Before the
Administrative Hearing Commission
State of Missouri

, in the interest of .,	)	
Petitioner,	)	
vs.	)	No. 15-0462 ED
UNIVERSITY ACADEMY CHARTER SCHOOL,	)	
Respondent.	)	

DECISION

We dismiss the due process complaint filed by ("Mother") on behalf of her minor child., ("Student") because Mother filed the due process complaint after Student was enrolled in another school district and because we lack jurisdiction over claims arising under Section 504 of the Rehabilitation Act.[1]

Procedure

Mother filed a due process complaint against the University Academy Charter School ("the School") on April 15, 2015. We scheduled the hearing on the complaint for May 21, 2015, and we held a pre-hearing telephone conference on May 7, 2015. On May 11, 2015, the School filed a motion to dismiss the complaint or, in the alternative, a motion for summary decision. We gave Mother until May 14, 2015, to respond to the motion, but she did not respond.

[1] 29 USC section 701 et seq.

We may grant a motion for involuntary dismissal or summary decision based on a preponderance of the admissible evidence.[2] "Admissible evidence" includes an allegation in the complaint, affidavit, or other evidence admissible under the law.[3] We will grant a motion to dismiss if we lack jurisdiction over a complaint, or if the case is moot.[4] Regulation 1 CSR 15-3.446(6) provides that we may decide this case without a hearing if the School establishes facts that Mother does not dispute and entitle the School to a favorable decision.

Findings of Fact

1. Student is years old and until recently was in the 4th grade at the School. Student began attending kindergarten at the School in the 2008/2009 school year. Student has been retained twice, once in kindergarten and again in the 3rd grade.

2. Prior to being enrolled at the School, Student was determined to qualify for early childhood special education as a Young Child with a Developmental Delay. Student's prior district, Center School District, developed an early childhood (pre-kindergarten) individualized education program ("IEP") for student.

3. The School evaluated Student and determined that he was not eligible for special education services under the Individuals with Disabilities Education Act ("IDEA").[5]

4. On March 10, 2015, Student was suspended from the School for ten days, and on March 26, 2015, Student was suspended for 180 days.

[2] 1 CSR 15-3.436(3). All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update

[3] *Id.*

[4] 1 CSR 15-3.436(1)(A) and (B).

[5] There is no evidence of the date of the initial evaluation. The School's answer asserts that Student was evaluated in 2008 and the School determined he was not eligible, and that the School's review of existing data in 2011 reached the same conclusion. The answer also states that Mother requested a re-evaluation on May 8, 2014, and the School denied the request.

5. On March 23, 2015, Student was enrolled in the Kansas City Public School District ("KC District") at Banneker Elementary School. On that date, the School received a request for transfer of student records, and dropped Student from the roll at the School.[6]

Conclusions of Law

This Commission has jurisdiction over due process complaints with respect to any matter relating to identification, evaluation, educational placement, or the provision of a free appropriate public education ("FAPE") for a child in this state.[7] Mother makes several claims under the IDEA, including that Student was denied FAPE because of the School's failure to evaluate him for special education services. The School argues that the case is barred by the Thompson rule.

IDEA – The "Thompson Rule"

In ***Thompson by and through Buckhanon v. Bd. of Special Sch. Dist. No. 1 (Minneapolis)***,[8] the Eighth Circuit held that the parent had not stated a cause of action under the IDEA because she filed her due process complaint after the student left the school district previously responsible for his education.[9] The ***Thompson*** court noted:

> Contrary to [the parent's] assertions, her need to preserve the right to challenge [the student's] prior educational services is not simply a procedural barrier. The purpose of requesting a due process hearing is to challenge an aspect of a child's education and to put the school district on notice of a perceived problem. Once the school district receives notice, it has the opportunity to address the alleged problem problem[.[10]]

Since ***Thompson***, courts within the Eighth Circuit have held that a due process challenge may not be lodged against a former school district when the student and his/her parent failed to

[6] Mother argues that the KC District did not accept Student, but the School provided evidence that he was enrolled in the district. The issues of whether or not Student was allowed to attend classes because of his suspension and his relationship with the KC District is not before us.

[7] Section 162.961.1. Statutory references, unless otherwise noted, are to RSMo Cum. Supp. 2013.

[8] 144 F.3d 574 (8th Cir. 1998).

[9] *Id.* at 578.

