

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████, )  
 )  
Petitioner, )  
 )  
vs. ) Case Nos. 10-10594E  
 ) 10-10595E  
HILLSBOROUGH COUNTY SCHOOL )  
BOARD, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

On March 11, 2011, an administrative hearing in these cases was held in Tampa, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Thomas M. Gonzalez, Esquire  
LaKisha M. Kinsey-Sallis, Esquire  
Thompson, Sizemore, Gonzalez,  
Hearing, P.A.  
201 North Franklin Street, Suite 1600  
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue in these cases is whether the Hillsborough County School Board (School Board) is providing a free and appropriate public education (FAPE) to ██████ (Petitioner).

PRELIMINARY STATEMENT

On December 13, 2010, [REDACTED], the Petitioner's foster mother, filed requests for due process hearings with the School Board. The School Board immediately forwarded the requests to the Division of Administrative Hearings (DOAH), asserting that the requests were facially insufficient. By Order of Consolidation dated December 14, 2010, the cases were consolidated and a Case Management Order was issued. On December 17, 2010, the Petitioner filed a Motion to Strike the School Board's Notice of Insufficiency. The School Board subsequently filed a Response and a Supplemental Response in opposition to the motion.

On January 31, 2011, a telephone conference was conducted to clarify the due process hearing requests, to identify the issues to be addressed at the hearing, and to identify dates upon which the parties would be available for hearing. As stated in the Notice of Hearing, the specific issues were identified as follows (1) Whether testing accommodations provided to the student should be discontinued at the request of the Petitioner's foster parent; (2) whether the School Board complied with occupational therapy requirements set forth in the current Individual Education Plan (IEP); (3) whether the School Board complied with speech therapy requirements set forth in the current IEP; and (4) whether services related to reading are providing educational benefit to the student. The Petitioner's

Motion to Strike the School Board's Notice of Insufficiency was denied.

On March 7, 2011, the parties filed a Joint Statement of Undisputed Facts that has been adopted and incorporated as necessary herein.

The hearing was conducted on March 18, 2011. At the hearing, the Petitioner presented the testimony of two witnesses and had exhibits 1 through 9 admitted into evidence. The School Board presented the testimony of six witnesses and had exhibits 17, 20, 51, 54, 59, 62, 66 through 68, 71 through 73, 75, 78, 80 through 81, 84 and 85 admitted into evidence.

At the conclusion of the hearing, the parties established a deadline of 14 days from the filing of the transcript to submit Proposed Final Orders. The Transcript was filed on March 18, 2011. The School Board filed a Proposed Final Order on April 8, 2011. On the same date, the Petitioner filed a document titled Closing Statement that has been treated as a Proposed Final Order.

On April 11, 2011, the Petitioner filed a Motion to Supplement the Record, and a letter essentially setting forth responsive findings related to the School Board's Proposed Final Order. On April 14, 2011, the Petitioner filed a second letter containing additional argument and documentation. On April 19, 2011, the School Board filed a Response to the Petitioner's

Motion to Supplement the Record. On April 20, 2011, the Petitioner filed a document titled "Rebuttal Argument" that appears to be a reply to the School Board's response. Upon review of the Motion and Response, and being otherwise fully advised in the premises, the Petitioner's Motion to Supplement the Record is hereby denied.

The deadlines established by Rule 6A-6.03311(11) (i), Florida Administrative Code (which requires that a Final Order be issued not later than 45 days following the school district's receipt of the parent's due process hearing request) were specifically extended to accommodate the parties' scheduling requests and to provide time for filing Proposed Final Orders.

#### FINDINGS OF FACT

1. At the time of the due process hearing, the Petitioner was a [REDACTED]-grade student enrolled at [REDACTED] Elementary School ([REDACTED]), a unit of the Hillsborough County, Florida, school district.

2. Based on age, the Petitioner should be in the [REDACTED] grade, but the Petitioner was retained for a year at the first grade level.

3. The Petitioner has a Specific Learning Disability (SLD). The Petitioner also has Post-Traumatic Stress Disorder (PTSD) and Impulse Control Disorder.

4. At all times material to this case, the Petitioner has received Exceptional Student Education (ESE) services.

5. At the time of the Petitioner's enrollment at [REDACTED] on March 23, 2009, an IEP was already in place, having been developed on March 18, 2009, during an enrollment at a different elementary school.

