

Hillsborough County School District
No. 07-3572E
Initiated by: Parent
Hearing Officer: Daniel Manry
Date of Final Order: November 9, 2007

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

█)
Petitioner,)
)
vs.)
) Case No. 07-3572E
HILLSBOROUGH COUNTY SCHOOL)
BOARD,)
)
Respondent.)
_____)
)

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the due process hearing of this case on September 7, 2007, in Tampa, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: █
(Address of record)

For Respondent: Thomas Gonzalez, Esquire
Lara J. Peppard, Esquire
Thompson, Sizemore & Gonzalez, P.A
201 North Franklin Street, Suite 1600
Tampa, Florida 33602

STATEMENT OF THE ISSUES

The issues are whether Individualized Education Plans (IEPs) that were developed on May 3 and September 6, 2007, for the 2007-2008 school year, offer Petitioner a free appropriate public education (FAPE) and, if not, whether the parents of Petitioner are entitled to reimbursement of private school tuition in an amount equal to the difference between the annual private school tuition and the McKay scholarship Petitioner receives pursuant to Section 1002.39, Florida Statutes (2007).

PRELIMINARY STATEMENT

On August 2, 2007, the [REDACTED] of Petitioner ([REDACTED]) filed a due process complaint with Respondent which was dated August 1, 2007. The complaint challenged the IEP that Respondent developed for Petitioner on May 3, 2007. Respondent referred the complaint to DOAH on August 3, 2007. DOAH assigned the matter to the undersigned ALJ.

The ALJ conducted a telephonic pre-hearing conference on August 13, 2007, and scheduled the due process hearing for September 7, 2007. During the pre-hearing conference, the parties agreed to toll the 45-day time limit until the issuance of this Final Order.

During the statutory resolution process, the parties developed another IEP dated September 6, 2007. At the hearing, the parties agreed to amend the scope of the due process hearing to include the IEP developed on September 6, 2007.

Petitioner's ■ testified and submitted two exhibits for admission into evidence. Respondent presented the testimony of one witness and submitted 35 exhibits for admission into evidence.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the one-volume Transcript of the hearing that was filed with DOAH on September 21, 2007. The parties agreed on the record to file their proposed final orders (PFOs) with DOAH no later than ten days after the date the court reporter filed the Transcript with DOAH. Subsequently, the ALJ granted the parties' agreed request for an extension of time to file their PFOs on October 8, 2007.

FINDINGS OF FACT

1. Petitioner is a developmentally delayed ■ student who was born on ■, and resides in the Hillsborough County School District (the District). Petitioner began ■ education at the start of the 2006-2007 school year in a private ■ school located within the District and, except for the extended school year in 2007, has been continuously enrolled in the same private school (the private school).

2. Respondent has developed three IEPs for Petitioner. The first IEP is dated December 3, 2006, and is not at issue in this proceeding. It is undisputed that, during the 2006-2007

school year, Petitioner made educational progress at the private school under the first IEP.

3. The second and third IEPs that Respondent developed for Petitioner are dated May 3 and September 6, 2007, respectively. Respondent implemented the second IEP for the extended school year in 2007. It is undisputed that the IEP implemented during the extended school year in 2007 provided Petitioner with FAPE. The challenge to the second IEP developed on May 3, 2007, is limited to the period between the end of the extended school year in 2007 and the development of the third IEP on September 6, 2007.

4. The due process complaint filed on August 1, 2007, was necessarily limited to the second IEP developed on May 3, 2007. However, the parties agreed on the record of the due process hearing to address [REDACTED] concerns involving the third IEP that Respondent developed on September 6, 2007.

5. The due process complaint challenges, among other things, the failure of the second IEP to include speech and language therapy to address Petitioner's echolalia. During the resolution period that followed the due process complaint, the parties met and completed the third IEP on September 6, 2007. The third IEP amends the second IEP, in relevant part, by providing two hours of speech and language therapy to address Petitioner's echolalia. It is undisputed that two hours of

speech and language therapy are adequate to address Petitioner's echolalia.

6. The remaining challenge in the due process complaint is related to occupational therapy. The ESE services provided to Petitioner pursuant to the first IEP did not include occupational therapy to assist Petitioner in the subject of writing.

7. An occupational therapist evaluated Petitioner on February 15, 2007, prior to the development of the second IEP on May 3, 2007. The evaluation concluded that Petitioner could benefit from teacher-guided motor activities that do not require the specialized intervention of an occupational therapist. In relevant part, the evaluation concludes that Petitioner:

[C]ould benefit from a structured daily schedule of teacher guided motor activities to promote and encourage [REDACTED] participation in the classroom, address [REDACTED] fine motor development and eventually lead to more age appropriate fine motor skills. It is also felt that this practice could be implemented within the format of the classroom curriculum and would not require the specialized intervention of a therapist.

