

Duval County School District
No. 04-4250E
Initiated by: Parent
Hearing Officer: Suzanne F. Hood
Date of Final Order: February 1, 2005

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 04-4250E
)
DUVAL COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

A final hearing was conducted in this case on January 6, 2005, in Jacksonville, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████, parent
(Address of Record)

For Respondent: LaShanda R. Dawkins, Esquire
117 West Duval Street, Suite 480
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

The issue is whether Petitioner is eligible for services as an exceptional student pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, et seq.

PRELIMINARY STATEMENT

On or about November 4, 2004, Respondent Duval County School Board (Respondent) advised Petitioner ■■■ (Petitioner) that ■■■ was not eligible to receive speech therapy under the Exceptional Student Education (ESE) program. On November 17, 2004, Petitioner requested a due process hearing to challenge Respondent's decision. On November 19, 2004, Respondent referred Petitioner's request to the Division of Administrative Hearings.

On November 23, 2004, the undersigned conducted a telephone conference. The purpose of the conference was to set a mutually convenient date for a pre-hearing conference and to set a tentative date for the final hearing.

A Notice of Hearing dated November 23, 2004, set the date for the final hearing on December 14, 2004. A Notice of Pre-Hearing Conference dated November 23, 2004, set the pre-hearing conference for November 30, 2004.

On November 30, 2004, the undersigned conducted the pre-hearing conference by telephone. During the conference, the parties confirmed that December 14, 2004, was a mutually convenient date for the final hearing. After the conference, the undersigned issued a Pre-Hearing Order dated November 30, 2004.

On December 6, 2004, Petitioner filed a request to cancel the scheduled hearing and to continue the case for 21 days. On December 7, 2004, Respondent advised the undersigned in a voice-mail message that the parties agreed to reschedule the hearing on January 6, 2005.

Pursuant to the agreement of the parties, the undersigned issued an Order Granting Continuance and Re-scheduling Hearing. According to the Order, the parties agreed to extend the 45-day period set forth in Florida Administrative Code Rule 6A-6.03311(5)(k). The Order scheduled the final hearing for January 6, 2005. It also advised the parties that their proposed final orders would be due on or before January 26, 2005, and that the final order would issue on or before February 7, 2005.

On January 4, 2005, Respondent filed a First Motion in Limine. The motion was granted on the record after hearing oral argument during the hearing.

During the hearing, Petitioner presented the testimony of eight witnesses. Petitioner offered nine exhibits, P1-P9, that were accepted as evidence.

Respondent presented the testimony of five witnesses. Respondent offered two exhibits, R3 and R5, that were accepted as evidence.

Petitioner filed a Proposed Final Order on January 24, 2005. A Transcript of the proceeding was filed on January 25, 2005.

Respondent filed a Proposed Final Order on January 25, 2005.

All references herein after shall be to Florida Statutes (2004) except as otherwise provided.

FINDINGS OF FACT

1. At all times relevant here, Petitioner was a . . . student in a regular education class at Respondent's ■■■ School. After the 2004/2005 school year commenced, Petitioner's teacher became

concerned that Petitioner's speech was immature for a [REDACTED] year old student.

2. On September 22, 2004, about four-and-a-half weeks into the school year, Petitioner's teacher prepared a progress report for Petitioner. The report indicated that Petitioner was performing satisfactorily in all areas, including letters and sounds. Petitioner's teacher commented as follows on the report:

[REDACTED] has good fine motor skills. [REDACTED] needs to practice letter recognition at home. I would like to have [REDACTED] evaluated for speech. Would you have any objection to that?

3. Petitioner's mother responded in writing to the comments on the progress report. Petitioner's mother advised that she would practice letter recognition with Petitioner at home. She also gave consent for the speech evaluation.

4. Jacqueline Theus is the speech and language pathologist assigned to [REDACTED] School. Ms. Theus provides screening, evaluations, and other services to students who are eligible for speech and language therapy. She also provides consultative services to the faculty members.

5. On or about September 22, 2004, Ms. Theus sent a Consent for Individual Evaluation form to Petitioner's home. The form advised Petitioner's parents that [REDACTED] had been referred for a hearing screening and a speech evaluation. On September 24, 2004, Petitioner's father signed the Consent for Individual Evaluation.

6. On October 4, 2004, Ms. Theus conducted the speech evaluation. First, she screened Petitioner's hearing. Second, Ms. Theus obtained a speech sample by engaging Petitioner in

social conversation. Third, Ms. Theus administered the Goldman Fristoe: Test of Articulation, 2nd Edition (GFTA) to Petitioner.

7. The GFTA consist of 35 simple pictures, which the student must identify. During the test, the student states one word to identify each picture. The speech/language pathologist listens to the words to determine how the student pronounces certain sounds.

8. Based on normative data, a qualifying impairment exists if the student scores below the 16th percentile on the GFTA. Petitioner scored at the 24th percentile on the test.

9. Petitioner's chronological age was [REDACTED] when [REDACTED] took the GFTA. [REDACTED] test/age equivalent was five-years. [REDACTED] intelligibility was fair. The comment section of the test stated as follows:

2.10 month delay, jumble some multi-syllabic words in conversation

10. Ms. Theus correctly concluded that Petitioner had a mild speech impairment. In other words, Petitioner made some sound errors showing a measurable speech deficit, but not a speech disability.

