

Collier County School District
No. 07-1032E AND 07-1130E
Initiated by: Parent
Hearing Officer: Carolyn S. Holifield
Date of Final Order: May 25, 2007

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

█)
Petitioner,)
)
vs.)
) Case Nos. 07-1032E
COLLIER COUNTY SCHOOL BOARD,) 07-1130E
)
Respondent.)
_____)
)

FINAL ORDER

Pursuant to notice, a hearing was held in this case in Naples, Florida, on April 9, 10, and 11, 2007, before Carolyn S. Holifield, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: █
(Address of record)

For Respondent: Richard W. Withers, Esquire
Collier County School Board
5775 Osceola Trail
Naples, Florida 34109-0919

STATEMENT OF THE ISSUES

The issues for consideration in this case are^{1/}:

(1) Whether Petitioner [REDACTED] is eligible for services under the Individuals with Disabilities Education Act (IDEA).

(2) Whether Respondent, Collier County School Board (School Board or Collier County School Board), violated Petitioner's procedural rights by:

a. Not including Petitioner in a meeting of School Board personnel where a decision was made regarding Petitioner's eligibility for IDEA services.

b. Not including Petitioner in a meeting of School Board personnel at which a decision was made not to conduct an Independent Education Evaluation (IEE).

(3) Whether the School Board failed to develop an appropriate Education Plan (EP) and provide appropriate accommodations to Petitioner under the gifted student program.

(4) Whether the School Board should have conducted an IEE and whether the cost of Petitioner's IEE should be reimbursed by the School Board.

PRELIMINARY STATEMENT

On February 26, 2007, Petitioner, [REDACTED] through [REDACTED] [REDACTED] [REDACTED].filed a Request for Due Process Hearing with the School Board. The request was filed with the Division of Administrative Hearings (DOAH) on February 28, 2007, and assigned DOAH Case No. 07-1032E. The request alleged that the

School Board had failed to provide a free appropriate public education (FAPE) in the design and implementation of Petitioner's Individual Education Plans (IEP) and also challenged the decision that Petitioner was no longer eligible for services as a student with a disability. Many of these allegations were similar to those previously raised in , [REDACTED] due process hearing requests in DOAH Case Nos. 05-1539 and 05-0785E (Administrative Law Judge William Quattlebaum), 05-4061E (Administrative Law Judge Daniel Manry), and 06-5088E (tried in a three-day hearing at which the undersigned presided).

[REDACTED] on behalf of Petitioner, filed a second due process request on March 2, 2007, alleging that the School Board refused to conduct an IEE. The School Board forwarded the second request to DOAH on or about March 9, 2007, and the matter was assigned DOAH Case No. 07-1130E. DOAH Case Nos. 07-1032E and 07-1130E were consolidated pursuant to the Order of Consolidation issued on March 12, 2007.

These cases were initially assigned to Administrative Law Judge Bram Canter, but were subsequently transferred to the undersigned prior to hearing.

At hearing, Petitioner testified on [REDACTED] own behalf and presented the testimony of, [REDACTED], [REDACTED], and Robert Ouaou, Ph.D., a neuropsychologist. Petitioner's Composite Exhibit 2 was offered and admitted into evidence. The School Board presented the

testimony of ■■■ of Petitioner, and the following employees of the School Board: (1) Sarah Collum (formerly Sarah Cammaratta), a school psychologist; (2) Larry Ruble, coordinator of psychological services; (3) Van Hylemon, Ph.D., a neuropsychologist for the school district; (4) Valerie Rowan, an exceptional student education (ESE) program specialist; (5) Dr. Victoria Sartorio, director of ESE; (6) Carl Defurio, assistant principal of curriculum and instruction; (7) John Stanley, Jr., an ESE inclusion teacher; and (8) Susan Ashbridge, coordinator of the gifted education program. The School Board's Composite Exhibit 2 was offered and admitted into evidence.

Also, the Transcript of the proceeding in DOAH Case No. 06-5088E, and the exhibits from that proceeding (Petitioner's Composite Exhibit 1 and the School Board's Composite Exhibit 1) were offered and accepted as evidence in this proceeding.

At the conclusion of the hearing, the parties agreed to file proposed final orders one week after the hearing Transcript was filed. The Transcript was filed on April 25, 2007. Both parties filed Proposed Orders on May 2, 2007, which have been considered in preparation of this Final Order. A post-hearing conference was conducted on May 17, 2007, and the time for issuance of the final order was extended.

On May 10, 2007, Petitioner filed a Motion to Enforce Stay Put Individual Education Plan and an Amended Motion to Enforce Stay Put Individual Education Plan. On May 14, 2007, the School Board filed a response to the Amended Motion to Enforce Stay Put Individual Education Plan. Upon due consideration of the foregoing, Petitioner's Amended Motion to Enforce Stay Put Individual Education Plan is denied. See 34 C.F.R. § 300.508(d)(3)^{2/} and 34 C.F.R. § 300.511(d).^{3/}

FINDINGS OF FACT

1. Petitioner, [REDACTED], is an [REDACTED] who is currently in the [REDACTED] grade at [REDACTED]. Except for the fall semester of the 2006-2007 school year,^{4/} Petitioner has attended [REDACTED] since the 2003-2004 school year, since [REDACTED] was in ninth grade.

2. Petitioner is scheduled to graduate with a standard diploma from [REDACTED] in May 2007. At the time of this proceeding, Petitioner's weighted GPA was 4.37 and [REDACTED] unweighted GPA was 3.15, and [REDACTED] was ranked in the top 20 or 25 percent of [REDACTED] class of about 400.

3. Petitioner is a gifted student and, as such, is qualified to receive gifted services pursuant to Florida Administrative Code Rule 6.03019.

4. When Petitioner first enrolled in the Collier County School District as a sixth grader, [REDACTED] was identified as a student with a specific learning disability (SLD). Based on

this disability, Petitioner was determined to be eligible for and received special education and related services.

