

Miami-Dade County School District  
No. 05-4540E  
Initiated by: Parent  
Hearing Officer: J. D. Parrish  
Date of Final Order: March 1, 2006

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████████, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 05-4540E  
 )  
MIAMI-DADE COUNTY SCHOOL BOARD, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to notice formal hearing was commenced on January 17, 2006, in Miami, Florida, and completed by video teleconference on January 31, 2006, with the parties appearing from Miami, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████, parent of the student, ██████████  
(Address of record)

For Respondent: Laura E. Pincus, Esquire  
Miami-Dade County School Board  
1450 Northeast Second Avenue  
Suite 400

Miami, Florida 33132

STATEMENT OF THE ISSUE

The issue in this matter is whether the Petitioner is entitled to additional tutoring through the [REDACTED] Learning Center, to be paid for by the Respondent, as requested by the parent. The parent alleges that the student cannot receive (and has not received) a free appropriate public education (FAPE) without the additional tutoring.

PRELIMINARY STATEMENT

This case was initiated by the parent, [REDACTED], on behalf of her [REDACTED], [REDACTED], a student enrolled within the Miami-Dade County School District. The student is eligible for exceptional student education services and Petitioner alleges that additional services are required for this student to receive FAPE. The Petitioner's proposal is for the Respondent to pay for tutoring services for the student at the [REDACTED] Center ([REDACTED]). Petitioner maintains that such tutoring is necessary for the student to remediate reading skills. The Petitioner alleged that the student, a tenth grader, is reading at the second grade level. The Petitioner maintains that additional tutoring is necessary to bring the student's reading level up as there is a short time remaining for this student to be in high school.

For its part, the Respondent denies that the student requires additional tutoring through [REDACTED]. The Respondent asserts that the student has progressed within the expectations for this student, that [REDACTED] reads and performs above the Petitioner's representations, and that the student is eligible for and could receive additional tutoring through [REDACTED] school placement.

On January 17, 2006, when the case commenced, the Petitioner represented [REDACTED] had not received subpoenas and could not secure the attendance of witnesses [REDACTED] desired. Based upon that representation, and in order to afford the Petitioner with additional time to secure witnesses, the hearing was continued and the record left open to January 31, 2006, to assure that the Petitioner was able to call witnesses not present on the January 17, 2006 date. The Petitioner testified in [REDACTED] own behalf and presented testimony from [REDACTED] mother; Deborah Lehman, a school psychologist; Darryl Hawkins, a school psychologist; James Brantley, Petitioner's welding teacher; and Anthony O'Rourke, director of [REDACTED] in Kendall, Florida. The Petitioner's Exhibits 1-3 were admitted into evidence. The Respondent offered testimony from Margaret Petta, the Petitioner's reading teacher, and Sandra Carithers, the Petitioner's English teacher. The Respondent's Exhibits 1-9 and 11 were received in evidence.

A transcript of the proceedings was not filed. The parties were afforded ten days to file proposed orders in this cause.

FINDINGS OF FACT

1. At all times material to the allegations of this case, the Respondent was a duly constituted School Board charged with the responsibility to operate, control and to supervise the public schools within the Miami-Dade County, Florida public school district. As such, the Respondent is responsible for providing FAPE to its exceptional student education (ESE) students.

2. At all times material to the allegations of this case, the Petitioner, ■■■, is an ESE student enrolled in the Miami-Dade County public schools. The Petitioner's current placement is a program at the ■■■ Center (■■■). The Petitioner is a 16-year-old, tenth-grade student who has been in an ESE assignment since elementary school.

3. Because the Petitioner has participated in an ESE program for a number of years, ■■■ mother has attended numerous meetings to resolve and plan for this Petitioner's educational needs. In fact, the Petitioner's mother has demonstrated an exceptional effort to assist ■■■ to receive a FAPE.

4. Part of the effort to secure a FAPE requires that the parties draft an individualized education plan (IEP) for this student at least annually. The IEP identifies the student's

goals and sets standards to measure ■■■ achievement. Typically a team of persons familiar with the Petitioner's record and academic needs convene to draft the IEP. This IEP team along with the parent then attempt to craft an educational plan tailored to meet the Petitioner's needs.

