

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FACES PRIVATE SCHOOL, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 10-0845  
 )  
 DR. ERIC J. SMITH, AS )  
 COMMISSIONER OF EDUCATION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on May 5 and July 15, 2010, in Melbourne, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lisa L. Hogleve, Esquire  
Lisa L. Hogleve, L.C.  
96 Willard Street, Suite 206  
Cocoa, Florida 32922-7946

For Respondent: Jason Hand, Esquire  
Robert Large, Esquire  
Florida Department of Education  
Turlington Building, Room 1244  
325 West Gaines Street  
Tallahassee, Florida 32399-0400

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner properly and timely re-enrolled students from her private school so they

would be eligible for McKay Scholarship Program payments from the Department of Education.

PRELIMINARY STATEMENT

Petitioner, FACES Private School (hereinafter "FACES" or the "School"), received a Notice from the Department of Education ("Department") dated January 13, 2010, denying the request by FACES for payment of warrants for students attending the School. FACES filed a Petition for Administrative Hearing prior to the Department's notice, but also timely filed a request for a formal hearing after the Notice. The Petition was forwarded to the Division of Administrative Hearings and assigned to the undersigned. The hearing was commenced on May 5, 2010, but did not finish on that date. The hearing was continued until July 15, 2010, and both parties were in attendance.

At the final hearing, FACES called ten witnesses: Tori Wilson, co-owner of the School; Riley Hyle, regional manager for the Department; Angela Simonton; Pamela London, scholarship program manager; Laura Harrison, director of scholarships for the Department; Dawn Banke; Toni Ranier, co-owner of FACES; Pamela Hansard, web application director for the Department; Cathy Russell, program specialist for the Department; and Sophia Patterson, choice officer for the Department. FACES' Exhibits 1

through 12, 14, 17, 18, and 21 through 23 were offered and accepted into evidence.

Respondent called three witnesses: Pamela London; Kim Reimer, senior database analyst for the Department; and Pamela Hansard. Respondent's Exhibits 1 through 14 and 16 through 21 were offered and accepted into evidence. The parties advised that a transcript of the final hearing would be ordered. The Transcript was filed on August 17, 2010. Each party timely submitted a Proposed Recommended Order, and each was duly considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. FACES is a private school which has participated in the McKay Scholarship Program since 2005. FACES is owned by Tori Wilson and Toni Ranier, who are sisters. Wilson and Ranier are both actively involved in the School as teachers and administrators. FACES caters to children with autism or autistic-related conditions.

2. It is the duty of the School to re-enroll its students into the McKay Scholarship Program each year in order for them to be eligible to receive McKay Scholarship payments from the Department. McKay Scholarships afford disabled students an opportunity to receive funds to defray the costs of attending private schools, such as FACES. The State of Florida, Department of Education, administers the McKay Scholarship

Program through its Office of Independent Education and Parental Choice.

3. For the 2009-2010 school year, there were 12 students to be enrolled at the School. Due to certain disabilities, each of the students was eligible to receive a McKay Scholarship. FACES relies upon the scholarships to fund the cost of operating the School. In some instances, FACES accepts the McKay Scholarship funds for a student as the sole payment for that student's attendance, even though the scholarship is not equal to the cost of educating the student. In such instances, the School will allow the student's parent to provide some sort of alternative payment. That might be in the form of buying provisions needed by the School, e.g., paper products, food, and school supplies, etc; or the School might allow the parent to provide volunteer in-kind services, such as, cleaning, helping with classroom activities, etc.

4. Each year Wilson would log on to the Department website in order to re-enroll her students. (Each returning student would have to be re-enrolled every year. At the same time, any student who was not returning would be withdrawn using the same process.) The process involved creating a Master Fee Schedule and, then, plugging each student's scholarship information into their individual fee schedule. For example, some students may be in need of tutoring services for which additional scholarship

funds are available. Others may need a summer program or some technology assistance. Once the Master Fee Schedule was completed, the school could then enter the individual students into the system.

5. The Department established definite guidelines to be followed by schools wishing to enroll students for scholarship purposes. For the 2009-2010 school year, all students had to be re-enrolled no later than August 2, 2009 (a Sunday). The re-enrollment process could have begun as early as April 10, 2009, for that school year. That is, any school could have re-enrolled its students as early as April 10, 2009, but not later than August 2, 2009.