5. During the course of [REDACTED] education in the Collier County School District and through the 2005-2006 school year, Petitioner has received special education and related services as a student with a learning disability pursuant to IEPs.

6. Petitioner's IEPs also included the gifted services that were provided to Petitioner.

The School Board Re-Evaluation

7. In August 2005, the School Board determined that a re-evaluation of Petitioner should be conducted due to [REDACTED] concerns that Petitioner was not receiving a FAPE. Initially, [REDACTED]. refused to grant consent for the re-evaluation, but she eventually consented.^{5/}

8. The School Board conducted a re-evaluation of Petitioner in accordance with the Procedures for Re-evaluation of Students with Disabilities and applicable statutes, rules, and regulations. The re-evaluation included a psychological evaluation and an occupational therapy evaluation. Instruments used in the psychological evaluation included a standardized test of intellectual functioning (an Intelligence Quotient (IQ) test), an individually administered evaluation of academic achievement, and behavioral assessments.

9. Sarah Collum, a school psychologist, conducted the psychological evaluation of Petitioner in September 2005. The specific tests used for the re-evaluation included the Wechsler Adult Intelligence Scale III, Third Edition (WAIS-III); the Woodcock-Johnson III, Tests of Cognitive Ability (WJ-III COG); the Woodcock-Johnson III, Tests of Achievement (WJ-III ACH); and the Developmental Test of Visual-Motor Integration (VMI). These tests are technically sound and designed to identify the student's strengths and weaknesses and learning disabilities.

10. Ms. Collum administered the WAIS-III and the WJ-III COG to Petitioner. She also reviewed the findings of the Behavior Assessment System for Children based on responses provided by Petitioner, ■■■, and some of ■■■ teachers. Valerie Rowan, the ESE program specialist at BCHS, administered the WJ-III ACH to Petitioner; the occupational therapist administered the VMI. The results of all the tests were included in the Psychological Evaluation report written by Ms. Collum.

11. Petitioner's scores on the intelligence and achievement tests referenced in paragraph 9 showed a significant discrepancy between ■■■ measured IQ and ■■■ achievements and reflected a processing deficit as defined in Florida Administrative Code Rule 6A-6.03018(2)(c)3.^{6/} Specifically, the scores showed that there is a significant difference between Petitioner's measured intelligence, which falls within the high

average range, and ■■■ basic reading and math calculation skills, both of which fall in the average range. Even though Petitioner's scores in basic reading and math calculation skills are in the average range, those scores are significantly lower than ■■■ IQ.

12. The psychological evaluation clearly indicated that despite the significant difference in ■■■ measured intelligence and basic reading and math calculation skills, Petitioner's achievement is at the average to high average achievement levels. For example, Petitioner scored within the high average range on the reading comprehension and math reading clusters.

13. Petitioner's scores on the WJ-III COG, revealed that ■■■ had deficits in the area of visual matching. The Psychological Evaluation report noted that the visual matching section of the test measured an aspect of cognitive efficiency-- the speed at which the student can make visual symbol discriminations. (This area relates to completion of work and pencil-paper tasks.) In the visual matching sub-test, Petitioner scored in the low average range compared to others his age.

14. The VMI is used to measure the visual motor integration skills and requires students to copy a variety of forms using pencil in a prescribed area in a booklet. The

drawings are scored based on developmental expectations.

Petitioner scored within the low average range on this test.

15. In the Psychological Evaluation report, Ms. Collum recommended that the "MDT [multidisciplinary team] be convened to discuss the results of the evaluation to determine if Petitioner is eligible for Exceptional Student Education services."

Meetings to Explain Results of Re-Evaluation

16. On or about October 20, 2005, [REDACTED] met with Ms. Collum; Larry Ruble, coordinator of psychological services; and Elizabeth Keech, the occupational therapist who conducted Petitioner's occupational therapy evaluation. The purpose of this meeting was to allow Ms. Collum and Ms. Keech to explain to [REDACTED] the results of the October 2005 psychological evaluation.

17. After the comprehensive re-evaluation was completed and prior to November 4, 2005, there was a meeting of school personnel. That meeting was attended by Todd Allman, the ESE coordinator; Ms. Collum; Ms. Rowan; and Carl DeFurio, the assistant principal for curriculum.

18. The meeting of school personnel referenced in paragraph 17 was to review the Psychological Evaluation report and the agenda for the November 4, 2005, IEP meeting. During the meeting, Ms. Collum explained the report and the scores noted therein so that school personnel could better understand

Petitioner's performance on the tests administered as part of the re-evaluation. During this meeting, there was some discussion about Petitioner's grades and [REDACTED] current performance in school, as well as [REDACTED] score on the FCAT. Mr. Allman also reviewed the agenda for the November 4, 2005, meeting.

19. There was no decision made at the meeting of school personnel discussed in paragraph 18 and 19 regarding Petitioner's continued eligibility for special education and related services as a student with SLD.

November 2005 Meeting of IEP Team

20. The IEP team met on November 4, 2005 (November 4 meeting), to discuss Petitioner's re-evaluation and consider [REDACTED] eligibility/ineligibility for ESE services. The meeting was properly noticed and attended by Petitioner, his mother, and all appropriate school personnel. Also, a parent advocate appeared by telephone at [REDACTED] request.

21. During the November 4 meeting, there was discussion concerning the psychological evaluation, the occupational therapy evaluation, Petitioner's grades, and [REDACTED] scores on standardized tests. The IEP team also considered the accommodations that were in place for Petitioner under [REDACTED] current IEP. While there was a significant discrepancy between Petitioner's measured IQ and [REDACTED] achievement, the IEP team

determined that Petitioner was no longer eligible for special education and related services as a child with a disability.

