

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL B. HARRISON ON BEHALF)
OF NOLAN WALTER HARRISON, A)
MINOR,)
)
Petitioner,)
)
vs.) Case No. 01-0293RU
)
CHARLIE CRIST, AS COMMISSIONER)
OF EDUCATION,)
)
Respondent,)
)
and)
)
FLORIDA SCHOOL FOR THE DEAF AND)
THE BLIND,)
)
Intervenor.)
_____)

FINAL ORDER

Pursuant to notice, this cause was heard by William R. Pfeiffer, the assigned Administrative Law Judge of the Division of Administrative Hearings, on February 16, 2001, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Michael B. Harrison, pro se
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STATEMENT OF THE ISSUES

This is a rule challenge proceeding pursuant to Section 120.56(4), Florida Statutes, in which Petitioner claims to be substantially affected by an agency statement that allegedly violates Section 120.54(1)(a), Florida Statutes. The subject matter at issue here concerns two sentences at page 11 of a pamphlet generated by Respondent, which is entitled "Florida's Educational Opportunities for Students with Sensory Impairments (2000)(the DOE Pamphlet)." The two sentences state that the Florida School for the Deaf and the Blind (FSDB) is an available educational option for sensory-impaired children in Florida.

PRELIMINARY STATEMENT

By Petition dated January 21, 2001, Michael B. Harrison, on behalf of Nolan Walter Harrison, a minor child (Harrison), challenged the validity of two sentences in the DOE Pamphlet as an allegedly unpromulgated rule of the Department of Education (Respondent).

By Order dated January 30, 2001, the Division of Administrative Hearings (DOAH) assigned the matter to

Administrative Law Judge William R. Pfeiffer. By Notice of Hearing dated February 1, 2001, the final hearing was scheduled for February 16, 2001.

On February 5, 2001, FSDB filed a Motion to Intervene, principally alleging that the pamphlet at issue offered a meaningful explanation of FSDB as one of the educational opportunities available to sensory-impaired children in Florida. The Motion to Intervene was granted.

On February 14, 2001, Respondent, FSDB, and Respondent filed Prehearing Statements.

At final hearing February 16, 2001, Petitioner offered two exhibits, of which one was received in evidence. Petitioner also presented testimony of two witnesses: Ms. Shan Goff, Chief of Respondent's Bureau of Instructional Support and Community Services, and Dr. Margot Palazeski, also of that Bureau. Neither Petitioner nor his father testified. Respondent and FSDB offered five exhibits, all of which were received in evidence. Respondent also presented the testimony of Ms. Goff.

The parties waived the time period for filing their Proposed Final Order and the entrance of the Final Order. There was no transcript filed. Petitioner and Respondent each filed a Proposed Final Order, which was duly considered in the preparation of this Final Order.

FINDINGS OF FACT

Background

1. Congress enacted the Individuals with Disabilities Education Act (IDEA) "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. Section 1400 (d)(1)(A). As a condition to IDEA funding, each state must have a policy in effect that executes the principal goal of the Act, which is to assure "all children with disabilities [have] the right to a free appropriate public education." 20 U.S.C. Section 1412(1). In 1997, Congress substantially amended IDEA. On March 12, 1999, regulations were published at Part B of Part 34 of the Code of Federal Regulations (CFR), implementing the 1997 IDEA amendments. The IDEA, as amended, is implemented in Florida at Section 230.23(4)(m), Florida Statutes, and Chapter 6A-6, Florida Administrative Code.

2. IDEA's centerpiece is the "individualized education program" (IEP), which is a detailed statement "summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive." Polk v. Central Susquehanna Intermediate Unit, 853 F.2d 171, 173 (3d Cir. 1988). The IEP provides special education and related

services tailored to the child's unique needs and designed to provide the child with a "free appropriate public education." 20 U.S.C. Sections 1401(8), 1414(d); 34 CFR Sections 300.13, 300.15, 300.344-300.347; Section 230.23(4)(m)5, Florida Statutes; Rule 6A-6.03028, Florida Administrative Code. A team including the child's teachers, local education agency representatives and the child's parents creates the IEP; 20 U.S.C. Section 1414(d)(1)(B); 34 CFR Section 300.344; Rule 6A-6.03028, Florida Administrative Code.