6. Historically, the Petitioner has received speech therapy services because of a speech-language exceptionality. The March 18, 2009, IEP provided the Petitioner with 15 minutes of speech-language therapy each week, and pursuant to the IEP, the Petitioner received those services at [REDACTED] during the applicable period of the IEP.

7. During the 2009-2010 school year, the Petitioner appeared to exhibit deficiencies in reading and writing skills. A referral was made to the [REDACTED] "Problem Solving Leadership Team" (PSLT).

8. The PSLT is a group of [REDACTED] staff members with expertise in assorted areas, who meet with a student's teacher, review relevant data, and attempt to identify the reasons underlying a student's lack of educational progress. Where appropriate, the PSLT may refer a student for a variety of screenings and propose classroom interventions intended to address the deficiencies.

9. In response to the Petitioner's reading and writing deficiencies, the PSLT reviewed relevant data, and implemented a "Response to Intervention" (RTI) process.

10. RTI process is a tier-based process. Tier 1 consists of the 90 minutes of core reading curriculum all [REDACTED] students receive on a daily basis. A student who does not make acceptable reading progress in Tier 1 receives additional instructional support as a Tier 2 student. If the support is not successful in achieving acceptable progress as the Tier 2 student, the student is yet provided additional educational support as a Tier 3 student.

11. Student reading skills are evaluated through the "Florida Assessments for Instruction in Reading" (FAIR) screening instrument that quantifies a student's progress in relation to same grade peers.

12. At the time the Petitioner's RTI was implemented, the Petitioner's FAIR data reflected a 47 percent probability of reading success for assessment period #1 and a 23 percent probability of reading success for assessment period #2.

13. Accordingly, the Petitioner began to receive Tier 2 support, consisting of participation in a reading group for 30 minutes three times weekly, and 30 minutes of additional reading-based student center activities per day.

14. At the end of the Tier 2 intervention period, the Petitioner was achieving only an average score of 77 percent on the weekly reading assessment, while the peer group averaged 90 percent.

15. The Petitioner thereafter began to receive Tier 3 instructional support, consisting of 30 additional minutes of daily, peer-mentored, reading time, and 30 additional minutes of weekly, adult-mentored, reading time. The Petitioner also began using an individualized, computer-based, reading program ("istation") for 30 minutes three times a week.

16. Although the Petitioner responded positively to the group and individual support, at the conclusion of the Tier 3 period, the Petitioner continued to exhibit difficulty in overall reading, including vocabulary, comprehension, and fluency. The PSLT, thereafter, considered potential reasons underlying the deficiencies.

17. The PSLT consideration included the Petitioner's early history of abuse and trauma, and the possibility that the Petitioner had an unidentified learning disability.

18. The PSLT included Dr. Michelle Durrance, the school psychologist. Dr. Durrance subsequently administered reading assessments and processing tests, and discovered that the Petitioner exhibited a cognitive processing deficit.

Dr. Durrance attributed the processing deficit to an unidentified learning disability.

19. On March 25, 2010, the [REDACTED] IEP team met to conduct an annual review of the Petitioner's IEP and to discuss re-evaluation requirements. The Petitioner's foster mother was present at the meeting.

20. At the conclusion of the meeting, the IEP team recommended that the RTI process continue at the Tier 3 level, that the existing speech therapy services be continued, and that Dr. Durrance conduct a psychological evaluation of the Petitioner.

21. On April 8, 2010, Dr. Durrance conducted the psychological evaluation of the Petitioner. Based thereon, she recommended that the Petitioner's Tier 3 RTI services continue and that the IEP team consider placement of the Petitioner in a small group classroom setting for more intense instruction in reading and writing. Dr. Durrance provided other suggestions as to specific interventions to address reading and writing difficulties, and to assist with a cognitive processing deficit.

22. On June 2, 2010, the [REDACTED] ESE department met to review the Petitioner's eligibility for services, and determined that the Petitioner met the criteria for services through the Specific Learning Disability (SLD) program. On the same date, the [REDACTED] IEP team met to review the Petitioner's existing IEP.

The services under the revised IEP were to commence on August 24, 2010, the beginning of the 2010-2011 school year. Dr. Durrance attended the IEP team meeting, and participated in a revision of the IEP to address the Petitioner's SLD. The Petitioner's foster mother attended the IEP meeting, but did not sign the IEP.