22. After reviewing and considering the psychological evaluation and Petitioner's current level of functioning in the classroom and other relevant information, the IEP team determined that Petitioner no longer met the criteria for ESE services, but instead met the criteria for dismissal from the program. This decision was appropriate and supported by Petitioner's success in the general education curriculum without special education supports as reported by ■■■ teachers in the November 4 meeting.

23. The IEP team's decision to dismiss Petitioner from the ESE program was based on several considerations. First, even though the psychological evaluation showed that Petitioner's academic achievement in basic reading and math calculation skills is significantly below ■■■ level of intellectual functioning, all Petitioner's academic and intellectual tests reported in the re-evaluation were at or above average. Second, Petitioner was having success in ■■■ regular classes, most of which were honors and advanced placement (AP) courses, without special education support. (Honors courses provide above-grade level work in the subject area; AP courses are college-level courses for exceptionally high achieving and motivated students.) At the November 4 meeting, Petitioner's teachers

reported that at that time, Petitioner had no grade lower than B. Next, the team reviewed Petitioner's records from ninth and tenth grades and found that [REDACTED] had earned grades of A's and B's. Finally, the IEP team determined that Petitioner had made the highest scores on most of the standardized tests required for high school graduation in Florida.

24. Petitioner received and utilized the accommodation of extended time (time and a half) on all standardized tests, including the Collier Writes, the FCAT, the SAT, the ACT, and the AP exams. Petitioner also utilized the accommodation of a scribe for the writing portion of the FCAT.

25. In November 2005 (2005-2006 school year), when Petitioner was determined to be ineligible for ESE services, [REDACTED] was taking two honors courses and four AP courses. That school year, Petitioner successfully completed these courses, earning a final grade of "B" in honors Spanish, AP calculus, and AP English; and a final grade of "C" in AP chemistry, honors chemistry, and AP American History.

26. While Petitioner earned good grades in 11th grade (the 2005-2006 school year), they are not as high as those [REDACTED] earned in ninth and tenth grades. The reason for this appears to be related to the marked increase in the number of honors and AP courses Petitioner took in the 11th grade. Petitioner testified that the classes [REDACTED] took in 2005-2006 were much more

challenging than those ■■■ took in ■■■ first two years of high school. This is evidenced by the fact that in ninth grade, Petitioner took no AP or honors courses; and in tenth grade, ■■■ took one honors course and no AP courses.

27. Another reason Petitioner's grades may have gone down when ■■■ was in the 11th grade and taking six AP and/or honors courses, was that ■■■ worked on school nights. Petitioner testified at this proceeding that when ■■■ changed ■■■ work schedule to only weekends, ■■■ grades improved because ■■■ had more time to do homework and school assignments.

28. Even with the decline in Petitioner's grades in the 11th grade, Petitioner's performance in ■■■ classes throughout ■■■ high school years has met or exceeded the levels expected by the School Board.

29. The School Board's Special Programs and Procedures for Exceptional Students manual sets forth the criteria for dismissing a student who previously qualified for ESE services as a child with a SLD. According to the prescribed criteria, a student meets the criteria for dismissal from the program, if after following the re-evaluation process, the IEP team determines that the student (1) is successful in the general curriculum without special education support; or (2) the disability no longer interferes with the student's ability to participate in the education program.

30. Based on its review and consideration of the psychological evaluation, Petitioner's academic records, and comments of [REDACTED] teachers, the IEP team, over [REDACTED] opposition, reasonably determined that Petitioner met the criteria for dismissal from the ESE program.

31. Immediately after the November 4 meeting in which the IEP team determined that Petitioner no longer met the criteria for ESE services, [REDACTED] filed a Request for Due Process Hearing which challenged several IEPs and the staffing committee's determination of Petitioner's ineligibility for special education and related services^{7/} and the School Board's reliance on its re-evaluation. The request was transmitted to DOAH and assigned Case No. 05-4061. During the pendency of Case No. 05-4061, Petitioner's August 12, 2005, IEP remained in effect and was implemented as the "stay-put" IEP.

Request for Independent Educational Evaluation

32. On November 4, 2005, after the IEP team determined that Petitioner was ineligible for ESE services, [REDACTED] requested an IEE for Petitioner. In response to that request, the School Board issued a prior written notice dated November 8, 2005, advising [REDACTED] that it was refusing [REDACTED] request because its re-evaluation was appropriate.

33. In the prior written notice, the School Board indicated that it would go to due process on the issue of the

appropriateness of its re-evaluation. However, due to the implementation of the "stay-put" IEP, during the pendency of a due process hearing initiated by ■■■, on ■■■ behalf, the issue of the appropriateness of the School Board's evaluation was not addressed prior to the instant proceeding.^{8/}

34. The prior written notice also indicated that parents have a right to obtain an IEE at their own expense and that it would be considered by the School Board. Finally, the notice indicated that a list of qualified evaluators was attached, but that parents were not limited to the listed evaluators.

35. Soon after the School Board refused to provide an IEE, ■■■ arranged for Dr. Robert Ouaou to evaluate Petitioner. ■■■ intended for this evaluation to serve as an IEE.

Results of the Independent Educational Evaluation

36. Dr. Ouaou conducted a neuropsychological evaluation of Petitioner in December 2005 and January 2006. The instruments used for this evaluation included a Neurobehavioral History and Interview Form, a Clinical Interview Form for ADHD Patients, Conner's Continuous Performance Test, the California Verbal Learning Test and the MMPI-II. Dr. Ouaou's did not administer achievement tests or tests of intellectual functioning. Rather, he reviewed and reasonably relied on the results of the WAIS-III, the WJ-III COG and WJ-III ACH in the psychological evaluation report written by Ms. Collum.

