BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION

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| IN THE MATTER OF: | ) | DUE PROCESS HEARINGS |
| | ) | |
| | ) | |
| [redacted] | ) | NO. 04-58 |
| | ) | |
| | ) | |
| [redacted] | ) | NO. 04-60 |

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# FINAL ORDER

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OFFICE OF LEGAL SERVICES
DEC 29 2004
DIVISION OF
SPECIAL EDUCATION

Jack E. Seaman
Administrative Law Judge
611 Commerce Street, Suite 2704
Nashville, Tennessee 37203
615/255-0033
December 29, 2004

# FINAL ORDER

Cases Nos. 04-58 and 04-60

This order involves two consolidated due process hearing requests on behalf of two students that are attending school in an adjoining county to their county of residence because of a contract between the counties allowing students of either county to attend schools in the other county without paying any fees or tuition. After years of the contract being in effect, the county where these two students (petitioners) were attending (respondent school system) rescinded the contract to attend their schools without paying tuition and notified the students and/or parents of students from other counties that they would have to pay tuition if they wanted to continue to attend their schools.

Because these two students qualified for special education services, a due process hearing was requested for each student stating concern about disenrolling a special education student and terminating an IEP and/or denying free appropriate public education at the school closest to the student's home. Counsel for the school district and the students agreed that a formal due process hearing was not necessary to resolve this case because all relevant facts were stipulated and all issues were presented in motions for summary judgment. Counsel did decide that oral argument upon the motions was necessary and the scheduled due process hearing was cancelled and oral argument by phone was requested and scheduled. Oral argument was presented by counsel for the parents/students and counsel for the school system to the undersigned Administrative Law Judge by a phone conference call.

The issue for determination specified in pleadings by counsel for the parents/students is whether the respondent school system is a proper "LEA" or "school district" with respect to the petitioner children and the stated basis for

determination is whether the petitioner children have any right to continue attending the respondent school district even though their residences are outside of the respondent school county. The students have been attending this school because of a reciprocity agreement entered into between the counties which included these students. The asserted basis for deciding in favor of the petitioner students is their right as third party beneficiaries of the reciprocity agreement between the county of residence and the respondent school county.

The issue specified by counsel for the school system is whether the school system may refuse to allow petitioner students, special education students, to continue to attend the school system without paying tuition as a result of the school system canceling an agreement with the county of residence of the petitioner students to allow reciprocal intracounty transfer of students without paying tuition which had been in effect since 1989.

It is stipulated that the respondent county school system had entered into an agreement with the resident county in 1989 whereby students residing in either county could attend schools in the other county without paying tuition. Both petitioner students who have been attending school in the respondent school county are currently residents of the other county. Both qualify for receiving special education services, one as Other Health Impaired under IDEA and the other as Intellectually Gifted under Tennessee eligibility.

On July 6, 2004, the respondent county board of education voted to cancel the 1989 agreement with the resident county and also cancel similar agreements with other adjoining counties. The board of education notified students and/or parents of students of the termination of the contract and that it would be necessary to pay tuition to continue attending school in the county if you were not a resident.

Student petitioners filed a request for Due Process Hearing on September 3, 2004. Various students, including student petitioners, also filed an action in

Chancery court seeking to enjoin the school county from disenrolling students who were not county residents. The chancery court ruled that the students had the right to attend school in their county of residence and, because the school county required out of county students to pay tuition, the students had no right to attend the school county without paying tuition. However, the chancery court did note that there were also requested Federal and State special education administrative proceedings involving petitioner students and there was a "stay put" provision in the special education laws.

## ISSUE

The issue is whether a non resident county can require petitioner students to attend school in their county/school district of residence or pay tuition to continue attending the nonresident county school and whether such action by the school violates petitioner students' rights to free appropriate public education.

## DISCUSSION

Whether the decision is termed a granting of a Motion for Summary Judgment or a ruling on a Due Process Hearing conducted upon stipulation of facts and oral argument, the ruling is based upon the stipulations of facts which establish that there is no genuine issue as to any material fact. The students are residents of a county that adjoins the respondent county and their zoned school is in their county of residence which is the location of the school they would normally attend if there were no contract/agreement between the two counties providing otherwise. Also, there is no issue as to the appropriateness of the IEP for either student or as to whether it could be implemented in their county of residence. Changing a student's school and teacher(s) when the schooling is going well for the student can be difficult for the student and possibly the new teacher(s); however, no legal authority has been discovered which prohibits a student being returned to their local

school district school from a school in a neighboring school district that had been attended under authority of a contract between the two school districts when there is no issue as to whether the local school district can provide special education and related services in conformity with an IEP.

Tennessee statutes provide that the local school district which the student resides in the zone of is responsible for providing free public education. Title 49 of Tennessee Code Annotated is entitled "Education". Chapter 10 of Title 49 is "Special Education". T.C.A. §49-6-3003(b)(1) provides that tuition and fees may be charged by a county to pupils that do not reside in that county. T.C.A. §49-6-3104(a) and T.C.A. §7-51-908 clearly provide authority for one local education authority to make arrangements with another local educational authority for the education of a student. Other provisions of Chapter 10, specifically including §49-10-107 and §49-10-305, do grant one school district authority to contract with another school district to provide special education services.[1] The contract involved in this case was not specifically for provision of special education; however, there is no question but that the school districts can contract with other school districts to provide education and there is no prohibition of terminating or changing the contracts, especially when done midway between school years. The county of

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[1] § 49-10-107 provides that "Nothing in parts 1-6 of this chapter shall be construed to prevent a school district from providing educational, corrective or supporting services for children with disabilities by contracting with another school district to provide such services for children with disabilities from such other district."