5. Because Petitioner nears adulthood, the parent is concerned that ■■■ will not be able to procure the education the Petitioner requires if additional instructional aids are not provided at this time.

6. In this case, the IEP team met with the parent on September 8, 2005, to prepare the annual IEP for the Petitioner. The parties considered a psychological educational assessment that had been completed in April 2005. That evaluation noted that the Petitioner "continues to benefit from ESE classes."

7. The Petitioner's mother expressed a concern over the Petitioner's speech and requested a speech evaluation. That assessment was completed and the IEP team reconvened on November 28, 2005, to consider the results of the speech evaluation.

8. In order to qualify for speech and language services, the Petitioner's performance assessment would need to fall below what would be expected for ■■■ intelligence. Because the Petitioner's speech and language levels were commensurate with ■■■ cognitive ability, ■■■ was not deemed eligible for speech

and language services. The parent was disappointed with this conclusion as she believes additional help must be provided for [REDACTED].

9. The Petitioner has a full scale I.Q. score of 72. This score is within a borderline range of intellectual functioning. Based upon this cognitive level, it could be anticipated that the student has difficulty performing at grade level. Nevertheless, the Petitioner's abilities to read words, calculate basic arithmetic problems, and spell are commensurate with his intellectual functioning.

10. When the Petitioner was tested by the outside entity ([REDACTED]), the results were also commensurate with [REDACTED] intellectual functioning. Essentially, the Petitioner is performing at a level consistent with [REDACTED] intellect. [REDACTED]'s director believes the Petitioner would benefit from their tutoring program but cannot guarantee any academic result. Generally speaking, all students benefit from additional tutoring resources.

11. One of the issues expressed by the Petitioner's teachers and evaluator was the Petitioner's appearance of disinterest. For reasons not fully addressed by this record, the Petitioner often exhibits sleepy behavior in class. Although there is no medical explanation for this behavior, it is evident that the sleepy demeanor inhibits the Petitioner's ability to focus on school work.

12. Even when working one-to-one with a teacher or evaluator, there are instances when the Petitioner cannot stay focused and awake.

13. The Petitioner's reading teacher represented that in addition to exhibiting sleepy behavior, the Petitioner does not complete homework. Accordingly, the Petitioner's grades do not reflect successful completion of all work assigned. More important, the Petitioner has not availed [REDACTED]self of tutoring that is provided through the school. This after school tutorial has been available to the Petitioner since the November IEP meeting but [REDACTED] has attended only 2 sessions.

14. The Petitioner's parent chose [REDACTED] as the appropriate educational placement for this student. The program at [REDACTED] affords the Petitioner with relatively small classes. For example, there are only ten students in the Petitioner's reading class. There are only five students in the Petitioner's language arts class. The Petitioner receives a lot of one-to-one instruction and assistance.

15. The Petitioner's reading skills continue to improve as [REDACTED] works on reading comprehension and vocabulary. Although [REDACTED] does not read at grade level, [REDACTED] performs significantly higher than the parent's representation of second grade. The Petitioner's test results suggest [REDACTED] achievement to be consistent with [REDACTED] cognitive functioning but in any event it

continues to improve as ■■■ applies ■■■self and makes serious effort. Some of the Petitioner's work demonstrates performance at the sixth or seventh grade level. Again, while this shows additional work is needed, the Petitioner's performance is above the parent's representation and understanding of ■■■ performance.

16. The Petitioner will need to continue to apply ■■■self to the tasks of reading and language arts in order to achieve improvements in these areas. The Petitioner would benefit from additional tutoring and should attend the tutoring provided by the staff at ■■■.

17. Specifically, the Petitioner should complete home reading assignments to reinforce the reading lessons presented at school. The Petitioner should complete homework assignments designed to improve vocabulary and comprehension.

18. The Petitioner is not on track for a "regular diploma." In fact, with the parent's agreement, it is expected the Petitioner will be eligible for a special diploma. The parent consented to the Petitioner's assignment and participation in a welding program at ■■■ that is designed to give its students credible life skills in welding that will allow them to be fully trained in this specialty. According to the Petitioner's welding instructor this student has made significant improvement and is capable of completing excellent

welding work. When motivated and when [REDACTED] applies [REDACTED]self, the Petitioner is fully capable of completing [REDACTED] welding assignments.