37. Dr. Ouaou concurred with the conclusion in the psychological evaluation report prepared by Ms. Collum. In his report, Dr. Ouaou stated, "[T]he results of those tests are well summarized by the Office of Student Services." He agreed with Mrs. Collum's report as follows: (1) Petitioner demonstrated a significant discrepancy between [REDACTED] verbal IQ, which was in the superior range, and [REDACTED] performance IQ, which was in the high average range; (2) Petitioner demonstrated a significant discrepancy between [REDACTED] full scale IQ and basic reading and math calculation skill clusters; and (3) Petitioner demonstrated low average visual-motor integration and visual-matching skills.

38. In reviewing Petitioner's scores on the subtests on the WAIS-III (digital symbol coding, digit span, letter-number sequencing, and symbol search), Dr. Ouaou concluded that Petitioner's "poor performance" on the subtests demonstrated a pattern of test results consistent with Attention Deficit Hyperactivity Disorder (ADHD). Dr. Ouaou also concluded that there was a difference in Petitioner's scores on the Verbal Comprehension Index and the Working Memory Index and described it as a "striking finding" that "occurs in subjects with reading disabilities and is well-documented in research literature." Finally, Dr. Ouaou's report noted that the presence of a reading disability is confirmed by the significant difference between

Petitioner's Perceptual Organization Index and Processing Speed Index.

39. Dr. Ouaou provided no support for the conclusions he reached based on a comparison of Petitioner's scores on the various subtests or indexes on the WAIS-III (i.e., reading disability).

40. In the Addendum to the Neuropsychological Evaluation, Dr. Ouaou recommended several "accommodations for education." Dr. Ouaou testified that the accommodations that would be helpful to Petitioner included extra time for examinations, take home examinations, preferential seating in front of the class, a note-taker, and a reduced course load.

41. Dr. Ouaou's evaluation did not consider, or otherwise take into account, Petitioner's grades, the level of courses ■■■ was taking, or ■■■ performance on standardized tests (i.e., FCAT, FCAT Writes, Collier Writes) required for high school graduation.

42. A careful review of Dr. Ouaou evaluation reveals no information about how Petitioner is progressing in the general education curriculum and if ■■■ is benefiting from the education.

43. ■■■ paid \$150.00 for the IEE. The remainder of the cost for the IEE was paid by ■■■ insurance.

Eligibility/Staffing/Resolution Meeting in March 2006

44. On March 16, 2006, a meeting was held to consider Petitioner's continued eligibility for ESE services in light of the IEE. This meeting was attended by Petitioner, [REDACTED], and John Sommer, Petitioner's attorney. School personnel attending the meeting were John Stanley, Carl DeFurio, Allman Todd, Ms. Collum, Susan Ashbridge, Valerie Rowan, Dr. Katrina Nedley, and Richard Withers, the School Board attorney.

45. Dr. Ouaou's neuropsychological evaluation provided no information that warranted a change in the decision of November 2005 that Petitioner was no longer eligible for special education services. The key component absent from Dr. Ouaou's evaluation, but required to make this determination, was information about [REDACTED] level of performance in school. Therefore, Dr. Ouaou's evaluation was insufficient to assist the IEP team in reaching an eligibility/ineligibility decision.

46. Based on the re-evaluation and review of other pertinent documents/information, Petitioner was appropriately found to meet the criteria for dismissal from the ESE program. After it was determined that Petitioner met the dismissal criteria as a student with a SLD, the IEP team discussed and considered the possibility that Petitioner might be qualified for ESE services under the category, "Other Health Impaired [OHI]" based on [REDACTED] diagnosis of ADHD. This diagnosis was made

when Petitioner was in elementary school. Dr. Ouaou's evaluation and the School Board's evaluation indicated evidence of attention problems.

47. Nonetheless, after reviewing the criteria for classifying a student based on the criteria for OHI eligibility, Petitioner did not meet the eligibility requirements. This decision was reached after determining that, despite the ADHD diagnosis, Petitioner was successfully functioning in school as evidenced by the level of courses ■■■ took (honors and AP), ■■■ grades in those courses, and ■■■ scores on the state-required standardized tests required for graduation. Therefore, any attention problems Petitioner may have been having were not negatively impacting ■■■ academic performance.

48. The OHI classification was also considered for Petitioner based on findings in the occupational therapy evaluation. ■■■ believed that as a result of some of those findings, Petitioner was eligible for occupational therapy. However, Petitioner did not meet the eligibility requirements for occupation therapy services. See Fla. Admin. Code R. 6A-6.03025(2).

49. The School Board issued a Prior Written Notice based on the March 16, 2006, meeting to Petitioner's parents stating that IDEA eligibility was refused because the re-evaluation indicates that special education and related services are no

longer needed. The notice also indicated that both SLD and OHI diagnoses were considered and discussed, but were not adopted because Petitioner's degree of disability does not require special education services under IDEA.

50. The Prior Written Notice related to the March 16, 2006, meeting, advised Petitioner's parents that [REDACTED] continued to be eligible for gifted services and that "a 504 Committee can be scheduled to discuss 504 eligibility." However, there is no indication that such meeting was ever convened by the School Board and/or requested by Petitioner or [REDACTED] parents.

Educational Plan

51. When Petitioner returned to [REDACTED] in or about mid-December 2006, [REDACTED] was in "stay-put," until the end of January 2007, when [REDACTED] mother dismissed the appeal in DOAH Case No. 05-4061E.

52. A meeting was scheduled on or about February 27, 2007, to develop an EP for Petitioner, after [REDACTED] was found ineligible for special education and related services as a child/student with a disability. The meeting was attended by Carl DeFurio, Susan Ashbridge, the gifted coordinator, [REDACTED] and Petitioner. Petitioner was unable to stay for most of the meeting because [REDACTED] had lacrosse practice. During the meeting, [REDACTED] asked for "IDEA-type" services and accommodations" to be included in Petitioner's EP. When it was explained to [REDACTED] that this could

not be done, ■■■ persisted in ■■■ request to include ESE services and accommodations in the EP that had been included in Petitioner's IEP. However, because Petitioner was no longer eligible for ESE services under IDEA, the services and accommodations provided to ■■■ under IDEA were not included in the EP.