6. On July 13, 2009, Wilson accessed the Department website to re-enroll her students. She had been through the process each of the past four years and was generally familiar with how it worked. However, on that date, when she logged in using her school Code No. 4809 and password (FACES 5525), she experienced problems. Wilson sent a request to the Department website for a new password, which was sent to her via email within a short time. Using the new password, FACES 101, Wilson was able to log on to the website.

7. The first screen Wilson opened contained the normal directive (accompanied by a red exclamation mark) to "Please complete a Fee Schedule Update for the 2009-2010 School Year."

But when Wilson clicked on the Update Fee Schedule link, she was only given the option to update the 2008-2009 school year, rather than the upcoming school year (2009-2010).

8. After encountering this problem, Wilson called an undisclosed person at the Department to find out what was going on with the system. She was presumably told that the system had a glitch of some sort, that if no changes to the fee schedule were being made, she could use the previous year's schedule to do re-enrollment or that she could try the process again later. This statement was not corroborated, however. The Department provided contrary evidence saying that other schools had done their re-enrollments on the same day (July 13, 2009) and time that Wilson was experiencing trouble. One school had experienced some problems saving individual fee schedules for four students, but had not experienced problems re-enrolling students. Wilson does not have any records concerning her phone call to the Department due to the fact that she changed telephone providers, and records from the prior provider were not available.

9. Wilson possesses a printout from her computer showing her browser history for July 13, 2009. It is clear that Wilson accessed the Department website on that date. There are a number of references to the re-enrollment portion of the Department's website, including the "student\_enroll.asp" and the

"student\_enroll1.asp," "student\_enroll3.asp," and "student\_withdraw.asp" URL address segments. Each of those asps is part of the enrollment process, but unless the entire process is completed, those intermediate steps will not effectuate a student enrollment. Wilson believes she was able to "submit" each of her re-enrollments for students on that date, resulting in a prompt saying, "the student has been successfully enrolled, would you like to enroll another student." However, the Department's IT experts opine that it is impossible to have received that prompt without having gone through the entire enrollment process. Department computer logs indicate that Wilson did not click on the link required to save the Master Fee Schedule, a prerequisite to enrolling students for the 2009-2010 school year. Thus, while Wilson may believe she was properly enrolling her students, computer records indicate she did not actually accomplish her goal on that date.

10. On July 20, 2009, Wilson logged on to the website again to see if she could complete the Master Fee Schedule and get her students re-enrolled. She attempted to log on using her new password, FACES 101, but was not able to do so. She finally logged on using her old password, FACES 5525, the same one she had been using for four years. When she was logged on to the website, she was able to update the Master Fee Schedule. She did not attempt to re-enroll her students at that time, because

she believed they had already been re-enrolled on July 13, 2009. Unfortunately, she did not check to verify the enrollment on July 20, 2009.

11. Wilson believes she completed the entire enrollment process for her students on July 13 and 20, 2009. Her testimony is entirely credible as to that belief, but she has no corroborating verification of the facts. The Department computer logs indicate that the enrollment process had begun, but had not been completed.

12. The Department sent out an email on July 31, 2009, to a number of schools who had McKay Scholarship students. The email advised the schools that as of the date of the email, "Our records indicate that one or more McKay Scholarship students enrolled in your school during the 2008-2009 school year has not been re-enrolled for the 2009-2010 school year. McKay students must be re-enrolled by August 2, 2009, in order to be eligible for a first period scholarship payment on September 1st." The email was sent to HAPPYFACES@BELLSOUTH.NET, which was FACES' email address of record at the Department as of the date of the email. FACES had actually stopped using that email address regularly in April or May of 2009, but did not notify the Department of that fact until some time later. However, as of July 2009, when the email was sent out, FACES was still using the address as a contact source for parents of potential new



students. It was, therefore, still being used for some purpose. FACES' contention that it did not receive the July 31, 2009, email is not credible. Based upon the changes FACES was going through with its communications systems at that time, however, it is very possible the email was never accessed by Wilson.

13. On August 5, 2009, Wilson logged on to the website to withdraw a student, only to find that none of her students' re-enrollments (which she verily believed to have been accomplished previously) appeared on the website. She immediately sent an email to the Department regional manager (Hyle) assigned to her geographic area. The email advised Hyle about the students not showing up as re-enrolled and inquired about receiving payments for those students. Hyle told her that other schools were having problems as well (although that statement was not true),<sup>1</sup> asked Wilson to send him information concerning her students, and said he would speak to his supervisor. Several exchanges between Wilson and Hyde ensued.