19. Further, to assist [REDACTED] with the textbook portions of the work, the Respondent provides a paraprofessional to coordinate with the Petitioner to complete textbook requirements of the welding course work.

20. For most of the current goals outlined in the Petitioner's IEP, the student is making some, albeit limited, progress. Most of the deficient categories or "insufficient progress" areas are directly related to the Petitioner's motivation and effort.

21. In this regard, the Respondent has provided rewards and initiatives to keep the student motivated. The Respondent has sufficient behavioral incentives to assist the Petitioner to stay on task and see work through to completion. The Petitioner's failures to stay alert in school and complete [REDACTED] homework assignments continue to limit [REDACTED] academic progress.

22. The tutoring offered by [REDACTED] would assist the Petitioner but is not available at the [REDACTED] site. If the Petitioner attended the school designated for [REDACTED] home area, [REDACTED] would be entitled to receive [REDACTED] tutoring through a special program. The Petitioner's parent, however, has determined that the program at [REDACTED] better suits the Petitioner's academic needs.

23. There is no evidence that the after school tutoring available at ■■■ is inferior to or less helpful than the ■■■ tutoring.

24. The Petitioner has expressed an interest in sports programs available at ■■■. Participation in those programs may interfere with the scheduling of after-school tutoring at ■■■. The student must elect which activity better suits ■■■ academic needs. The Respondent does not compel performance or attendance at either activity.

25. According to the parent, the Petitioner was offered computer support to enhance ■■■ home learning experience. If the Respondent provided the computer but not the software necessary for the assistance, as alleged by the parent, the school district should complete the installment of the necessary programs to allow the Petitioner to improve language and reading skills.

#### CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.57(1), and 1003.57(5), Fla. Stat. (2005).

27. The Petitioner bears the burden of proof in this cause. See Schaffer v. Weast, 126 S. Ct. 528; 105 LRP 55797 (2005). The Petitioner has argued the ■■■ tutoring is necessary for the Petitioner to make meaningful progress. Therefore, the

Petitioner must show that the student will not receive a FAPE without such tutoring. Such proof must be by a preponderance of the evidence.

28. The question is not whether the Petitioner would benefit from tutoring, undoubtedly [REDACTED] would. The question is whether the [REDACTED] tutoring is necessary for this student to receive a FAPE. It is not. This Petitioner is making progress under the terms of [REDACTED] IEP. The Respondent is providing a FAPE. Could the Petitioner make more progress with additional tutoring? Yes. Has the Respondent offered additional tutoring? Yes. Has the Petitioner availed [REDACTED]self of the tutoring currently available? No.

29. More critical to this student's potential success is the failure to complete homework. Reading homework reinforces the strategies and information provided in class. When the Petitioner fails to follow up and complete the homework, the benefits to be derived from that work is lost. The Respondent cannot complete homework for the Petitioner. The team effort of home and school is necessary to educate this student.

30. At some point this Petitioner is going to have to decide to complete [REDACTED] assignments and make [REDACTED] best effort to achieve academic success. The Respondent cannot do that for [REDACTED]. More important, the Petitioner's mother cannot do that for [REDACTED]. The struggle to achieve academic success will be won or

lost based upon this student's determination to complete [REDACTED] assignments, stay awake in class, and attend the tutoring sessions available to him.

31. With regard to the computer that the Respondent made available to the student, it is concluded the Respondent should follow up to verify the software is installed on the computer so that it can be used in a meaningful way to assist the Petitioner. Accordingly, the Respondent shall provide and install the programs necessary for the Petitioner to use [REDACTED] home computer to follow up on [REDACTED] studies and complete [REDACTED] homework assignments.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the request for [REDACTED] tutoring is denied.

DONE AND ORDERED this 1st day of March, 2006, in Tallahassee, Leon County, Florida.

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J. D. PARRISH  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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this 1st day of March, 2006.

COPIES FURNISHED:

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■  
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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.