23. On September 8, 2010, at the beginning of the 2010-2011 school year, the IEP team met at the request of the Petitioner's foster mother. At the meeting, the Petitioner's foster mother presented the IEP team with a quantity of documents, and advised the IEP team that she would be filing a due process complaint against the School Board. She expressed concern about the Petitioner's academic progress, but expressed no specific disagreement with any specific portion of the IEP. She stated that she believed the Petitioner needed additional behavioral support. She noted that the Petitioner had personal hygiene issues. She requested that an occupational therapy observation be conducted.

24. The documents presented to the IEP team included various evaluative reports and recommendations of a number of professionals that had been consulted by the Petitioner's foster mother.

25. The Petitioner's foster mother has asserted that she considered the documents submitted at the September 8, 2010, IEP

team meeting to be her request that the School Board provide all the services identified therein.

26. The IEP team did not regard the documents provided by the Petitioner's foster mother as constituting a request for all the services identified therein.

27. There was no credible evidence presented at the hearing to establish that the recommendations set forth in the documents are required for the Petitioner to receive educational benefit from the instruction provided at [REDACTED].

28. At the September 8, 2010, meeting, the IEP team requested time to review the documents, and proposed to reconvene the IEP meeting after the review, with the participation of any additional and appropriate personnel, to consider any possible revisions to the IEP.

29. On October 1, 2010, the IEP team reconvened to address the documents provided at the September 8, 2010, meeting. The meeting resulted in a revised IEP that referenced and summarized the documents previously provided by the Petitioner's foster mother.

30. The prior IEP goals were revised and additional ESE services were identified.

31. The Petitioner's foster mother was present at the IEP meeting and was invited to provide input on development of the IEP. She specifically disagreed with the testing accommodations

included in the October 1, 2010, IEP and asked that they be discontinued. The School Board declined to discontinue the testing accommodations.

32. In order to assess the academic or educational progress of a student with a learning disability, testing accommodations may be provided to allow appropriate assessment without the results being adversely affected by the student's learning disability.

33. The October 1, 2010, IEP stated that the Petitioner would participate in classroom, district, and state assessments with these accommodations: flexible setting (small group), flexible scheduling (breaks as needed) and flexible presentation (test questions read as allowed; directions repeated or summarized).

34. The IEP team considered the Petitioner's learning disability, characteristics, and functional level when including the testing accommodations in the IEP.

35. The Petitioner presented no credible evidence that the accommodations are inappropriate, or that the accommodations have or will cause an inaccurate assessment of the Petitioner's educational progress.

36. The Petitioner's foster mother specifically objected to accommodations being provided as part of an "Accelerated Reading" (AR) program, in which the Petitioner has participated.

37. The AR program allows students to select library books that are read independently or in small groups. After a student completes a book, the student's reading comprehension is assessed through a computer-based, multiple-choice test.

38. The AR program is not part of the [REDACTED] curriculum. The Petitioner's AR reading comprehension scores are not used for grading purposes.

39. The Petitioner's reading comprehension scores were poor at the beginning of the school year. Teachers were unsure whether the Petitioner's test scores reflected a failure to read the books completely; whether the materials exceeded the Petitioner's reading level; or whether the test scores signified carelessness in test taking. In order to identify the cause for the poor scores, teachers read books with the Petitioner.

40. Because the Petitioner's foster mother objected to the provision of reading accommodations to the Petitioner, the teachers advised that they will discontinue reading books selected by the Petitioner in [REDACTED] AR program participation; however, the Petitioner's teachers declined to discontinue assisting the Petitioner by reading required instructional materials. The evidence failed to establish that any of the reading assistance was inappropriate.

41. Similarly, the School Board declined to discontinue the testing accommodations set forth in the IEP. No credible

evidence was offered to establish that the testing accommodations set forth in the IEP are inappropriate or that they should be discontinued.

42. The Petitioner's foster mother asserted that the School Board's employees have falsified test scores, but offered no evidence to support the assertion.

43. The Petitioner asserted that the School Board failed to comply with occupational therapy requirements set forth in the October 1, 2010, IEP. The evidence failed to support the assertion. The School Board has complied with the requirements of the IEP, related to occupational therapy.

44. The Petitioner's foster mother asserted that the School Board was required to provide an occupational therapy "evaluation." The conference summary written during the September 8, 2010, IEP stated that the "parent requested an OT observation" and that the "ESE teacher will follow through on implementing that request."

45. An "evaluation" is not an "observation." An evaluation includes testing of various skills. An observation includes viewing the student in the classroom setting, identifying problem areas, and offering related ideas to the student's teacher.

