STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],

Petitioner,

vs. Case No. 15-3704E

PINELLAS COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on August 20, 2015, in Clearwater, Florida.

APPEARANCES

For Petitioner: Petitioner, pro se
(Address of record)

For Respondent: Heather J. Wallace, Esquire
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STATEMENT OF THE ISSUE

The issue in this proceeding is whether Respondent's alleged failure to secure the attendance of certain mandatory members of the subject child's Individual Education Plan ("IEP") team at a meeting conducted on May 28, 2015, resulted in a denial of a

free, appropriate public education ("FAPE") within the meaning of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq.; and, if so, to what remedy is Petitioner entitled.

PRELIMINARY STATEMENT

On June 24, 2015, the Child's father (hereinafter "[redacted]"), Petitioner in this cause, filed a Request for Due Process Hearing ("Complaint"). Respondent Pinellas County School Board promptly forwarded the Complaint to DOAH for further proceedings.

The Complaint alleges that, on May 28, 2015, an IEP meeting was held without the attendance of Petitioner's general and exceptional student education teachers, and, therefore, said meeting violated the IDEA. The sole relief set forth in the Complaint is for "an iep [sic] meeting within idea [sic] regulations should be held before the next school year starts."

The final hearing was held, as scheduled, on August 20, 2015. At the conclusion of the final hearing, the parties stipulated to submitting proposed final orders seven days after the filing of the Transcript. The final hearing Transcript was filed on September 1, 2015. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript.

On September 8, 2015, Respondent timely filed a Proposed Final Order, which was considered in preparing this Final Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged violation.

For stylistic convenience, the undersigned will use [redacted] pronouns in the Final Order when referring to the Child. The [redacted] pronouns are neither intended, nor should be interpreted, as a reference to the Child's actual gender.

FINDINGS OF FACT

1. The Child is currently [redacted] years old. [redacted] is a student who qualifies for exceptional student education ("ESE"). [redacted] documented primary exceptionality is [redacted], with additional exceptionality for [redacted].

2. On or about January 26, 2015, the Child began attending School A, a public school in Pinellas County, Florida. The Child was a [redacted]grade student during the [redacted] school year.

3. On April 21, 2015, the Child's IEP team met to amend the Child's IEP, [redacted]. Petitioner's Complaint does not assert any claims regarding the design or implementation of the April 21, 2015, IEP and accompanying [redacted].

4. The Child continued to attend School A for approximately one week following the April 21, 2015, IEP meeting. Thereafter, [redacted] did not return the Child to School A.[1/]

5. [redacted] subsequently requested that the Child be transferred to a different school.[2/] By correspondence dated May 11, 2015, [redacted] provided Lisa Grant, Respondent's executive director for ESE, a letter from a physician wherein the physician highly recommended the Child be transferred to a different school. Ms. Grant credibly testified that, after receiving said correspondence, the ESE student assignment office assigned the Child to a different school, School B.[3/] [redacted], an ESE supervisor, testified that School B was chosen because it "is the closest school to [School A] that offers the EBD programming for which [the Child] is eligible." Petitioner's Complaint is void of any allegation concerning placement determinations or any allegation that the Child is not being educated in the least restrictive environment.[4/]

6. On May 28, 2015, an IEP meeting was conducted at School B. Respondent's witnesses uniformly testified that the purpose of the meeting was to assist the Child's transition to School B by introducing [redacted] to the School B individuals who would be responsible for implementing the Child's IEP.[5/] Petitioner contends the purpose of the meeting was to discuss the Child's behavior, academics, as well as a possible school reassignment.

7. The undersigned finds that Petitioner's construction of the purpose of the meeting is entitled to more weight. The

"purpose of meeting" as noted on the actual May 28, 2015, IEP is "IEP Amendment." The computer-generated conference notes for May 28, 2015, provide that, "[t]eam met to review student progress, goals, and information." The Meeting Participants sheet attached to the IEP provide that the purpose of the meeting was "Annual Review, IEP Amendment." Respondent's position apparently stems from a "Pinellas County Schools Conference Report" attached to the IEP that provides the purpose is a "transfer meeting."[6/]

8. The May 28, 2015, meeting was attended by the Child's parent, [redacted], as well as the following individuals: 1) [redacted], a School B licensed clinical social worker; 2) [redacted], School B principal; 3) Dr. Lisa Grant, Respondent's executive director for ESE; 4) [redacted], a School B behavioral specialist; 5) [redacted], a School A behavioral specialist; 6) [redacted], a School A social worker; 7) [redacted], a School B special education teacher (EBD specifically); 8) [redacted], a third-grade School B regular education teacher; and 9) [redacted], an ESE supervisor for Area 1.

