

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,

Petitioner,

vs.

Case No. 13-3222E

BROWARD COUNTY SCHOOL BOARD,

Respondent.

_____/

FINAL ORDER

On October 9, 2013, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: ██████████, mother of Petitioner
(Address of record)

For Respondent: Barbara J. Myrick, Esquire
Broward County School Board
Office of the General Counsel
K.C. Wright Administration Building
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STATEMENT OF THE ISSUE

The issue is whether the individual education plans prepared in 2013 fail to provide Petitioner with a free appropriate public education (FAPE) in the least restrictive environment (LRE).

PRELIMINARY STATEMENT

By Request for Due Process Hearing filed August 21, 2013, Petitioner complained that her child's educational program fails to educate [REDACTED] in the LRE and asked that [REDACTED] be placed in a regular education classroom instead of a classroom with students with disabilities.

In its response filed September 3, 2013, Respondent stated that the child requires intensive education with direct [REDACTED] services and [REDACTED] ([REDACTED]) in an exceptional student education (ESE) placement to overcome deficits in academics, independent functioning, and communication.

At the hearing, Petitioner called one witness and offered into evidence no exhibits. Respondent called five witnesses and offered into evidence 27 exhibits: Respondent Exhibits 1-11, 13-20, 22, 24-29, and 32. The hearing was attended by Petitioner.

The parties did not order a transcript for filing in this case. The parties stated that they did not intend to file proposed final orders.

FINDINGS OF FACT

1. Petitioner was born on [REDACTED], [REDACTED]. [REDACTED] was born at full term, weighing [REDACTED] pounds, [REDACTED] ounces, in an uncomplicated delivery. [REDACTED] health has been good, and [REDACTED] has

suffered no unusual illnesses or injuries. [REDACTED] walked at [REDACTED] [REDACTED] and was toilet trained at [REDACTED].

2. As described by [REDACTED] mother and as was apparent at the hearing, Petitioner is a happy, friendly child. During a four and three-quarter hour hearing, interrupted by a 45-minute lunch break and four 5-10 minute breaks, Petitioner behaved remarkably well, even though [REDACTED] was sitting at the main table with no activities with which to occupy [REDACTED]. In response to two or three conversational questions from the Administrative Law Judge, Petitioner was appropriate, confident, and engaged in [REDACTED] responses.

3. For the 2011-12 and 2012-13 school years, and possibly half of the 2010-11 school year, Petitioner attended [REDACTED] classes at the [REDACTED] [REDACTED]. While attending [REDACTED], Petitioner received specialized instruction and related services due to [REDACTED] ESE eligibility of [REDACTED] ([REDACTED]). During the 2012-13 school year, the [REDACTED] [REDACTED] served 85 ESE students and 20 nonESE students.

4. The record does not describe these school years in much detail, although the 2012-13 school year was marked by a high turnover rate among Petitioner's classroom teachers. The first teacher was terminated when [REDACTED] failed to complete

satisfactorily [REDACTED] probationary period, and the next teacher may not have been a permanent replacement.

5. However, one change was at the request of the mother. From March 2013 through the end of school in the first week of June 2013, for one hour and fifteen minutes daily, Petitioner attended a higher-functioning class consisting of [REDACTED] students taught with a greater number of nonESE students. All of the students were [REDACTED]. Petitioner was included in this more challenging class while it participated in circle time, music/movement, and small group activities.

6. Petitioner appeared to struggle in this more challenging setting. During circle time, Petitioner sat next to the teacher aide due to [REDACTED] inattentiveness and constant fidgeting. Petitioner required more frequent prompts to stay engaged. Often, [REDACTED] tried to distract other students around [REDACTED]. When asked a question, Petitioner almost always repeated an answer [REDACTED] had heard from another student or smiled at the teacher and said something unintelligible.

7. During music/movement, Petitioner behaved similarly, requiring close supervision so that [REDACTED] would not distract the other students or run around the music room. During small group time, Petitioner, lacking permission, often grabbed the materials on the table and began randomly scribbling on the

paper while the other students awaited instructions. Petitioner needed much hand-over-hand assistance.

8. During the 2012-13 school year, Petitioner's educators had to plan for a couple of transitions that the child was about to undergo. Petitioner was about to lose [REDACTED] eligibility, which is unavailable once a child reaches [REDACTED] years of age, and [REDACTED] would be starting [REDACTED] at a new school for the 2013-14 school year.

9. On November 16, 2012, the IEP team prepared a reevaluation plan. The plan details Petitioner's present levels of performance and documents that [REDACTED] would be undergoing vision and hearing screenings in the near future. The plan notes the need for assessments of current levels of function in [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED], [REDACTED]. On November 26, 2012, the mother consented to the necessary assessments.

10. Petitioner's due process hearing request does not complain about procedural violations, so this final order will not consider procedural issues except to note that Respondent appears to have complied with all applicable procedural requirements, and the mother's testimony and argument at the hearing did not extend to claims of procedural violations.