[10] *Id.* at 579.

request a due process hearing before the student was withdrawn.[11] Courts have followed the ***Thompson*** rule and "found lack of notice when no formal due process complaint was filed, even though the district was aware that the parent/guardian was dissatisfied with the education provided."[12]

In ***M.P. ex rel. K.P. v. Indep. School Dist. No. 721***,[13] a student with schizophrenia attended school in one district, where he had an IEP. In January 2000, a school nurse disclosed that the student had schizophrenia, and the fact became common knowledge among the student body. After that, the student was verbally and physically harassed by other students. Student's mother complained to the district officials, who made suggestions to remedy the situation that mother considered unacceptable. Student's parents enrolled him in a different district for the 2000-2001 school year and filed a due process complaint against the first district in November 2000, alleging violations of the IDEA and other laws, including § 504 of the Rehabilitation Act. The court in ***M.P.*** held that it could not consider student's IDEA claim under the ***Thompson*** rule.

"[T]he law in the Eighth Circuit is clear: an IDEA claim is barred when the [parent] does not request a hearing before the child leaves the District."[14] Because Mother filed her due process complaint after Student voluntarily left the School and was enrolled in a different district, we find her request for relief is barred by the ***Thompson*** rule.

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[11] *See*, e.g., ***C.N. Willmar Pub. Sch., Indep. Sch. Dist. No. 347***, 591 F.3d 624, 631, n.6 (8th Cir. 2010); ***Smith ex rel. Townsend v. Special Sch. Dist. No. 1***, 184 F.3d 764, 768 (8th Cir. 1999).

[12] ***A.H. by and Through D'avis v. Indep. Sch. Dist.***, *slip op.*, 2015 WL 1548879, * FN7 (Mo. App. W.D., April 7, 2015).

[13] 326 F.3d 975 (8th Cir. 2003).

[14] ***A.H.,*** 2015 WL 1548879 at *4.

Section 504

Mother also argues that Student is entitled to a 504 Plan under Section 504 of the Rehabilitation Act. Section 504 "prohibits discrimination against the disabled recipients of federal funding[.]"[15]

Section 162.961.1 states that we may hear due process hearings "with respect to any matter relating to identification, evaluation, educational placement, or the provision of a free appropriate public education of the child." These covered areas are all parts of the IDEA.[16] Section 504, in contrast, has a very different function. That section ensures that "[n]o other qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."[17] "To show discrimination under [§ 504] plaintiffs must show more than the failure to provide a FAPE, an incorrect evaluation, or a faulty IAP."[18] A plaintiff must show "bad faith or gross misjudgment."[19]

The statutory authority in § 162.961 is limited to identification, evaluation, educational placement, or the provision of a free appropriate public education of a child. All of these stem directly from the IDEA. Section 504 requires more than that – it requires a showing of bad faith or gross misjudgment, as well as a showing of exclusion, denial of benefits, or discrimination. The statutory authority in § 162.961 thus does not extend to or otherwise cover such discriminatory acts against the disabled by recipients.[20]

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[15] ***Barnes v. Gorman***, 536 U.S. 181, 185 (2002).

[16] 20 U.S.C. §§ 1414 and 1415.

[17] 29 U.S.C. § 794(a).

[18] ***Breen By and Through Breen v. St. Charles R-IV School Dist.,*** 2 F.Supp.2d 1214, 1221 (E.D. Mo. 1997).

[19] *Id*., *quoting* ***Monahan v. State of Nebraska***, 687 F.2d 1164, 1171 (8th Cir. 1982).

[20] To the extent that it may be required, we find that Student has exhausted his § 504 claims before this Commission.

Because this Commission was created by state statutes, we have only such authority as the statutes give us.[21] We do not have authority to add to or subtract from the terms of the statutes or to make an exception.[22] We lack jurisdiction over § 504 claims, and cannot hear Student's 504 claims.

School Administrative Decisions/Statute of Limitations

Because we have dismissed the complaint on other grounds, we do not rule on the School's arguments that parts of Mother's complaint should be dismissed because of the statute of limitations or because the issues raised were administrative decisions and not IEP team decisions.

Summary

We grant the School's motion for summary decision of the IDEA claims because they are barred by the ***Thompson*** rule. We grant the School's motion for involuntary dismissal of the Section 504 claims because we lack jurisdiction to hear them. We cancel the hearing.

SO ORDERED on May 18, 2015.

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NICOLE COLBERT-BOTCHWAY
Commissioner

Appeal Procedure

Please take notice that this is a final decision of the Administrative Hearing Commission and you have a right to request review of this decision. Specifically, you may request review as follows:

[21] ***State Bd. of Reg'n for the Healing Arts v. Masters***, 512 S.W.2d 150, 161 (Mo. App. K.C.D. 1974).
[22] ***Lynn v. Director of Revenue,*** 689 S.W.2d 45, 49 (Mo. 1985).

1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within forty-five days after the mailing or delivery of the notice of this final decision.

2. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff's residence.

Please take notice that you also have a right to file a civil action in federal or state court pursuant to the IDEA. See 34 C.F.R. Section 300.512.