53. The credible testimony of Ms. Ashbridge, the coordinator to the School Board's gifted program, is that the EP is a vehicle for the delivery of services to gifted students, but does not include or list accommodations. According to Mrs. Ashbridge, if a gifted student needs accommodations because of certain impairments/disabilities (i.e. processing issues), the accommodations are not allowed in the EP, but must be included in an IEP or 504 Plan.

54. The School Board never developed an EP for Petitioner that included any of the "IEP-type services or accommodations" ■■■ requested. The inclusion of such services and accommodations in an EP is not appropriate and, thus, were properly not included in Petitioner's EP.

Petitioner's Current Status and Future Plans

55. Petitioner is a highly motivated student and genuinely desires to do well in school and earn good grades. The record in this case established that Petitioner has been successful in accomplishing that goal.

56. During [REDACTED] high school career, Petitioner has chosen to take some of the most challenging courses offered (i.e., AP science and math courses, including chemistry, physics, and statistics) at [REDACTED]. While taking these classes, Petitioner has achieved or exceeded the School Board's expectations.

57. Petitioner is on track to graduate in May 2007. At the time of this proceeding, Petitioner was ranked in the top 20 or 25 percent of [REDACTED] class of about 400 students. After graduating from high school, Petitioner plans to attend college.

58. Petitioner has found that the "ESE supports" [REDACTED] has received throughout [REDACTED] education have been helpful. However, [REDACTED] acknowledged that [REDACTED] still has some organizational problems and other issues. Accordingly, Petitioner believes that some of the accommodations and services previously offered and/or provided to [REDACTED] will allow [REDACTED] to be successful in [REDACTED] future academic endeavors. When [REDACTED] enrolls in college, Petitioner intends to utilize the accommodations for which [REDACTED] may be eligible.

59. It is not imperative for Petitioner to be "classified" as ESE eligible in order for [REDACTED] to receive accommodations.^{9/} In fact, a student's eligibility for ESE services terminates upon graduation from high school with a regular or standard high school diploma. See 34 C.F.R. § 102(a)(3)(i).

60. Many of the accommodations recommended for Petitioner by Dr. Ouaou and which Petitioner would like continued (i.e., extended time on tests) may be provided outside of IDEA. As has been discussed and testified to by school personnel, a 504 plan may be an appropriate vehicle to provide any necessary accommodations to Petitioner.

61. The evidence clearly shows that Petitioner has had a very successful academic career while attending school in the Collier County School District. The special education and related services provided to Petitioner, as well as the combined efforts of Petitioner, ■■■ parents, and school staff enabled ■■■ to progress well through the general education program.

62. The evidence at hearing clearly established that Petitioner's performance in high school indicates that ■■■ is and has been successful in the general education. In light of Petitioner's academic performance, ■■■ is no longer eligible for special education and related services under IDEA.

CONCLUSIONS OF LAW

63. The Division of Administration has jurisdiction over the parties and the subject matter of this case. § 1003.57(5), Fla. Stat. (2006)^{10/}; Fla. Admin. Code R. 6A-6.03311(5)(e); 20 U.S.C. § 1401, et seq.; and the regulations promulgated to implement IDEA.

64. The IDEA, 20 U.S.C. Section 1400 et seq., was enacted to ensure that children with disabilities receive an education that is both appropriate and free. The federal regulations implementing the IDEA are codified in 34 C.F.R. Part 300.

65. A "child with a disability" within the meaning of IDEA is one who has one of the disabilities/impairments enumerated therein, including SLD and who, by reason of [REDACTED] disability, needs special education and related services. See 20 U.S.C. § 1401(3)(A). "Special education" is defined as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child [student] with a disability." See 20 U.S.C. § 1401(29). "Related services" are developmental, corrective, and other supportive services as may be required to assist a child with a disability. See 20 U.S.C. § 1401(26).

66. The United States provides funds to the several states for education. In return for these funds, the IDEA directs the states to provide a FAPE to students with disabilities. To qualify for federal funding, states and local agencies are required to develop plans and policies to carry out the intent of the IDEA. Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 180-81, 102 S. Ct. 3034, 3037-38, 73 L.Ed.2d 690, 696 (1982).

67. Consistent with the mandate of the IDEA, the Florida Legislature passed Sections 1001.42 and 1003.57, Florida

Statutes, and the State Board of Education promulgated Florida Administrative Code Rule Chapter 6A-6.

68. Subsection 1001.42(4)(1), Florida Statutes, requires school boards to provide for "an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable in accordance with the provisions of s. 1003.57."

69. Subsection 1003.01(3), Florida Statutes, defines "exceptional student" and "special education services" and provides in relevant part the following:

(3)(a) "Exceptional student" means any student who has been determined eligible for a special program in accordance with rules of the State Board of Education. The term includes students who are gifted and students with disabilities who are mentally handicapped, speech and language impaired, deaf or hard of hearing, visually impaired, dual sensory impaired, physically impaired, emotionally handicapped, specific learning disabled, hospital and homebound, autistic, developmentally delayed children, ages birth through 5 years, or children, ages birth through 2 years, with established conditions that are identified in State Board of Education rules pursuant to s. 1003.21(1)(e).

(b) "Special education services" means specially designed instruction and such related services as are necessary for an exceptional student to benefit from education. Such services may include: transportation; diagnostic and evaluation services; social services; physical and occupational therapy; speech and language pathology services; job placement;

orientation and mobility training; braillists, typists, and readers for the blind; interpreters and auditory amplification; rehabilitation counseling; transition services; mental health services; guidance and career counseling; specified materials, assistive technology devices, and other specialized equipment; and other such services as approved by rules of the state board.