Respondent's Exhibit 8 at 600042.

8. The second IEP developed on May 3, 2007, included a collaboration provision that required, in relevant part:

Collaboration between Occupational Therapist, ESE Teacher and regular education teacher to address strategies for participation with table top activities.

Respondent's Exhibit 9 at 600051.

9. Before the start of the 2007-2008 school year, Petitioner received a McKay scholarship pursuant to Section 1002.39, Florida Statutes (2007). The District developed a matrix of services that determines the level of funding for the McKay scholarship.

10. It is undisputed that the matrix of services developed by the District results in an annual scholarship amount of \$8,037 and that Petitioner's annual tuition at the private school is \$8,700. It is also undisputed that a matrix of services based on occupational therapy at the level of collaboration used in the District's Matrix of Services Handbook would increase the amount of the McKay scholarship to Petitioner, but the record does not disclose the amount of the increase.

11. The due process complaint asserts that Respondent developed a matrix of services based on consultation, rather than the collaboration required in the IEP. The complaint argues that McKay scholarship funding based on consultation denies a free education to Petitioner and that a matrix of services based on collaboration would provide Petitioner with a free education.

12. The third IEP dated September 6, 2007, in relevant part, included an expanded collaboration provision that requires:

Collaboration between Occupational Therapist, ESE Teacher and regular education teacher to address strategies and task modifications for participation with table top motor activities. Collaboration would consist of discussions between the Occupational Therapist and [Petitioner's] teachers (regular and ESE) to share information which would promote [Petitioner's] progress and skill development in the classroom.

Respondent's 36 at 6.

13. Petitioner agrees that the level of ESE services prescribed in the third IEP dated September 6, 2007, is adequate. However, Petitioner seeks an order requiring the District to amend the matrix of services and, thereby, provide a free education for Petitioner at the private school. In response, Respondent asserts that the use of the term "collaboration" in either of the challenged IEPs does not require a matrix of services based on collaboration, as that term is used in the District's Matrix of Services Handbook.

14. The ALJ is precluded by the state constitution from granting equitable relief, including an order in the nature of mandamus, that would require Respondent to amend the relevant matrix of services. Equity is the exclusive province of constitutional courts in the state. Art. V, Fla. Const.

15. The authority of the ALJ is limited to the remedies described in 20 U.S.C. Subsection 1415(3)(E). The relevant federal statute limits the decision of the ALJ to a determination of whether the challenged IEPs offered a FAPE to Petitioner. The ALJ is statutorily authorized to determine that alleged procedural violations denied FAPE only if the procedural inadequacies impeded Petitioner's right to FAPE, "significantly" impeded the parents' opportunity to participate in the decision making process, or caused a deprivation of educational benefits.

16. Prior to the hearing, Respondent moved to dismiss the due process complaint for failure to state a cause of action under the IDEA. The ALJ declined to dismiss the due process complaint. The ALJ deemed the due process complaint to be an implicit request for reimbursement of private school tuition. The due process complaint alleges in relevant part:

The IEP team determined [on May 3, 2007] that collaboration was necessary to meet the student's occupational therapy needs. However, the district unilaterally changed [collaboration] to consultation when it came to funding. . . .

* * *

The district needs to adjust the matrix of services to fund collaboration not consultation. . . . They must have a correct IEP that reflects [a] matrix of services so that [redacted] education is free. (Where are the procedural safeguards?)

Respondent's Exhibit 1 at 600000-600003.

17. In order to prevail on a claim for reimbursement of private school tuition, ■■■ must first show that the challenged IEPs did not offer FAPE to Petitioner. ■■■ failed to satisfy this evidential prerequisite for reimbursement of private school tuition.

18. The private school has provided ESE services to Petitioner pursuant to the challenged IEPs, except for speech and language therapy and occupational therapy. With those two exceptions, it is undisputed that Petitioner is making educational progress at the private school and that the challenged IEPs provide Petitioner with an appropriate education in all areas other than speech and language therapy and occupational therapy.

19. It is undisputed that Petitioner is making educational progress in all areas of education except for writing and echolalia. Progress in reading is very good, according to the testimony of Petitioner's ■■■ at the due process hearing. Petitioner is progressing faster than necessary in math. Petitioner can identify numbers up to 100 and can count. Petitioner is progressing adequately in geography and Spanish, and ■■■ progress in science is excellent.