9. Respondent presented unrefuted evidence that [redacted] is the special education teacher at School B who would be responsible for implementing the Child's IEP.

10. Petitioner failed to present sufficient evidence for the undersigned to determine whether the Child is, or may be, participating in the regular education environment. The undersigned's independent review of the Child's current IEP documents that the Child does not receive his educational program in a regular education environment, but rather, in a separate "special class" located within the school. No evidence was presented concerning whether the Child has opportunities for "mainstreaming" during physical education, lunch, etc.[7/]

11. Assuming, arguendo, that the Child may be participating in the regular education environment at School B (as noted above), a School B third-grade regular education teacher, [redacted], attended the May 28, 2015, meeting. [redacted] has not previously taught the Child. The record is silent as to whether [redacted] may be the School B regular education teacher responsible for implementing a portion of the Child's IEP.

12. [redacted], the Child's special education teacher at School A, was not physically present at the meeting. At the beginning of the meeting, [redacted] announced that he believed [redacted] was a member of the Child's IEP team and needed to be present. [redacted] then advised those assembled that, "we can move on though." In response, Petitioner was advised that Respondent could certainly call and have [redacted] participate by phone, if

necessary. It is undisputed that [redacted] did not participate telephonically.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to section 1003.57(1)(b), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

14. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

15. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th. Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on the agency's compliance with the IDEA's procedural and substantive

requirements. Doe v. Alabama State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

16. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child's records and participate in meetings concerning their child's education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1), (b)(3), & (b)(6).

17. Local school systems must also satisfy the IDEA's substantive requirements by providing all eligible students with FAPE, which is defined as:

> Special education services that--(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity

> with the individualized education program required under [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(9).

18. "Special education," as that term is used in the IDEA, is defined as:

> [S]pecially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--
>
> (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings . . . .

20 U.S.C. § 1401(29).

19. The components of FAPE are recorded in an IEP, which, among other things, identifies the child's "present levels of academic achievement and functional performance," establishes measurable annual goals, addresses the services and accommodations to be provided to the child and whether the child will attend mainstream classes, and specifies the measurement tools and periodic reports that will be used to evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. "Not less frequently than annually," the IEP team must review and, as appropriate, revise the IEP. 20 U.S.C. § 1414(d)(4)(A)(i).

20. Among other members, the team that develops an IEP must consist of "[n]ot less than one regular education teacher of the child (if the child is, or may be, participating in the regular

education environment)"; and "[n]ot less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child." 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a)(2) & (a)(3); Fla. Admin. Code R. 6A-6.03028(3)(c)(2),(3).

21. In Board of Education of Hendrick Hudson Center School District v. Rowley, 458 U.S. 176, 206-07 (1982), the Supreme Court held that a two part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. As an initial matter, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Id. at 206-07. A procedural error does not automatically result in a denial of FAPE. See G.C. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to a free, appropriate public education, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 (2007).

Regular Education Teacher

22. It is undisputed that a regular education teacher, [redacted], attended the IEP team meeting. Petitioner contends that [redacted] was not an appropriate regular education teacher

because [redacted] is a prospective regular education teacher rather than [redacted] former regular education teacher. A Notice of Interpretation to the regulations implementing the IDEA provides as follows:

> The regular education teacher who serves as a member of a child's IEP team should be a teacher who is, or may be, responsible for implementing a portion of the IEP, so that the teacher can participate in discussions about how best to teach the child.

34 C.F.R. Part 300, App'x A, at 112 (2002)(emphasis added). An agency's interpretation of its own regulations carry controlling weight unless the interpretation is plainly erroneous or is inconsistent with the regulations themselves. Stinson v. United States, 508 U.S. 36, 45 (1993).