11. On February 15, 2013, [REDACTED], a speech language pathologist, administered a test of articulation to Petitioner, normed to gender. By this time, Petitioner had passed [REDACTED] vision and hearing screenings. However, [REDACTED] sound errors were numerous, and [REDACTED] presented with decreased oral motor movements and slightly open mouth posture. The test revealed that Petitioner performed at an age equivalent of less than two years, even though [REDACTED] was [REDACTED] years and [REDACTED] months at the time of the test.

12. In May 2012, Petitioner had undergone a frenectomy to free [REDACTED] tongue and assist in the ability to articulate sounds. [REDACTED] mother attributes [REDACTED] current speech problems to the fact that [REDACTED] had this surgery less than one year prior to evaluations that led to the 2013 IEPs. The mother may be correct in attributing part of her child's speech problems to deficits that occurred prior to [REDACTED] surgery, as the child's speech language pathologist at the time noted that [REDACTED] began forming more sounds after the surgery. But, even if Petitioner's speech deficits were entirely due to [REDACTED] tongue-tied presurgical condition, the speech deficits are large enough presently to require intensive intervention to help Petitioner make up lost ground.

13. Petitioner likewise is experiencing significant deficits in receptive and expressive language--the former of

which would not have been affected by [REDACTED] presurgical condition. Testing was done in English and [REDACTED], as Petitioner is exposed to the latter at home, although the administrator of the test quickly determined that English is Petitioner's dominant language. Testing revealed significant language deficits. Petitioner functioned at the equivalent of two years and eight months in receptive language and one year and nine months in expressive language.

14. On March 7, 2013, [REDACTED], an OT therapist, conducted an OT evaluation. Petitioner performed reasonably well on much of this test, but [REDACTED] demonstrated that [REDACTED] required supervision and physical assistance in accessing classroom materials and physical assistance in opening meal containers, operating zippers and buttons for toileting and stringing beads. Petitioner also demonstrated that [REDACTED] could not use a tong to pick up small objects.

15. Additionally, Petitioner used a fist grip to scribble, and [REDACTED] required physical assistance to imitate lines, circles and letters and to use scissors. Petitioner was unable to attend to tasks for more than two minutes and required supervision to complete tasks; however, [REDACTED] showed no signs of tactile defensiveness. The OT therapist concluded that Petitioner suffers from deficits in fine motor skills, attention span, and sensory processing.

16. On March 4, 2013, Dr. [REDACTED], a school psychologist, met with Petitioner and administered various tests as part of an effort to prepare a psychological report. A test of cognition probably understates Petitioner's true ability due to cooperation and attention issues that emerged during testing. But the testing generally suggests performance at 1-2 standard deviations below the mean, which is consistent with at least a mild intellectual disability.

17. This testing also revealed Petitioner's lack of preacademic skills. [REDACTED] vocabulary and problem-solving skills are underdeveloped. When seizing a pencil with which to complete an assignment, Petitioner sometimes used whichever hand was closer to the test materials; with either hand, though, [REDACTED] wrote with an immature fistful grasp.

18. Based on the results from testing and surveys, Dr. [REDACTED] concluded that Petitioner needs to increase [REDACTED] ability to perform self-care skills independently, increase [REDACTED] ability to complete teacher-directed activities independently, and increase expressive and receptive language skills. Dr. [REDACTED] determined that Petitioner's teachers need to use multiple modalities in instruction, provide frequent drill and repetition, and close supervision.

19. On March 21, 2013, the IEP team met at a meeting attended by Petitioner's mother. The IEP team discussed the

findings of the evaluations discussed above. For each of the following areas, the March 2013 IEP details Petitioner's present levels of performance and sets goals, which given the child's present levels of performance, are appropriate. All goals are to be mastered by March 2014.

20. For curriculum and instruction, the March 2013 IEP states goals of identifying colors, pictures, objects, and shapes, with redirections to attend and verbal encouragement, in four of five chances. For social/emotional behavior, the March 2013 IEP states goals of waiting to be called upon, with visual cues, in four of five chances in small and large groups and of initiating peer interaction by appropriate speech during unstructured activities, with verbal prompts and encouragements, in four of five chances.

21. For independent functioning, the March 2013 IEP states goals of remaining in a designated area until completing an assigned, less-structured activity, with no more than two verbal prompts, four of five chances and of operating buttons and zippers, with no more than two physical prompts, four of five chances. For communication, the March 2013 IEP states goals of using an appropriate phrase for desired items, given one verbal model and one gestural cue, four of five chances; of expressing the "ing" ending for each of 15 verbs depicted in a picture four of five chances; of identifying spatial concepts when presented

with manipulatives during small group activities four of five chances; and of producing bilabial sounds in the initial, medial and final positions, given a picture cue and verbal prompt, four of five chances.

22. The March 2013 IEP provides direct language therapy for 60 minutes per week and direct speech therapy for 30 minutes per week. For the remainder of the 2012-13 school year, the March 2013 provides specialized instruction in academics, behavior, independent functioning, and communication for 1380 minutes per week. For the following school year, the March 2013 IEP provides intensive instruction in these areas for 1530 minutes per week. The March 2013 IEP also provides 30 minutes per week of OT. Lastly, the March 2013 IEP provides for no instruction or services with nonESE students; Petitioner's sole opportunity for interaction with nonESE students is in hallways and during lunch and recess.