§49-10-305 provide, in part, that "school district may enter into agreements with other districts or states to provide such special education; provided, that a child receiving special education outside the school district in which the child would normally attend public school shall continue to be the responsibility of such school district . . ."

residence school system (or local school district, local education agency, or LEA) remains responsible for the provision of education, including special education and related services, to these students. Generally speaking, the student's resident school district is responsible for identifying eligible students and providing FAPE. Multiple authorities, including T.C.A. §§ 49-10-101, 49-10-305(a), 34 C.F.R. 104.31-39 and 34 C.F.R. 300.340-350, lead to the conclusion that the residential county or other residential local school district is responsible for education of these students.

A question was raised about an issue of change in placement; however, it appears from the authorities that a change in placement "does not occur when a student is transferred from one school to another with a comparable program." Morgan v. Chris L., No. 94-6561 (6th Cir. January 21, 1997), 1997 U.S. App. LEXIS 1041, citing Tilton v. Jefferson County Board of Education, 705 F.2d 800 (6th Cir. 1983), cert. denied, 465 U.S. 1006 (1984). See. e.g. Morris by Morris v. Metropolitan Government of Nashville, 26 IDELR 159 (U.S.D.Ct.M.D.TN No, 3:96-1112, June 24, 1997) and Hale v. Poplar Bluff R-I School District, 280 F.3d 831, 834 (8th Cir. 2002) ("A transfer to a different school building for fiscal or other reasons unrelated to the disabled child has generally not been deemed a change in placement . . .."). Also, "least restrictive environment" does not mean that the student has any legal right to attend the school physically closest to their residence. The idea is for students to attend the school they would attend if they had no disability. These matters are addressed in statutes, regulations, and court decisions and the following decisions provide discussions and authorities concerning situations relative to that present in the instant case and indicate there is no basis for relief sought by petitioners. White v. Ascension Parish School Board, 343 F.3d 373(5th Cir. 2003); McLaughlin v. Holt Public Schools, 320 F.3d 663 (6th Cir. 2003); Wise v. Ohio Department of Education, 80 F.3d 177 (6th Cir. 1996).

Because of the responsibility of the school district of residence, if the student attends school in that school system and the IEP currently in effect is not implemented and/or there is an issue as to a new IEP developed by an IEP team at the new school, a due process hearing may be requested to address any appropriate issues; however, under the stipulated facts presented there is no change in placement triggering procedural requirements or an issue as to appropriate placement.

## FINDINGS AND CONCLUSIONS

The following findings and conclusions are In addition to the stipulated facts which are adopted and incorporated herein by reference.

1. The respondent school district/county does have authority to charge tuition for pupils residing out of district.

2. The question presented as to whether the students have rights as third party beneficiaries of the contract/agreement between the residential and respondent school districts (LEAs) is not a federal or state special education issue to be decided by an administrative law judge in an education due process proceeding. Additionally, it does appear that the contractual issue was tentatively decided by the Chancery Court and there is no legal basis for enforcing the prior contract on a third party basis..

3. The termination of the contract which results in a transfer if the students choose not to stay and pay tuition did not violate the students/parents' procedural rights or the right to a free appropriate public education because it was not intended to be a change in services provided and, although it will transfer the students from the county school system they have been attending to the school system for their residential area, it should provide educational services in the same school where

the students would receive educational services if the students had no disabilities or otherwise qualified for no special education services..

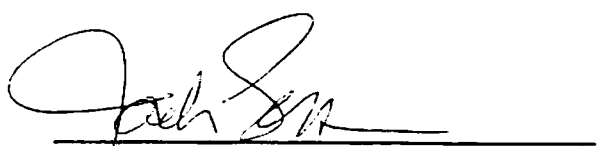
7. The school system for the residential area of the students is responsible for providing these students with a free appropriate public education.

## CONCLUSION

Based upon the stipulations, documents and pleadings filed, the oral argument of counsel, the applicable law, and the findings of the administrative law judge, it is hereby, ordered that the students/parents (petitioners) are not entitled to the relief sought and the respondent school system's motion for summary judgment is granted and the requests for due process proceedings in the two consolidated cases are hereby dismissed..

If either student transfers to a school in their residential LEA system and has an IEP that has been in effect at the school they are transferring from, the school transferred to shall provide services comparable to those provided for in the IEP until the new school either adopts the IEP previously developed or develops a new IEP.

ENTERED this 29 day of December, 2004.



JACK E. SEAMAN
ADMINISTRATIVE LAW JUDGE
611 Commerce Street, Suite 2704
Nashville, Tennessee 37203
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## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by facsimile and U.S. Mail to the following on this 29 day of December, 2004:

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