was simply following the law. Id.

14. Further, as previously ruled, Petitioner's claims under section 504 and the ADA are not cognizable in this proceeding.

15. In accordance with section 120.57(h), Florida Statutes, considering the pleadings, cross motions, and attachments, it is concluded that there remain no genuine issues of material fact and the School Board is entitled to the entry of this Summary Final Order in its favor as a matter of law.

CONCLUSION

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

ORDERED:

1. The Motion for Summary Final Order filed by the School Board is GRANTED;

2. The Motion for Summary Final Order filed on behalf of [REDACTED] is DENIED;

3. Petitioner's request for a due process hearing under IDEA filed on behalf of Petitioner with the School Board on August 17, 2012, is hereby DISMISSED.

DONE AND ORDERED this 5th day of October, 2012, in Tallahassee, Leon County, Florida.

S

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2012.

ENDNOTES

^{1/} Unless otherwise indicated, all citations to law, rule or regulations are to versions currently in effect.

^{2/} 29 U.S.C. § 701 et seq. is the codification of the Rehabilitation Act of 1973, as amended. The provision popularly known as "Section 504" is codified at 29 U.S.C. § 794.

^{3/} 42 U.S.C. §§ 12101-12117.

COPIES FURNISHED:

Rosemary N. Palmer, Esquire
Rosemary N. Palmer, Attorney at Law
5260 Pimlico Drive
Tallahassee, Florida 32309
floridalawlady@gmail.com

Lindsey Granger, Program Director
Bureau of Exceptional Education
and Student Services
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

Erik Matthew Figlio, Esquire
Ausley and McMullen, P.A.
123 South Calhoun Street
Tallahassee, Florida 32301
rfiglio@ausley.com

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

- a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(b), Florida Statutes (2011), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).