23. The mother's dissatisfaction with Respondent's plan not to educate her child with nonESE peers led to this case and probably motivated her not to allow her [REDACTED] to attend school for the first month of the 2013-14 school year. On September 13, 2013, at the urging of the mother, the IEP team convened and prepared an interim IEP that provides that Petitioner will be educated with nonESE peers 8.33 percent of the time. This appears to have been achieved by allowing Petitioner to attend

regular education classes in special area, which is art, music, physical education, and media. After achieving this important revision to her [REDACTED] education plan, the mother allowed Petitioner to attend [REDACTED] assigned class at [REDACTED] [REDACTED] School, although obviously she still does not agree that Petitioner is receiving [REDACTED] education in the LRE.

24. At this time, Petitioner attends a cluster class, which is attended by nine [REDACTED] ([REDACTED]) students who are taught by one teacher and two aides. At the time of the hearing, which the parties agreed could address the appropriateness of the September 2013 interim IEP, even though it was prepared after the filing of the due process hearing request, the classroom teacher, who had been teaching Petitioner for only three weeks, had found [REDACTED] to be cognitively on par with [REDACTED] classmates. Although it is too early to make any definitive findings, it appears that Petitioner will make reasonable progress in this cluster class.

25. At this time, Petitioner's instruction could not appropriately take place in a placement with nonESE students because [REDACTED] needs too much supervision and intensive instruction to make up the above-described deficits, especially in the preacademic skills that are necessary for success in regular education elementary school. In a class free of nonESE students--and, more to the point, free of more challenging

instruction geared toward such students--Petitioner will be better situated to make up the above-described deficits faster, so that, at some point in the future, ■ could benefit from academic instruction geared toward nonESE students.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 1003.57(1), Fla. Stat., and Florida Administrative Code rule 6A-6.03311(9)(u).

27. Petitioner has the burden of proving by a preponderance of the evidence that Respondent is not educating Petitioner in the LRE. Schaffer v. Weast, 546 U.S. 49 (2005).

28. A parent may file a due process hearing request on any matter "related to the identification, evaluation, or educational placement of a student or the provision of FAPE to the student." Fla. Admin. Code R. 6A-6.03311(9)(a).

29. "FAPE" is specialized instruction and related services that, among other things, are provided in accordance with a student's IEP. Fla. Admin. Code R. 6A-6.03411(1)(p).

30. Specialized instruction is:

adapting, as appropriate to the needs of an eligible exceptional student, the content, methodology, or delivery of instruction to address the unique needs of the student that result from the student's disability or giftedness and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards

within the jurisdiction of the school district that apply to all students.

Fla. Admin. Code R. 6A-6.03411(1)(jj).

31. Section 1003.57(1)(e) requires that the education of ESE students take place in the LRE. The relevant part of this statute provides:

To the extent appropriate, students with disabilities, including those students in public or private institutions or other facilities, shall be educated with students who are not disabled. Segregation of exceptional students shall occur only if the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

32. Petitioner's challenge to the March 2013 IEP and September 2013 interim IEP does not raise any issues as to [REDACTED] ESE eligibility or even whether these IEPs provide FAPE. The sole issue, which is jurisdictionally "related" to FAPE, is whether the instruction of Petitioner outside of the presence of nonESE students--except in art, music, physical education, and media--satisfies Respondent's obligation to educate Petitioner in the LRE.

33. The LRE requirement is independent of FAPE. As such, the issue of LRE must be analyzed separately from the issue of whether an IEP is reasonably calculated to provide educational benefit to a child. Greer v. Rome City Sch. Dist., 950 F.2d 688, 695-96 (11th Cir. 1991).

34. Petitioner's mother was correct that LRE demanded that Petitioner attend art, music, physical education, and media with nonESE students. Nothing whatsoever in the record justifies [REDACTED] exclusion from [REDACTED] nonESE peers during these activities, so Respondent wisely revised the March 2013 to correct this defect.

35. At this time, however, Petitioner lacks the means to access [REDACTED] curriculum if academic instruction were presented to [REDACTED] and [REDACTED] nonESE peers simultaneously. Imposing greater demands on students, regular education lacks the intensity of the focused, multimodal repetitive instruction in a tightly supervised setting that Petitioner receives in [REDACTED] cluster class. The surest path to regular education in academics in the future is for Petitioner now to receive the kind of instruction that [REDACTED] needs, which is among ESE peers exclusively, so [REDACTED] can work on eliminating the deficits that prevent [REDACTED] greater inclusion in regular education at this time.

ORDER

It is ORDERED that the due process hearing request is denied.

DONE AND ORDERED this 11th day of October, 2013, in
Tallahassee, Leon County, Florida.

S

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
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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)(b), Florida Statutes (2011), 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).