

BEFORE THE DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION

, a minor, by and

through his parents,

Petitioner,

vs. HICKMAN MILLS C-1 SCHOOL DISTRICT

Respondent.

ORDER OF DISMISSAL

Comes Now this 22nd day of May, 2000, the hearing panel through the hearing chairperson, Rick S. Vasquez, hereby dismisses the Petitioner's Request for Due Process Hearing of March 2, 2000, and subsequent, amended request of April 19, 2000.

BACKGROUND: On March 2, 2000, by and through counsel, Paul S. Franco, filed a "Request For Due Process Hearing Waiver of Resolution Conference." In the complaint it was alleged that had been denied a Free and Appropriate Education (FAPE) by being suspended, physically restrained, being placed in the hall and other teacher's classrooms, and by being placed in a half-day program. parents requested an accommodation plan under Section 504 of the Rehabilitation Act and, according to the hearing request, was provided an IEP. Apparently, was not given an accommodation plan and the parents filed an Office of Civil Rights complaint. The purported reason for the hearing request filed on behalf of alleged to seek remedial relief under Section 504 of the Rehabilitation Act of 1973. The hearing request points to the dichotomy between an accommodation plan devised under Section 504 and an IEP under the guise of the IDEA. Essentially, an accommodation plan under the ADA is sought on behalf of as opposed to an IEP. The hearing request sought the following relief: 1) creation of an accommodation plan without an IEP; 2) provided a behavioral aide; 3) provide

compensatory services; 4) a behavioral plan, and 5) an independent evaluation at the district's expense.

On April 18, 2000, the district, by and through counsel, Linda J. Salfrank and Kirsten Roth, filed a Motion to Dismiss and accompanying Stipulations. The Stipulations can be summarized as follows: 1) the district agreed to provide an aide as requested; 2) the district recognized its obligation to provide an independent evaluation; 3) the district indicated it has developed a behavioral plan and recognized its obligation to meet with parents to procure their input in the plan; and 4) the district acknowledges its time strictures with respect to meeting requests.

The district's Motion to Dismiss urged two (2) points. First, the district points out the hearing panel lacks jurisdiction to hear a Section 504 complaint referring to 20 U.S.C. section 1400, et seq. and RSMo 162.961 as well as a line of cases supporting this notion. Secondly, the district points that it is obligated to provide services under the IDEA because he meets the eligibility criteria as "other health impaired" and therefore, Section 504 accommodations would not satisfy the district's obligations under the IDEA. It is worth noting that at no point in this process through, pleading, motion nor argument, has Petitioner's asserted does not meet the IDEA criteria for "other health impaired."

In response to the district's motion to dismiss, Petitioner's filed an Answer to Respondent's Motion to Dismiss on April 19, 2000. The Answer is not only an answer, but also, an amended complaint. In essence the Answer raises the following contentions: 1) should have a Section 504 accommodation plan and not an IEP under the IDEA; 2) a change in placement has occurred by virtue of multiple suspensions; 3) Petitioner's disagree with the IEP process because a) they have not been provided the IEP team's notes, b) they claim to lack proper notice; and c) the IEP team is not impartial.

The district filed an April 28, 2000, response to the Answer ("Amended Complaint") addressing Petitioner's new requests point by point as follows:

1. The district urges that in school suspensions do not constitute a change in placement under the IDEA;

2. Again the district agreed the panel lacks jurisdiction as to Section 504 complaints;

3. To the extent Petitioner has raised some factual allegations of assault taken against Petitioner by district personnel, the district urges these allegations are beyond the scope of the panel; and

4. The district argues Petitioner's complaints as to the IEP process are without legal remedy.

The parties conducted a May 4, 2000, oral argument addressing the Motion to Dismiss. Essentially, the parties argued the same points as set forth in the pleadings and motions. Petitioner's argued the input of the entire three (3) member panel would be appropriate to address the issue presented in the motion to dismiss.

PROCEDURE: The original hearing request was filed March 2, 2000. Upon the request of Respondent, the 45 day deadline was extended to June 2, 2000.

DETERMINATION: To the extent Petitioner's Answer to Respondent's Motion to Dismiss was in amended complaint and Respondent has objected thereto, the panel chairperson, Rick S. Vasquez, is allowing Petitioner to file his Answer as an amended complaint. Panel Chairperson, Rick S. Vasquez, and panel member Christine Montgomery concur in sustaining Respondent's motion to dismiss. It is the opinion of the Panel Chairperson that the Motion to Dismiss is properly made as the panel is without jurisdiction to hear the issues raised in this matter. The crux of Petitioner's hearing request, both the initial complaint and the amended complaint is a request for relief under Section 504 of the Rehabilitation Act. This hearing panel is convoked pursuant to the Missouri State Plan for Part B of the IDEA. Missouri hearing panels do not have authority to hear complaints under Section 504. Therefore, this panel is unable to address the relief requested by

Petitioner in seeking a Section 504 accommodation plan as opposed to an IDEA, IEP plan.

The remaining relief sought in Petitioner's initial complainant (a behavioral aide, services, behavioral plan and an independent evaluation) have all been fully addressed by Respondent's April 18, 2000, stipulation agreeing to these points of relief.

With respect to the allegations of assault by district personnel these allegations are beyond the subject matter jurisdiction of this panel to hear IDEA issues of identification, evaluation, placement and FAPE. With respect to Petitioner's asserting a change in placement has occurred by virtue of multiple suspensions the assertion is without merit. A change in placement can only arise by a pattern of suspensions being created by series of short-term suspensions. In school suspensions are not a factor in this regard. The district has argued and the Petitioner has not refuted the only suspensions herein are in school suspensions. Hence, there is no plausible basis for determining a change in placement has occurred. Finally, Petitioner has raised several other plausible claims for relief, i.e., 1) seeking the panel to address allegations Petitioner has been subjected to physical assault by district personnel; 2) arguing a change in placement has occurred by virtue of multiple suspensions; and 3) grievances with the IEP panel.

With respect to Petitioner's complaint regarding the IEP meeting the complaint lacks merit. The interim IEP meeting was convened by agreement. The district clearly may prepare a draft IEP prior to the meeting. The district is under no obligation to provide an impartial IEP team nor to provide the team members notes. There is no justifiable issue raised herein to which the panel may proceed to hearing.

For the foregoing reasons Petitioner's request is dismissed.

DISSENTING OPINION: Panel Member, Dorothy White, dissents from the dismissal herein as she maintains the panel is and/or should be empowered to hear complaints arising under Section 504 of the Rehabilitation Act.

Any party wishing to challenge the dismissal of this action may do so by following procedures available through the Department of Elementary and Secondary Education under the Missouri State Plan for Part B of IDEA or may file for administrative review pursuant to RSMo 536.110.

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CERTIFICATE OF SERVICE

Comes Now, Rick S. Vasquez, and hereby certifies that a true and correct copy of Order of Dismissal, was mailed postage prepaid via the US Postal Service this 22nd day of May, 2000, to the following:

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