46. On September 10, 2010, an initial occupational therapy observation was conducted by one of the [REDACTED] occupational

therapists. On September 17, 2010, the occupational therapist conducted a second observation.

47. The occupational therapist contemporaneously logged the results of her observations when the classroom visits occurred, but did not summarize her observations prior to the October 1, 2010, IEP meeting. After the meeting had concluded, the occupational therapist prepared a summary of her observations.

48. Because the Petitioner's IEP team has not met again, the team has not reviewed the results of the observations. No evidence was presented that would warrant amendment of the IEP, based on the occupational therapy observations.

49. The Petitioner's foster mother has asserted that the Petitioner experiences "excessive drooling" causing communication and social problems that should be addressed by the IEP.

50. The School Board asserted that the Petitioner's speech can sound "slushy" because saliva collects in the corners of the mouth (identified as a "saliva pooling" issue).

51. The October 1, 2010, IEP stated that the Petitioner has "difficulty being understood by adults and peers." The goal of the IEP is for the Petitioner to "use self-monitoring skills to identify speech error with 80 percent accuracy over a 9-week period." The IEP stated that the Petitioner would "participate

in oral-motor exercises to decrease excess saliva," and assigned the responsibility for provision of such services to the [REDACTED] speech-language pathologist.

52. The relevant services have been provided on a weekly basis by the [REDACTED] speech pathologist during the duration of the IEP.

53. The speech pathologist testified without contradiction that the Petitioner has demonstrated increased proficiency in the referenced saliva reduction techniques, and that the Petitioner's communication skills have improved to the extent that the Petitioner can speak clearly enough to be understood. The most recent data indicated that the Petitioner was self-correcting speech errors with approximately 75 percent accuracy.

54. There was no evidence that the IEP does not appropriately identify the Petitioner's communication deficiencies, or that the services provided by the IEP are insufficient to address the deficiencies.

55. The IEP noted the Petitioner's deficiencies in reading fluency and comprehension of grade level material. The goal is for the Petitioner to read and comprehend materials on the current grade level with 80 percent accuracy as measured by classroom, district, and state assessments.

56. Under the IEP, the Petitioner's classroom teacher and ESE teacher were assigned the responsibility for implementation of the services and for documenting progress.

57. Both teachers participate in providing core curriculum reading and writing instruction for two classroom hours daily. Additionally, the Petitioner, with three other ESE students, participates in guided reading exercises led by the ESE teacher. The guided reading consists of 20-30 minute sessions during which the Petitioner reads grade-level material and the ESE teacher works on developing the specific reading skills referenced in the IEP.

58. The Petitioner also receives 30 minutes of additional reading instruction led by the classroom teacher, Monday through Thursday, through the [REDACTED] "Prepare to Win" program, including use of the computer-based "istation" program.

59. Various assessments indicated that the Petitioner's reading skills have improved. Absent evidence to the contrary, it is reasonable to presume that the improvement is related to the level of educational support being provided by the School Board.

60. The classroom teacher and ESE teacher assess student progress through the "Developmental Reading Assessment" (DRA) system. At the beginning of the school year, the Petitioner was reading at DRA level 20. As of February 2011, the Petitioner

was reading at DRA level 24, which, although improved, essentially reflected a reading level consistent with a student at the end of the second grade or beginning of the third grade.

61. The Petitioner's FAIR assessment scores for the current school year indicated progress in reading. The Fall 2010, assessment indicated a "success probability" of 9 percent and the Winter 2011 assessment indicated a "success probability" of 20 percent.

62. The Petitioner's FAIR reading comprehension scores indicated similar progress, improving from a score of 77 (percentile 7) to a score of 85 (percentile 16). A different comprehension assessment (the "Maze" score) improved from a score of 77 (percentile 6) to a score of 95 (percentile 37). The word analysis assessment score improved from a score of 69 (percentile 2) to a score of 82 (percentile 12). The "Lexile" measurement (related to library book reading levels) improved from a score of 385 to a score of 490.

63. The Petitioner's foster mother asserted that the comparison of the Petitioner's FAIR scores from the second grade to the third grade indicated that the Petitioner's performance had declined. The evidence established that the second grade FAIR assessment measured the likelihood of reading success and the third grade FAIR assessment was directed towards the likelihood of success on the Florida Comprehensive Assessment

Test (FCAT). Accordingly, although the FAIR scores could provide information related to the Petitioner's performance within the peer group, comparison of scores between the two years provided little significant information as to the individual student's progress.