14. Thereafter, Wilson received an email from Laura Harrison, director of the scholarship programs, saying the information submitted by Wilson was not sufficient to establish re-enrollment of the students at FACES. Harrison reiterated what Wilson had already heard from other persons within the Department, i.e., the evidence shows a visit to the website to

change her password on July 13, 2009, but no re-enrollment of students was accomplished on that date.

15. Following notification to Wilson that the student enrollment was deemed untimely by the Department, there were three disturbing events: First, the Department erroneously advised Wilson that FACES did not have a current fire inspection; in fact, FACES did. Second, the Department erroneously advised FACES that it did not have a current health certificate; in fact, FACES did. Third, the Department took several months to issue its final agency action (despite requests by FACES' attorney) so that FACES could challenge the decision. These events reflect unfavorably on the Department, but do not affect the outcome of this case. They are noted only because they were raised by Wilson as part of her case-in-chief.

16. The Department's database analyst and web application developer established the following facts:

- Wilson logged on to the Department website on July 13, 2009, using IP address 70.152.251.108 with school code 4809;
- On that same date, other schools logged into the website and made student changes, including re-enrollment and withdrawals;
- Wilson, on behalf of FACES, did attempt to engage in the re-enrollment process on that date, starting at 6:54 p.m.;
- There were a number of entries by FACES on that date, but none of the entries went beyond

phase three of the enrollment process, identified as reenroll3.asp by the server;

- Wilson logged on to the Department website again on July 20, 2009, on behalf of FACES;
- The server log shows that other schools logged in on that same date and at the same time;
- FACES completed its Master Fee Schedule on that date beginning at 2:52 p.m., but upon completing the schedule, FACES logged out of the website;
- FACES logged on to the Department website on August 5, 2009, at 11:24 a.m., at 4:36 p.m., at 6:15 p.m., and at 7:40 p.m.;
- Other users logged on to the website at the same time FACES was on-line;
- FACES re-enrolled its students on that date, although it was three days after the deadline for doing so; and
- The re-enrollment of students by Wilson on August 5, 2009, ultimately, resulted in a computer code called "studentenroll=true" at 3:25 p.m.

17. Clearly, no matter what Wilson attempted to do on July 13, 2009, regarding the enrollment of her students, she did not fully accomplish that task. The computer records and testimony of the Department's witnesses are clear and unequivocal. The enrollment process was not completed prior to the deadline of August 2, 2009.

18. FACES school does not generate a surplus of income from which it might operate without the McKay Scholarships. Loss of the scholarships would be a significant financial strain on the School. Both Wilson and Ranier appear willing to suffer

financial shortfalls in order to keep the School running, but cannot do so without scholarship funds. However, due to the technical failure to meet the enrollment deadline, FACES does not appear to be entitled to the scholarships for the 2009-2010 school year.

19. Despite the findings herein, it is abundantly clear that Wilson's testimony was honest and sincere. She was simply mistaken concerning the completion of her enrollment process.

#### CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Sections 120.57 and 120.569, Florida Statutes (2009).

21. The burden of proof in this matter is on Petitioner to prove, by a preponderance of the evidence, that the students from FACES were either timely enrolled or that the Department's website prevented FACES from re-enrolling its students. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

22. Section 1002.39, Florida Statutes (2009), states in pertinent part:

The John M. McKay Scholarships for Students with Disabilities Program.--There is established a program that is separate

and distinct from the Opportunity Scholarship Program and is named the John M. McKay Scholarships for Students with Disabilities Program.

(1) THE JOHN M. MCKAY SCHOLARSHIPS FOR STUDENTS WITH DISABILITIES PROGRAM.--The John M. McKay Scholarships for Students with Disabilities Program is established to provide the option to attend a public school other than the one to which assigned, or to provide a scholarship to a private school of choice, for students with disabilities for whom an individual educational plan has been written in accordance with rules of the State Board of Education. Students with disabilities include K-12 students who are documented as having an intellectual disability; a speech impairment; a language impairment; a hearing impairment, including deafness; a visual impairment, including blindness; a dual sensory impairment; an orthopedic impairment; another health impairment; an emotional or behavioral disability; a specific learning disability, including, but not limited to, dyslexia, dyscalculia, or developmental aphasia; a traumatic brain injury; a developmental delay; or autism spectrum disorder.