23. The interpretation of 34 C.F.R. §§ 300.321(a)(2) and (3), by several courts, has yielded varying results. See R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 940 (9th Cir. 2007)(interpreting 34 C.F.R. § 300.321(a) as not requiring the current teacher but requiring one who actually taught the child in question); L.R. v. Manheim Twp. Sch. Dist., 540 F. Supp. 2d 603 (E.D. Pa. 2008)(holding that composition of IEP team meeting that included general education teacher who had never taught the child constituted procedural violation of IDEA); A.H. ex rel. S.H. v. Colville Sch. Dist., 51 IDELR 279 (Wash. Ct. App. 2009)(no procedural violation of IDEA where prospective

general education teacher rather than former teacher attended IEP team meeting); Dirocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 U.S. Dist. LEXIS 434 at *52-53 (S.D.N.Y. 2013)(interpreting § 300.321(a) as requiring general education teacher to be a teacher who is or may be responsible for implementing portions of IEP and noting issue was whether subject teacher could have been responsible for implementation); and R.G. v. N.Y. City Dep't of Educ., 980 F. Supp. 2d 345 (E.D.N.Y. 2013)(holding that failure to include general education teacher who is or may be responsible for implementing a portion of the child's IEP impeded child's right to FAPE).

24. Here, Petitioner failed to present sufficient evidence concerning what role, if any, [redacted] would have played in implementing the Child's IEP. The record does establish that [redacted] attended the IEP meeting and agreed with the IEP. Applying the "is or may be responsible" standard, Petitioner failed to meet [redacted] burden of showing that [redacted] could not have been responsible for implementing portions of the Child's IEP. Under the heightened standard articulated in Napa Valley, Petitioner established that [redacted] had never actually taught the child, and, therefore, established a procedural violation of the IDEA.

25. Assuming, arguendo, that Petitioner established a procedural violation of the IDEA, Petitioner did not allege and

there is no evidence that the absence of the former general education teacher impeded the Child's right to FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. Accordingly, the undersigned concludes that any procedural violation did not result in a denial of FAPE.

Special Education Teacher

26. It is undisputed that, [redacted], the special education teacher at School B who would be responsible for implementing the Child's IEP, attended the subject IEP team meeting. "Decisions as to which particular [special education] teacher(s) or special education provider(s) are members of the IEP Team . . . are best left to State and local officials to determine, based on the needs of the child." 71 Fed. Reg. 46,670 (2006).

27. Applying the same analysis as noted above, even assuming Petitioner established a procedural violation based on the lack of attendance at the IEP meeting of a special education teacher who had actually taught the Child, Petitioner failed to allege or present sufficient evidence to establish that the same impeded the Child's right to FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits.

Accordingly, the undersigned concludes that any procedural violation did not result in a denial of FAPE.

ORDER

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

Petitioner's Complaint is denied in all respects.

DONE AND ORDERED this 15th day of September, 2015, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
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this 15th day of September, 2015.

ENDNOTES

[1/] The record fails to indicate whether the Child continued to receive any form of educational services after leaving School A.

[2/] The record fails to provide the specific date [redacted] requested the transfer.

[3/] The record lacks any evidence concerning the date of the reassignment decision or when and how Mr. S was notified of the same.

[4/] The undersigned's review of the conference notes attached to the May 28, 2015, IEP reveals that, "[[redacted]] continues to state

that [School B] is too far. [redacted] also states that [redacted] is not an appropriate placement." Petitioner's Complaint, however, does not assert any allegations regarding the placement of the Child.

[5/] The May 28, 2015, Amended IEP does not contain any revisions or changes to the IEP of April 21, 2015. Petitioner's Complaint does not assert any claims regarding the design of the May 28, 2015, Amended IEP.

[6/] If Respondent provided prior written notice of the meeting pursuant to Florida Administrative Code Rule 6A-6.03028(3)(b), which would have included the purpose, time, and location of the meeting, and who, by title or position, would be attending, the same was not received in evidence in this proceeding.

[7/] The Child's current IEP documents that the Child's total school week is 1,800 minutes, with 350 minutes with nondisabled peers. The only regular education setting documented on the current IEP is the related service of transportation, wherein the Child rides the bus to school with nondisabled peers.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or

b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).