3. Both IDEA and the parallel Florida Statute state that special education students should be educated with non-disabled peers "to the maximum extent appropriate," and that separate classes or schooling should be used if "the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." See 34 CFR Section 300.550 and Section 230.23(4)(m)6, Florida Statutes. Placement must be determined on a child-by-child basis.

4. Section 230.23(4)(m), Florida Statutes, generally identifies the educational options available for sensory-impaired children in Florida, including FSDB. That statute is implemented in pertinent part by Respondent at Rules 6A-6.03014, and 6A-6.03022, Florida Administrative Code, which set school district admissions criteria for visually impaired and dual-

sensory impaired children, respectively. One of the options listed in the statute is FSDB. Section 230.23(4)(m)3, Florida Statutes.

5. Section 242.3305, Florida Statutes, states the "responsibilities and mission" for FSDB. In pertinent part, it provides that FSDB educates "hearing-impaired and visually impaired students in the state who meet enrollment criteria." Rule 6D-3.002, Florida Administrative Code, implements that statute by setting forth the "Admission and Enrollment Requirements" for FSDB.

6. The DOE Pamphlet was generated in 1997, and amended in 2000, to explain the special education options available to parents of sensory-impaired school-age children in Florida.

The Parties

7. Petitioner is a nine-year-old student who is legally blind and otherwise developmentally impaired. He resides in St. Johns County, Florida, and attends classes for the sensory-impaired offered by the St. Johns County School District. His parents moved from Belize in September, 1999, for the express purpose of enrolling Petitioner at FSDB.

8. Respondent is the head of the state agency that published the DOE Pamphlet.

9. FSDB is a state school that, pursuant to Section 242.3305, Florida Statutes, maintains a residential program for educating sensory-impaired children in Florida.

The Factual Background

10. The Petition asserts that Petitioner's parents moved to St. Johns County in 1999, where they "chose to enroll the Petitioner in the . . . FSDB . . . as described in the DOE Pamphlet." The Petition notes that FSDB declined to accept Petitioner. The Petition further states Petitioner then filed multiple due process petitions pursuant to Section 232.23(4)(m), Florida Statutes, which "yielded an offer by FSDB that the Petitioner be evaluated over an extended period in a temporary assignment at FSDB." Thereafter, "As the parents' choice of enrollment was denied by FSDB, Petitioner's parents enrolled the Petitioner in the local St. Johns County School District." The Petitioner further states that he later sought County support for placement at FSDB, which was rejected because the County believed it could adequately educate Petitioner.

11. The records of DOAH adequately set forth the factual background. Petitioner was denied admission to FSDB when he applied in 1999. Thereafter, his parents filed a due process petition to contest the FSDB denial (DOAH Case No. 99-4930E). Petitioner and FSDB entered into a Settlement Agreement, which allowed Petitioner to enroll at FSDB on a "temporary assignment

basis for extended evaluation [in] accordance with Rule 6D-3.002(4) . . . , for a period of 90 school days within which time [Petitioner] will participate in the educational program as established by the IEP team." The Petitioner dismissed his case, however, for reasons not apparent in this record, the child's parents opted not to enroll their son in the school.

12. On January 19, 2000, Petitioner's parents again filed a request for a due process hearing, alleging that they made a "unilateral mistake" in entering into the first Settlement Agreement. (DOAH Case No. 00-0348E). On March 1, 2000, Petitioner and FSDB entered into another Settlement Agreement (the Second Settlement Agreement). The Second Settlement Agreement provided for the same 90-day temporary assignment, which would commence on the first day of the 2000-2001 school year. That agreement also provided that Petitioner could contest any decision made by FSDB after the temporary assignment. The Petitioner then dismissed his petition.

13. On July 9, 2000, Petitioner filed a third request for due process hearing against FSDB (DOAH Case No. 00-2871E). It alleged that both settlement agreements denied rights under the IDEA, violated FSDB's admissions rules, and the Second Settlement Agreement was an attempt by FSDB to "circumvent the requirements of law." Petitioner requested a hearing to determine "their conformity to both IDEA and FSDB Rule 6D."