\* \* \*

(8) PRIVATE SCHOOL ELIGIBILITY AND OBLIGATIONS.--To be eligible to participate in the John M. McKay Scholarships for Students with Disabilities Program, a private school may be sectarian or nonsectarian and must:

\* \* \*

(b) Provide to the department all documentation required for a student's participation, including the private school's and student's fee schedules, at least 30 days before the first quarterly scholarship payment is made for the student.

\* \* \*

(10) JOHN M. MCKAY SCHOLARSHIP FUNDING  
AND PAYMENT.--

\* \* \*

(d) Following notification on July 1, September 1, December 1, or February 1 of the number of program participants, the department shall transfer, from General Revenue funds only, the amount calculated under paragraph (b) from the school district's total funding entitlement under the Florida Education Finance Program and from authorized categorical accounts to a separate account for the scholarship program for quarterly disbursement to the parents of participating students. Funds may not be transferred from any funding provided to the Florida School for the Deaf and the Blind for program participants who are eligible under subparagraph (2)(a)2. For a student exiting a Department of Juvenile Justice commitment program who chooses to participate in the scholarship program, the amount of the John M. McKay Scholarship calculated pursuant to paragraph (b) shall be transferred from the school district in which the student last attended a public school prior to commitment to the Department of Juvenile Justice. When a student enters the scholarship program, the department must receive all documentation required for the student's participation, including the private school's and student's fee schedules, at least 30 days before the first quarterly scholarship payment is made for the student.

23. Florida Administrative Code Rule 6A-6.0970 addresses the procedure for applying for a McKay Scholarship. Subpart (5)(c)2. of that Rule states:

A student must have an enrollment date thirty (30) days before the first scholarship payment is made. The submission of the school and student fee schedules are required to establish the enrollment date and are completed using the Department's website. A student that changes private schools after meeting the enrollment date requirement may still qualify for payment for that payment period.

24. It is clear from the evidence and from the credible testimony of Wilson that FACES attempted to re-enroll its students on July 13, 2009. The evidence does not show that the attempted re-enrollment process was completed on that date or on July 20, 2009. There is no evidence that the system had "glitches" or was, otherwise, the cause of FACES' failure to complete the attempted re-enrollment. When FACES became aware that its efforts to re-enroll students had failed, the re-enrollment process was completed on August 5, 2009, just three days after the enrollment deadline. This fact is a clear indication that Wilson acted at all times with an understanding of what was required. However, the re-enrollment was accomplished only after the deadline, and the Department has the right to deny the claim by FACES for the September 2009, McKay Scholarship warrants.

25. Although the Department's actions against FACES after the enrollment difficulties are suspect, those actions do not cure the failure to timely enroll students. (Whether the

Department has any discretion to grant the scholarships despite Wilson's failures is unknown. Whatever action the Department may take as recompense for its erroneous behavior is outside the purview of this Recommended Order.)

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Respondent, Dr. Eric Smith, as Commissioner of Education, denying the claim by Petitioner, FACES Private School, for the September 2009 McKay Scholarship Program awards.

DONE AND ENTERED this 23rd day of September, 2010, in Tallahassee, Leon County, Florida.



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R. BRUCE MCKIBBEN  
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 23rd day of September, 2010.



ENDNOTE

<sup>1/</sup> Hyle testified that he was trying to comfort Wilson in some way, so he erroneously told Wilson that other schools were having the same problem. Had Hyle's statement been made prior to the enrollment deadline, it may serve as a basis for an estoppel action against the Department. But since the enrollment deadline had already passed, Wilson could not rely on the statement as a reason for not timely complying with the enrollment requirements.

COPIES FURNISHED:

Dr. Eric J. Smith  
Commissioner of Education  
Department of Education  
Turlington Building, Suite 1514  
325 West Gaines Street  
Tallahassee, Florida 32399-0400

Deborah K. Kearney, General Counsel  
Department of Education  
Turlington Building, Suite 1244  
325 West Gaines Street  
Tallahassee, Florida 32399-0400

Lynn Abbott, Agency Clerk  
Department of Education  
Turlington Building, Suite 1514  
325 West Gaines Street  
Tallahassee, Florida 32399-0400

Lisa L. Hogreve, Esquire  
Lisa L. Hogreve, L.C.  
96 Willard Street, Suite 206  
Cocoa, Florida 32922-7946

Jason Hand, Esquire  
Robert C. Large, Esquire  
Florida Department of Education  
Turlington Building, Suite 1244  
325 West Gaines Street  
Tallahassee, Florida 32399-0400

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.