70. Subsection 1003.57(1), Florida Statutes, provides that the district school boards provide the necessary professional services for diagnosis and evaluation of exceptional students.

71. [REDACTED] on behalf of Petitioner, has filed this action to challenge the School Board's decision to dismiss Petitioner from the ESE program. [REDACTED] contends that Petitioner is disabled, by virtue of having a SLD, and that this disability has interfered with [REDACTED] educational progress at [REDACTED]. Finally, [REDACTED] contends that Petitioner is eligible for special education and related services under IDEA and the OHI classification.

72. Prior to hearing, the specific issues for consideration at hearing were determined as follows: 1) Whether Petitioner is eligible for IDEA services; 2) Whether the School Board violated Petitioner's due process rights by failing to include [REDACTED] in meetings of School Board personnel regarding Petitioner's eligibility for ESE services and the School Board's decision to not conduct an IEE; 3) Whether the School Board failed to develop an appropriate educational plan and provide

appropriate accommodations for Petitioner under the gifted program; and 4) Whether the School Board should have conducted an IEE and, if the cost of Petitioner's IEE should be reimbursed by the School Board.

Eligibility For Continuation of ESE Services

73. The primary issue in this case is whether Petitioner is eligible to continue to receive services under IDEA. In order to establish eligibility, it must be established that Petitioner is a child/student disabled within the meaning of IDEA and that ■■■■ needs special education and related services to benefit from education. If Petitioner is eligible for special education and related services, those must be provided to ■■■■ at no cost to ■■■■ parents pursuant to an appropriately developed and implemented IEP.

74. The evidence established that the re-evaluation was conducted in accordance with Florida Administrative Code Rule 6A-6.0331(7).

75. The evidence established that the re-evaluation appropriately concluded that there is a significant discrepancy between Petitioner's levels of intellectual functioning and achievement on tasks required for reading and mathematics calculation skills and that Petitioner has a processing deficit. Fla. Admin. Code R. 6A-6.03018. If this were the sole basis for determining Petitioner's eligibility for ESE services, ■■■■ would

qualify. However, to establish that Petitioner is eligible for continued services under IDEA, it must be demonstrated that ■■■ needs special education services to benefit from education.

76. The preponderance of evidence established that Petitioner is progressing in school and is achieving at a level that meets and, in many instances, exceeds the School Board's expectations. The evidence established that Petitioner has earned good grades while taking mostly honors and AP courses and has almost always scored at the highest possible level on state-mandated standardized tests.

77. The evidence also established that Petitioner's teachers have observed that Petitioner is able to perform at the level expected, without ESE services when ■■■ chose to do so. This was substantiated by Petitioner, who acknowledged that when ■■■ tries, ■■■ earns better grades.

78. The evidence established that Petitioner is and has benefited from ■■■ education, is making academic progress at a level which meets, and in some instances, exceeds School Board expectations. This is evidenced by Petitioner's grades, ■■■ class ranking, and ■■■ progress toward graduation.

79. While there is a significant discrepancy in Petitioner's ability and achievement level and ■■■ has a process deficit/disorder, the evidence established that these deficiencies do not warrant special education services in that

such services are not necessary for Petitioner to benefit from education.

80. Petitioner, through [REDACTED], also argues that Petitioner is eligible for ESE services under the OHI classification of IDEA.

81. 34 C.F.R. Section 300.8(c)(9) defines the term "other health impairment" as follows:

(9) Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that--

(i) Is due to chronic or acute health problems such as . . . attention deficit disorder or attention deficit hyperactivity disorder

82. Based on the evidence, Petitioner does not meet the eligibility requirements to be classified as other health impaired as that term is defined in 34 C.F.R. Section 300.8(c)(9). Therefore, [REDACTED] is not eligible to receive special education and related services under IDEA.

83. Petitioner, through [REDACTED], also contends that Petitioner should receive occupational therapy.

84. The criteria for receiving occupational therapy services are set forth in Florida Administrative Code Rule 6A-6.03025(2), which provides as follows:

(2) Criteria for eligibility. An exceptional student is eligible for a special program of occupational therapy if the exceptional student has identified significant developmental deficits, dysfunctions, or disabilities to a degree not otherwise provided for in the exceptional student education instructional environment.

Violations of Procedural Due Process Rights

85. There are two alleged violations of the parents' procedural rights at issue.

86. First, [REDACTED] alleges that the School Board violated [REDACTED] procedural rights by not including [REDACTED] in a meeting of school personnel where, [REDACTED] contends, a decision was made concerning Petitioner's eligibility.

87. IDEA requires an opportunity for the parents of a child with a disability to participate in meetings with respect to the "identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child." See 20 U.S.C § 1415(b)(1) and 34 C.F.R. § 300.501(b)and (c).

88. A parent's participation in meetings related to decisions involving his/her child with a disability is important. However, that participation is clarified and limited by IDEA's implementing regulations. See Kings Local School District v. Zelazny, 325 F.3d 724, 731-32, (6th Cir. 2003).

89. 34 C.F.R. Section 300.501(b)(3) describes meetings that do not require notice or parental participation. That section provides the following:

(3) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

Also see Fla. Admin. Code R. 6A-6.03311(4)(e).

90. Petitioner's █████ failed to establish that the meeting of school district personnel prior to the November 4 IEP team meeting was a meeting in which any decision was made regarding Petitioner's educational placement. Contrary to █████ assertions, the evidence established that no decisions regarding Petitioner's eligibility or continued eligibility were made at that meeting. Based on the foregoing, the meeting of school personnel is one which does not require participation. Therefore, there was no violation of █████ procedural rights.

91. If a procedural violation has occurred, that violation must be analyzed in view of whether any actual harm results. See Michael P. v. Indian River County School Board, 37 IDELR 186 (11th Cir. 2002).