14. On August 8, 2000, DOAH dismissed the case on two grounds. First, Petitioner failed to allege a dispute subject to DOAH review, because Petitioner "clearly stated his intent to continue his enrollment in the public schools of St. Johns County . . .," and further stated his satisfaction with that school system. Final Order in N.H. v. F.S.D.B., Case No. 00-2871E at p. 3. Second, it was dismissed because the Second Settlement Agreement barred the action. Id. at p.3, et seq. That order was not appealed, and became final.

15. Petitioner filed a fourth due process petition on August 1, 2000 (DOAH Case No. 00-3129E), opposing FSDB's IEP meeting set for August 8, 2000, which was set by FSDB to implement the Second Settlement Agreement. Petitioner later withdrew that request.

16. FSDB has repeatedly stated, and continues to maintain, that it will excuse the terms of the Second Settlement Agreement to allow Petitioner to remain in the St. Johns County School District. Alternatively, FSDB continues to state Petitioner may temporarily enroll at FSDB pursuant to the Second Settlement Agreement.

The Current Case

17. Petitioner filed the instant rule challenge on January 21, 2001. His father received a copy of the predecessor 1997 version of the DOE Pamphlet in August 2000, from a

representative of the Dade County School District. He asserts the following two sentences constitute an unpromulgated rule in violation of Section 120.56(4), Florida Statutes:

Parents in Florida have the right to choose the educational setting they consider most appropriate for their child who has a hearing or visual impairment. FSDB is an option in the continuum of placement for the education of students with sensory impairments.

18. The Petition claims Petitioner is adversely affected by the two sentences due to the following three injuries:

(1) his "parents were denied the right to choose the educational setting they feel most appropriate for their child"; (2) his sensory-impaired peers attend FSDB; and (3) the St. Johns County School District loses funding for special education of sensory-impaired children because most local parents of sensory-impaired children choose FSDB over the District.

19. At the hearing, Petitioner presented the testimony of two employees of the Respondent, Shan Goff and Margot Palazeski. Both testified that the Respondent promulgated the DOE Pamphlet as an informational document for parents and others dealing with sensory-impaired children in Florida.

20. Ms. Goff testified that DOE generates a multitude of similar brochures and pamphlets. She further stated that there is no relation between funding of FSDB and funding of local school districts' special education programs.

21. The DOE Pamphlet is clear. At page 3, the DOE Pamphlet distinguishes between mandatory education of sensory-impaired children in school districts and discretionary admissions at FSDB:

School districts must provide educational programs to each eligible student who has a sensory impairment, beginning on the student's third birthday and continuing until the student's 22nd birthday or until the student graduates with a standard diploma, whichever comes first.

* * *

For students between the ages of 5 and 22 who have sensory impairments and who meet enrollment requirements, the FSDB provides educational and co-curricular programs, support services, day school and residential programs.

22. Immediately following the two challenged sentences, the DOE Pamphlet advises:

Interested parents may contact the School's Parent Information Office for information regarding admission . . .

23. There is no evidence that the DOE Pamphlet, read in pari materia, is inconsistent with the laws, regulations, or policies of the federal government.

CONCLUSIONS OF LAW

Jurisdiction

24. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.56, Florida Statutes.

Standing

25. Pursuant to Section 120.56(4), Florida Statutes, any substantially affected person may challenge an agency statement as an allegedly unpromulgated rule that violates Section 120.54(1)(a), Florida Statutes. In order to meet the substantially affected test, the Petitioner must establish that, as a consequence of the agency statement, the Petitioner will suffer injury in fact and that the injury is within the zone of interest that is regulated or protected. See generally F.A.C.S. v. Dept. of Health, 2000 W.L. 1763541 (Fla. DOAH Nov. 16, 2000). The Petitioner bears the burden of proof to establish standing by a preponderance of the evidence. The Continental Ins. Co. v. Dept. of Insurance, 1998 W.L. 866219 (Fla. DOAH May 12, 1998).

