

BEFORE THE THREE-MEMBER DUE PROCESS HEARING PANEL

PURSUANT TO RSMo. § 162.961

_____, by and through his Father and Next Friend,

Petitioners,

vs .

ROLLA 31 PUBLIC SCHOOLS,

Respondent.

DECISION AND ORDER

On or about October 14, 1997, a due process request was received by the Department of Elementary and Secondary Education ("DESE") in which Petitioners requested hearing before an impartial three-member hearing panel. The Department of Elementary and Secondary Education assumed that this was a request for a hearing under Individuals with Disabilities Education Act ("IDEA"), P.L. 94-142, 20 U.S.C. § 1400 et seq. Panel members were chosen by Petitioner and the School District, and DESE appointed a chairperson and assigned the case to be heard by letter dated October 22, 1997 to the Chairperson. This matter was originally scheduled to be heard on or before November 28, 1997. A request for continuance from counsel for the School District was received on or about October 30, 1997 and accordingly the matter was reset for hearing on January 7, 1998. On or about December 18, 1997, request was received from Petitioner, and the hearing was rescheduled for February 2, 1998. On or about December 19, 1997, the Chairperson received "Respondent Rolla Public Schools' Motion to Dismiss Due Process Hearing Complaint," including Respondent's argument and affidavits of Linda Giger and Dr. Nicholas Ginos, Director of Special Services and Assistant Superintendent, respectively, thereof, attached to said motion, together with numerous exhibits. On or about January 5, 1998, the Chairperson received Petitioner's response, with attachments, to the Motion to Dismiss. After a careful review of the motion and the response and all the documents attached to each, it is the decision of the Hearing Panel that the Motion to Dismiss has merit and should be sustained. The Panel concludes that there is no justiciable issue presented under the Individuals with Disabilities Education Act as presented in Petitioner's Request for Hearing.

This Panel is convoked pursuant to the State's Plan for Part B of "IDEA," 20 U.S.C. § 1400, et seq., and § 162.961 RSMo. to hear and decide cases concerning children with disabilities as therein described. This Panel has no authority to hear complaints under § 504 of the Rehabilitation Act.

Petitioner's letter to the Department of Elementary and Secondary Education requesting a three-member due process hearing, does not identify any statutory basis for DESE's jurisdiction. It seeks to prohibit "a proposed action concerning the identification, evaluation, re-evaluation, educational placement or provision of a free and appropriate education for my _ year old son, _ ." The letter references the Petitioner's objections to the planned action stated in the 9-4-97, and 9-25-97 letters (of Respondent). (All letters referred to are either attached to Respondent's Motion to Dismiss or Petitioner's response.)

Importantly, neither the September 4, 1997 letter from Linda Giger to Mr. _ nor the September 25, 1997 letter from Dr. Ginos to Mr. _ make any reference to the IDEA. Giger's letter refers to an August 27 meeting with Mr. _ at which Mr. _ raised some concerns and questions. The letter indicates that it is because of those concerns and questions that the Respondent was seeking to re-evaluate _ in order to formulate a plan. In the September 25, 1997 letter from Dr. Ginos to Mr. _ , reference is made several times to discuss appropriate accommodations for _ which would be consistent with obligations of the School District under Section 504 of the Rehabilitation Act. No mention is made in the letter from Dr. Ginos to the IDEA. In a letter dated September 11, 1997 to Dr. Nicholas A. Ginos, Assistant Superintendent of Respondent, the Petitioner informs that "I refuse to consent to testing for _ , as requested/proposed by Ms. Giger's 9-4-97, letter to me (copy enclosed)." In a letter dated September 30, 1997 to Dr. Ginos, the Petitioner states as follows:

"Even though I refuse to consent to diagnostic testing, I have no objection to participating in a meeting, under Section 504 guidelines, to reaffirm reasonable accommodations for _ ."

Perhaps the clearest evidence that Petitioner was aware that the request for re-evaluation had to do with _ accommodations under Section 504 of the Rehabilitation Act is contained in the September 5, 1997 letter from Mr. _ to Linda Giger. (See letter attached to Respondent's Motion to Dismiss.)

The affidavits of Linda Giger and Dr. Ginos and the attachments thereto clearly indicate and establish that ___ was evaluated in 1995 and found not to qualify for a Special Education Program, and all actions taken thereafter by the Petitioner and the Respondent were pursuant to

Section 504 of the Rehabilitation Act. In addition, the affidavit of Linda Giger indicates that the Petitioner never challenged the Respondent's conclusion that _ did not qualify for a Special Education Program.

The affidavits of Linda Giger and Dr. Ginos and the exhibits attached to same clearly indicate that since some time in 1996 the Respondent had implemented a plan for _ under Section 504 of the

Rehabilitation Act of 1973. Letters from the Respondent to the Petitioner which are included as exhibits and attachments to the aforesaid affidavits clearly acknowledge an understanding by the Respondent of evaluation and implementation of a plan under Section 504. Moreover, Petitioner's letter dated 11-15-97 to Ms. Heidi Atkins-Lieberman and identified as Exhibit F and attached to Respondent's Motion to Dismiss clearly acknowledges the Petitioner's misunderstanding that an IDEA due process hearing was available for a complaint under Section 504 of the Rehabilitation Act.

The Petitioner in his response to the Motion to Dismiss argues that the Respondent sent him a copy of the "Procedural Safeguards for Children and Parents" under IDEA along with the letter of notification dated 9-4-97 to re-evaluate. He further points out that the letter refers to a "program" which normally is referenced by the IDEA and not under Section 504 which calls for a "plan." These arguments are not persuasive. Accepting that the Respondent sent Petitioner the procedural safeguards normally utilized under IDEA, that does not create a justiciable issue under IDEA. Nor does the reference to the word "program" which was used in a generic sense in the letter dated 9-4-97 from Respondent to the Petitioner.

Moreover, it is clear from the documents attached to the Motion to Dismiss as well as the "Notice Of Intent To Reevaluate, which is attached to Petitioner's response as _ Exhibit A-3" that the Respondent was merely proposing a re-evaluation to which Petitioner refused to consent. There is no allegation that the School District has made any attempt to re-evaluate in view of the Petitioner's objection. Since the Respondent School District has acceded to Petitioner's objection, there is nothing for the Hearing Panel to determine, even assuming that the Panel had jurisdiction to hear the Petitioner's Complaint. If anything, it would be the Respondent's right to request a hearing because the Petitioner refused to allow the re-evaluation as proposed. See 34 CFR §§ 300.504 and 300.506.

Therefore, it is the decision of this Hearing Panel that the Respondent's Motion to Dismiss is sustained, and it is hereby ordered that the Petitioner's request for a hearing is hereby dismissed.

DATED this 19th day of January, 1998.

Kim Ratcliffe, Panel Member

Rebecca Stith, Panel Member

George J. Bude, Chairperson

Copies of the foregoing mailed to:

Ms. Teri B. Goldman

Mr. _

Ms. Heidi Atkins-Lieberman