92. According to 20 U.S.C. Section 1415(f)(E)(ii), a procedural violation results in denial of a FAPE (i.e., actual harm) only if such violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE; or (3) caused a deprivation of educational benefits.

93. Even if it is assumed that the School Board's failure to include █████ in this meeting of school personnel constituted a violation, in order to prevail on this issue, Petitioner must prove actual harm. In order to show actual harm, it must be established that the violation significantly impeded █████ opportunity to participate in the decision-making process █████ has failed to make such a showing. To the contrary, the undisputed evidence established that █████ fully participated in the IEP team meeting in which the decision was made regarding Petitioner's continued eligibility for ESE services.

94. Second, █████ alleges that the School Board violated █████ procedural rights by not including █████ in a meeting in which school personnel decided not to provide an IEE.

95. In response to █████ request for an IEE, school personnel met to discuss, determine, and develop a response to that request. Given the nature of this meeting, and in accordance with 34 C.F.R. Section 300.501(b)(3), quoted above,

there was no legal requirement that Petitioner's parents be allowed to participate in the meeting. Therefore, the failure to include [REDACTED] in the meeting does not constitute a procedural violation.

96. Even if it is assumed that the School Board should have included Petitioner's parents in the meeting, in order to prevail, there must be a showing that the violation resulted in actual harm. Applying the standard set out above, no such showing has been made. Here, the evidence established that [REDACTED] was properly notified of the School Board's refusal to conduct an IEE. Moreover, the evidence established that in response to that notice, [REDACTED] obtained an IEE, which was considered by the School Board in a staffing/eligibility meeting in which [REDACTED] fully participated.

97. For the reasons stated above, Petitioner failed to prove that the failure to include [REDACTED] in the meeting of school personnel in which the School Board developed a response to [REDACTED] request for an IEE was a procedural violation.

Appropriateness of Educational Plan

98. Petitioner's [REDACTED] alleges that the School Board failed to develop an IEP and to provide appropriate accommodations under the gifted student program.

99. The evidence established that even after the School Board found Petitioner ineligible for services as a student with

a disability, [REDACTED] continued to be classified as a gifted student. As a student who is "gifted," Petitioner is considered an exceptional student in Florida. See § 1003.01(3)(a), Fla. Stat. A "gifted student" is one with "superior intellectual development and capable of high performance." See Fla. Admin. Code R. 6A-6.0319(1).

100. After Petitioner was dismissed from the SLD program, [REDACTED] was classified solely as a gifted student. As such, Florida Administrative Code Rule 6A-6.03019 requires that an Educational Plan be developed for Petitioner. The contents of the EP focus on the gifted student's strengths and needs beyond the general curriculum. In developing, reviewing, and revising the EP, consideration is given to "the strengths of the student and needs resulting from the child's giftedness." See Fla. Admin. Code R. 6A-6.03020(4) and (5). Compare required contents of and considerations for developing IEP for students with disabilities, handicaps, and/or impairments in Florida Administrative Code Rule 6A-6.03028(6) and (7) with the contents of and considerations for developing, reviewing, and revising the EP's for "gifted students," in Florida Administrative Code Rule 6A-6.03019(5) and (6).

101. The undersigned is aware of no legal authority, and none has been provided, which supports Petitioner's position that accommodations required to be included in IEPs for

"children with disabilities" may be properly included in the EP of a student classified solely as gifted.

102. The credible testimony of the gifted coordinator was that it is inappropriate to include accommodations in the EP and that when accommodations are needed, they are provided for in either an IEP or 504 Plan.^{11/} An IEP is appropriate only if the "gifted" student is also one with a disability under IDEA.

103. Based on the foregoing, Petitioner failed to prove that the School Board failed to develop an appropriate EP and provide appropriate accommodations under the gifted program.

Independent Educational Evaluation

104. Petitioner seeks reimbursement for the costs incurred in having an IEE conducted after the School Board refused to provide one at public expense.

105. Pursuant to 34 C.F.R. Section 300.502, generally, parents have the right to an IEE if the parent disagrees with the evaluation obtained by the School Board. That section provides, in pertinent part, the following:

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about

where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this subpart--

(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.103.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

* * *

(c) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation--

(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

* * *

(e) Agency criteria. (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (e)(1) of this section, a public

agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

106. Here, [REDACTED] disagreed with the School Board's psychological evaluation to the extent it adversely affected Petitioner's eligibility for ESE services. As a result of that disagreement, [REDACTED] requested an IEE at public expense, but the request was denied. Having denied the request, the School Board was required to file a due process complaint to request a hearing to show that its evaluation was appropriate. 34 C.F.R. 300.502(b)(2)(ii) and Fla. Admin. Code R. 6A-6.03311(4).

107. Notwithstanding the requirement that it do so, the School Board failed to file a due process complaint to request a hearing to show that its evaluation was appropriate.

108. The evidence established that [REDACTED] obtained an evaluation from Dr. Ouaou and provided it to School District personnel so that it could be considered in determining Petitioner's continued eligibility for ESE services.

109. In obtaining the IEE from Dr. Ouaou, [REDACTED] incurred costs of \$150.00. The remainder of the costs for the IEE was covered by [REDACTED] insurance.

110. The School Board is required to pay for the IEE obtained by Petitioner's [REDACTED] unless, the IEE failed to meet agency criteria.

111. First, the School Board argues that the IEE conducted by Dr. Ouaou does not meet agency criteria because Dr. Ouaou did not administer achievement tests and an intelligence test to Petitioner, but instead relied on the tests reported in the psychological evaluation report prepared by Ms. Collum.