20. It is undisputed that Petitioner is making some progress in writing. Petitioner's [REDACTED] testified that Petitioner can print some letters, including the letters "A" and "T."

21. The preponderance of evidence shows that Petitioner is making educational progress in writing under the challenged IEPs and that the challenged IEPs offer Petitioner an appropriate education in writing. As of the date of the due process hearing, Petitioner had been educated under the challenged IEPs approximately four weeks. [REDACTED] is identifying and printing letters, and [REDACTED] is making some progress in writing.

22. Even if it were found that Petitioner is not making educational progress in writing, the overall educational progress Petitioner is making provides Petitioner with an appropriate education. Relevant law does not require IEPs that maximize Petitioner's educational progress or IEPs that enable Petitioner to progress in each subject if Petitioner is making overall progress toward [REDACTED] educational goals.

23. The failure of Petitioner to progress faster in writing and the failure of Petitioner to make progress in reducing echolalia cannot be attributed to a flaw in the design or implementation of the challenged IEPs. Petitioner's [REDACTED] instructed staff at the private school not to implement the speech and language therapy and collaboration provision for occupational therapy in the challenged IEPs until this

proceeding is resolved. The action of Petitioner's [REDACTED] effectively precludes the evidentiary prerequisite for a finding that the challenged IEPs either denied an appropriate education to Petitioner or constituted one or more of the procedural violations described in 20 U.S.C. Subsection 1415(3)(E)(ii).

24. There is no dispute or allegation that Respondent has impeded the parents' participation in the development of the challenged IEPs. [REDACTED] is an active participant in [REDACTED] educational planning. There is no dispute or allegation that Respondent has not properly evaluated Petitioner or identified Petitioner's disability.

25. It is undisputed that Petitioner's parents did not provide the District with written notice of their intent to reject the challenged IEPs and to enroll Petitioner in private school. It is undisputed that the level of services in the challenged IEPs provides Petitioner with an appropriate education.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the subject matter herein pursuant to Subsection 1003.57(5), Florida Statutes (2003); Florida Administrative Code Rule 6A-6.03311; and the Individuals with Educational Disabilities Act, 20 U.S.C. Section 1400 (the IDEA). DOAH provided the parties with adequate notice of the administrative hearing.

27. Petitioner is the party seeking relief under the IDEA. The burden of proof is properly placed upon the party seeking relief under the IDEA. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005); West Platte R-II School District v. Wilson, 439 F.3d 782, 784-785 (8th Cir. 2006); J.H. v. Henrico County School Board, 395 F.3d 185, 197 (4th Cir. 2005). For reasons stated in the Findings of Fact, Petitioner did not satisfy the applicable burden of proof.

28. The failure of [REDACTED] to provide prior notice to the District that [REDACTED] rejected the challenged IEPs and that [REDACTED] intended to place Petitioner in a private school is not a basis for the decision of the ALJ. The IDEA does not require [REDACTED] to preserve [REDACTED] right to reimbursement of private school tuition by enrolling Petitioner in a public school and accepting an allegedly inadequate IEP in order to provide the required 10-day notice to Respondent and then place Petitioner in a private school. M.M. v. School Board of Miami-Dade County, Florida, 437 F.3d 1085, 1099 (11th Cir. 2006).

29. Except for the extended school year in 2007, Petitioner was continuously enrolled in private school and was never enrolled in public school. Respondent developed three IEPs for Petitioner with the knowledge that Petitioner was continuously enrolled in private school. The absence of prior written notice to the District is not material.

30. Entitlement to reimbursement of private school tuition requires ■■■ to first show that the challenged IEPs do not offer FAPE to Petitioner. M.M., 437 F.3d at 1101. Petitioner's ■■■ did not satisfy this evidential prerequisite for reimbursement. For reasons stated in the Findings of Fact, a preponderance of the evidence shows that the challenged IEPs are reasonably calculated to enable Petitioner to receive educational benefits and in fact provide individualized education and services sufficient to provide Petitioner with some educational benefit. M.M., 437 F.3d at 1102-1103.

ORDER

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

ORDERED that the IEP dated September 6, 2007, offers Petitioner a free appropriate public education, and the due process complaint filed on August 1, 2007, is dismissed with prejudice.

DONE AND ORDERED this 9th day of November, 2007, in Tallahassee, Leon County, Florida.

S

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of November, 2007.

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(5), Florida Statutes; or
c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.