26. Petitioner has demonstrated sufficient proof to establish standing in this case. While Respondent argues that the Second Settlement Agreement between Petitioner and FSDB bars this action, Petitioner's rule challenge addresses Respondent's alleged unpromulgated rule providing for FSDB as a guaranteed educational option.

27. Specifically, in the Second Settlement Agreement, FSDB in fact agreed to temporarily admit Petitioner. Petitioner, however, has challenged the Respondent's pamphlet as agency policy which allegedly constitute a rule which provides

unconditional admission to FSDB. Notwithstanding his agreement with FSDB, Petitioner has standing to challenge the alleged rule.

28. While Petitioner asserts that he also has standing because local students enrolled at FSDB result in a loss of legislative funding from the St. Johns School District, there was no reliable evidence presented to support his claim and it is rejected.

Alleged Rule

29. For the purposes of Chapter 120, Florida Statutes, the term "rule" is defined, in pertinent part, as follows at Section 120.52(15), Florida Statutes:

(15) "Rule" means each agency statement of general applicability that implements, interprets or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule . . .

30. Section 120.56(4), Florida Statutes, in pertinent part, states:

(4) CHALLENGING AGENCY STATEMENT DEFINED AS RULES; SPECIAL PROVISIONS. -

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates Section 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show

that the statement constitutes a rule under Section 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by Section 120.54.

31. Section 230.23(4)(m), Florida Statutes, in pertinent part, states:

(m) Exceptional students - [The School District shall provide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the state board as acceptable, including provisions that:

* * *

3. The school board annually provide information describing the Florida School for the Deaf and Blind and all other programs and methods of instruction available to the parent or guardian of a sensory impaired student.

32. Section 242.3305, Florida Statutes, in pertinent part, states:

242.3305. Florida School for the Deaf and the Blind; responsibilities and mission.

(1) The Florida School for the Deaf and the Blind is a state supported residential school for hearing-impaired and visually impaired students in preschool through 12th grade. The school is part of the state system and shall be funded through the Division of Public Schools and Community Education of the Department of Education. The school shall provide educational programs and support services appropriate to meet the education and related evaluation and counseling needs of hearing-impaired and visually impaired students in the state who meet enrollment criteria

(2) The mission of the Florida School for the Deaf and the Blind is to utilize all available talent, energy, and resources to provide free appropriate public education for all eligible sensory-impaired students of Florida

33. Rule 6D-3.002, Florida Administrative Code, contains several "Admission and Enrollment Requirements" for FSDB. The Rule requires applicants to be "deaf," "visually impaired" or "deaf-blind," and meet specific admissions standards. See, e.g., Rule 6D-3.002(1)(i),(j) and (2), Florida Administrative Code.

34. The DOE Pamphlet at page 3 clearly states that applicants to FSDB must "meet enrollment requirements." It is consistent with Sections 230.23(4)(m)3, and 242.3305, Florida Statutes, and Rule 6D-3.002, Florida Administrative Code, which provide that a student must meet certain criteria to be admitted to FSDB. The DOE Pamphlet does not reasonably limit or alter the statutorily authorized admissions criteria, as set forth by Rule 6D-3.002, Florida Administrative Code.

35. Furthermore, it is unreasonable to read the two sentences at issue out of context. It is a fundamental tenet of statutory and contractual construction that one must read all parts of a document in pari materia. See, e.g., The Continental Insurance Co. v. Dept. of Insurance, 1998 WL 866219 (Fla. DOAH May 12, 1998)(stating "[s]tatutes governing the [regulated parties] must be read in pari materia, not in isolation," in

dismissing a rule challenge to an agency statement). Upon reading the DOE Pamphlet as a whole, the two sentences cannot be reasonably interpreted to unconditionally offer admissions to FSDB. They merely identify an option available to parents of sensory-impaired children in Florida.

36. The DOE Pamphlet, including the challenged sentences is not a "rule" as defined by Section 120.52(15), Florida Statutes.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's challenge be dismissed.

DONE AND ORDERED this 18th day of May, 2001, in Tallahassee, Leon County, Florida.

WILLIAM R. PFEIFFER
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.