112. Dr. Ouaou's reliance on the achievement tests and the intelligence test is reasonable under the facts in this case. First, the School Board relied on the scores and asserted during this proceeding that the tests were valid and reliable. Second, the school psychologist relied on, and included and considered in the psychological evaluation report she prepared Petitioner's achievement tests scores, even though she did not administer those tests; instead those tests were administered by the an ESE specialist. Third, Dr. Ouaou accepted the scores on both the achievement tests and the intelligence test that were reported in the School Board's psychological evaluation as accurate. Finally, Dr. Ouaou reasonably decided not to administer the achievement tests and the intelligence test (in December 2005 and/or January 2006, when he conducted [REDACTED] evaluation) because they had been recently administered (in September and October 2005).

113. Next, the School Board argues that Dr. Ouaou's IEE did not meet agency criteria because it was not conducted in a school setting. This argument appears to be based on the

requirement in 34 C.F.R. Section 300.502(e)(1) and Florida Administrative Code Rule 6A-6.03311(7)(d), which provides that the criteria under which an IEE is obtained, including the location of the evaluation, must be the same. The School Board appears to define "location" to require that IEEs be administered in a school setting or in the same or similar facility as the one in which the School Board's evaluation was conducted.

114. The School Board's interpretation, if applied, would unduly restrict and limit a parent's right to obtain an IEE. Undoubtedly, the result of applying the School Board's definition would likely decrease the number of otherwise qualified evaluators to those willing to go to a school setting to conduct the IEE, regardless of whether administration of a particular assessment required such a setting. A more reasonable interpretation of "location," as it relates to agency criteria, is one that may require an IEE to be conducted in a certain geographic region, such as a particular county or state. See 20 IDELR 1219 (1993).

115. Assuming that the School Board had established criteria that required the IEEs to be conducted in the same physical facility as the School District's evaluation, it would have to provide this "agency criteria" to parents upon their

request for an IEE. See 34 C.F.R. § 300.502(a)(2). In this case, no such agency criteria was provided for [REDACTED].

116. The IEE was conducted by a qualified evaluation specialist and met agency criteria. Therefore, [REDACTED] is entitled to reimbursement for the costs she incurred to obtain the IEE.

ORDER

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

ORDERED that:

1. The decision of Respondent, Collier County School Board, to dismiss Petitioner, [REDACTED] from the Exceptional Student Education program is affirmed.

2. Petitioner is ineligible for the Specific Learning Disability program and for special education and related services associated therewith.

3. The Collier County School Board reimburse Petitioner's [REDACTED] \$150.00 for the costs [REDACTED] incurred in obtaining the IEE from Dr. Ouaou.

DONE AND ORDERED this 25th day of May, 2007, in Tallahassee, Leon County, Florida.

S

CAROLYN S. HOLIFIELD
Administrative Law Judge

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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of May, 2007.

ENDNOTES

^{1/} The issues were determined in a Corrected Order issued on March 15, 2007, by Administrative Law Judge Bram Canter, who was initially assigned this case, after a three-hour prehearing conference on March 9, 2007. One issue included in the Corrected Order, whether the School Board violated Petitioner's procedural rights by not providing prior notice of its determination not to conduct an IEE, is no longer an issue, as Petitioner acknowledged during this proceeding that prior notice of that decision was provided.

^{2/} 34 C.F.R. Section 300.508(d)(3) reads, in pertinent part, the following:

(3) A party may amend its due process complaint only if--

(i) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to 300.510; or

(ii) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

^{3/} 34 C.F.R. Section 300.511(d) reads, in pertinent part, the following:

(d) Subject matter of due process hearings. The party requesting the due process hearing

may not raise issues at the due process hearing that were not raised in the due process complaint filed under 300.508(b), unless the other party agrees otherwise.

^{4/} During the fall semester of the 2006-2007 school year, Petitioner attended a private out-of-state school.

^{5/} After [REDACTED] initially refused to give her consent for the re-evaluation, the School Board filed a request for due process hearing to have the issue resolved. That request was assigned DOAH Case No. 05-3373E. The issue was resolved prior to the commencement of the due process hearing, after [REDACTED] consented to the re-evaluation.

^{6/} For students ages 11 and above, there must be a discrepancy of one and one-half (1 1/2) standard deviations or more between an intellectual standard score and achievement standard score in basic reading skills, reading comprehension, oral expression, listening comprehension, mathematics calculation, mathematics reasoning, or written expression.

^{7/} The School Board addressed the ineligibility determination in its response to the amended petition filed at DOAH on March 18, 2006.

^{8/} On October 18, Administrative Law Judge Daniel Manry dismissed Case No. 05-4061 for lack of jurisdiction, after Petitioner's parents removed [REDACTED] from the Collier County School District and enrolled [REDACTED] in a private school in California. Petitioner timely appealed the decision in the Second District Court of Appeal, but several months later, on January 27, 2007, Petitioner, through [REDACTED], filed a dismissal of the appeal. The court dismissed the appeal on January 30, 2007.

^{9/} For example, the issue of providing accommodations for Petitioner through a 504 Plan was discussed brought up during the November 4, 2005, IEP/staffing meeting as an option for providing accommodations that the IEP should address.

^{10/} Unless otherwise indicated, all references are to the 2006 Florida Statutes.

^{11/} The issue of developing a 504 Plan for Petitioner was brought up by the parent advocate and briefly discussed during the November 4, 2005, meeting. The 504 Plan was later noted as something that would be considered for Petitioner. However,

there is no indication in the record that either the School Board or Petitioner's parents ever took steps to consider whether a 504 Plan was an appropriate option for Petitioner after [REDACTED] was determined to be ineligible for ESE services.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only

exceptionality is "gifted"] or
b) brings a civil action within 30 days in
the appropriate state circuit court pursuant
to Section 1415(i)(2)(A) of the IDEA and
Section 1003.57(1)(e), Florida Statutes; or
c) files an appeal within 30 days in the
appropriate state district court of appeal
pursuant to Sections 1003.57(1)(e) and
120.68, Florida Statutes.