64. The Petitioner's performance on the "Istation" also indicated educational progress. The "Istation Indicators of Progress" (ISIP) data reports of February 21, 2011, reflected progress in overall reading ability, including fluency, comprehension, and vocabulary. Spelling progress was minimal.

65. The Petitioner's reading comprehension level, although improved, remained below grade level. The deficiency may reflect the Petitioner's habit of reading too rapidly through material, and may be related to Impulse Control Disorder. The October 1, 2010, IEP stated that the Petitioner was "scheduled to begin medication for Impulse Control in the near future." The evidence failed to establish the efficacy of the medication to the Petitioner.

66. There have been no further amendments to the October 1, 2010, IEP and the Petitioner has continued to receive the services set forth therein.

#### CONCLUSIONS OF LAW

67. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this

proceeding. Section 1003.57(1)(b), Florida Statutes (2010), and Florida Administrative Code Rule 6A-6.03311(9)(u).

68. The Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1400, et seq. (IDEA), provides the right of all disabled children to FAPE. Local school districts must meet the requirements set forth by the state educational agency charged with adopting implemented rules in order to receive funding under IDEA for the provision of the specialized public education. The IDEA defines "free appropriate public education" at 20 U.S.C. 1401(9), as follows:

The term 'free appropriate public education' means special education and related 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, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 614(d) [20 USCS s. 1414(d)].

69. In order to satisfy the IDEA requirement of a free appropriate public education, the School Board must provide personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that

instruction. The School Board is not required to maximize the child's educational benefit or guarantee a specific level of success. The child is entitled to an individual plan of instruction that contains goals and objectives reasonably calculated to provide educational benefit. The issue at an administrative hearing is to determine whether the School Board has complied with statutory procedures, and then determine whether the individualized program developed through such procedures is reasonably calculated to enable child to receive educational benefits. Bd. of Educ. v. Rowley, 458 U. S. 176 (1982); JSK v. Hendry Cnty. Sch. Bd., 941 F.2d 1563 (11th Cir. 1991).

70. The nature and extent of services that must be provided to the Petitioner was addressed in School Board of Martin County. v. A. S., 727 So. 2d 1071, 1074 (Fla. 4th DCA 1999) as follows:

Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits provided under IDEA must be more than trivial or de minimis. J.S.K. v. Hendry Cnty. Sch. Dist., 941 F.2d 1563 (11th Cir.1991); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir.1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198. The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school

district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer.”  
Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir.1997) (citing Bd. of Educ. of Community Consol. Sch. Dist. 21 v. Illinois State Bd. of Educ., 938 F.2d at 715, and Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 (7th Cir.1988)).

71. The Petitioner bears the burden of proof in this case. Schaffer v. Weast, 546 U.S. 49 (2005). In this case, the burden has not been met. The evidence establishes that the School Board has met the requirement to provide a free and appropriate public education to the Petitioner.

72. The October 1, 2011, IEP is reasonably calculated to provide an educational benefit to the Petitioner, and the evidence establishes that the services identified within the IEP are being provided. The evidence also establishes that the Petitioner has made educational progress at [REDACTED].

73. As to the specific issues set forth in the Notice of Hearing, the evidence fails to establish that testing accommodations provided to the student are inappropriate, or that such accommodations have or will result in an inaccurate assessment of the Petitioner's educational progress.

74. There is no evidence whatsoever that employees of the School Board have falsified the Petitioner's test scores.

75. The evidence failed to establish that the School Board has failed to comply with the IEP provisions related to occupational therapy.

76. The evidence failed to establish that the IEP does not adequately address speech issues; that the services required by the IEP are not being provided; or that the Petitioner's verbal communication skills have not improved.

77. The evidence failed to establish that the IEP does not properly identify the Petitioner's reading deficiencies or provide appropriate services in relation thereto. The evidence establishes that the Petitioner is making progress in reading. There was no evidence presented that the School Board is unable to provide the services required to facilitate continued educational benefit to the Petitioner.

FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Petitioner's request for due process hearing is hereby DISMISSED.

DONE AND ORDERED this 13th day of May, 2011, in  
Tallahassee, Leon County, Florida.

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WILLIAM F. QUATTLEBAUM  
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Filed with the Clerk of the  
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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)(b), Florida Statutes (2009), 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), and Florida Administrative Code Rule 6A-6.03311(9)(w).