11. In reaching this conclusion, Ms. Theus used a table entitled the "Developmental Age Expectancies for Target Speech Sounds" to assess speech errors. The table shows the expected mastery of speech sounds in the initial, medial, and final positions, at the 85-90 percent level for children ages two through eight.

12. Pursuant to the table, Ms. Theus assessed six age-appropriate sounds, establishing that Petitioner had a two-year

and ten-month delay in regard to an error with one sound in one position. She also determined that Petitioner had a ten-month delay on a second sound in two positions. Petitioner also made an error on a third sound in three positions; however, the third sound did not represent a delay because children are not expected to pronounce it correctly until about seven-years of age.

13. Children do not achieve adult standard speech until they are about eight years old. It is not uncommon for children who are five to seven years old to have speech errors.

14. Sounds usually occur in three positions in words. In order for a sound to be considered delayed, it must be mis-articulated consistently in at least two positions in a word. In order for a sound to constitute a developmental delay, a student must mis-articulate one sound in two positions with a three-year delay or two sounds in two positions with a two-year delay.

15. Ms. Theus summarized the results of Petitioner's speech evaluation on ESE Form 046. The form indicates that Petitioner had the following consonant sound errors: n/ng, s/sh, t or s/th, b/vj/z, s/sp,j. However, the listing of the consonant sound errors on the form does not mean that Petitioner has a developmental delay as to each consonant sound.

16. The form also indicates that Petitioner's speech was delayed by two-years. Ms. Theus noted the two-year delay because the evaluator is required to report the sound error with the greatest delay.

17. According to the form, Petitioner's mild speech impairment did not meet the criteria for educational relevance.

The form states as follows in relevant part:

Background Information/Observations: [] was referred by [] teacher. [] appears to have a vocabulary adequate for [] age, however [] uses pronouns he/his and her/she incorrectly. Voice is smooth and adequate in pitch and volume. Hearing is within normal limits for speech purposes.

Strengths: [] demonstrates appropriate pitch and volume. [] hearing is adequate for speech purposes, and [] articulates all sounds clearly except those noted on the GFTA.

Weaknesses: Inconsistent clear articulation of several speech sounds that developmental charts show as later developing sounds. Incorrect use of some pronouns add to the immature presentation of [] verbal communication performance.

18. The criteria for educational relevance reviews the student's ability to benefit from the educational program. In other words, educational relevance is considered to determine the impact of a deficit on a student's educational endeavors. Petitioner's speech impairment did not meet the criteria for educational relevance.

19. Educational relevance is only one of three criteria that Respondent must consider when determining whether a student is eligible for speech therapy. The other two criteria are: (a) evidence that a disability exists; and (b) the student's performance on standardized tests.

20. In this case, Petitioner did not exhibit a speech deficit that was required to be addressed within the context of a primary ESE program because [] scored higher than the 16th

percentile on the GFTA. In fact, Petitioner's mild speech impairment, as indicated by ■■■ score at the 24th percentile, qualifies ■■■ for no ESE services under state and district criteria.

21. On October 4, 2004, Ms. Theus had a brief conference with Petitioner's father. The purpose of the conference was to discuss the scheduling of a Child Study Team (CST) meeting.

22. On October 6, 2004, Ms. Theus sent a written notice to Petitioner's home. The notice advised Petitioner's parents about the upcoming CST meeting. Ms. Theus also provided Petitioner's parents with a copy of the Communication Evaluation prior to the meeting.

23. On October 7, 2004, Respondent conducted a CST meeting/staffing to discuss and review Petitioner's eligibility for ESE speech therapy. During the meeting, Respondent's staff and Petitioner's parents considered the following: (a) the results from Petitioner's GFTA evaluation; (b) the speech pathologist's oral/peripheral examination; (c) a speech/language sample; (d) a behavioral/academic statement from Petitioner's teacher; (e) all of Petitioner's student records; and (f) the desire of Petitioner's parents for Respondent to take a proactive approach to Petitioner's speech problem.

24. The CST rejected the suggestion of Petitioner's parents that ■■■ receive instruction in a basic class supplemented by speech therapy in a resource room for 12 hours per week or less. The suggestion was rejected as not providing Petitioner with free appropriate public education in the least restrictive

environment. However, the CST did not reach a definitive recommendation regarding Petitioner's eligibility for ESE speech therapy on October 7, 2004. Instead, the CST withheld a recommendation pending a review of all documentation by Respondent's coordinator of speech and language services, Mary Ellen Cook.

25. During the October 7, 2004, meeting, Petitioner's father requested an opportunity to meet with Ms. Cook. Respondent's staff agreed to provide Petitioner's father with the requested documents and to invite Ms. Cook to the next CST meeting.

26. On or about October 14, 2004, Respondent issued Petitioner's report card for the first nine weeks of the 2004/2005 school year. According to the report card, Petitioner was performing satisfactorily in the communications area. However, ■■■ needed help at home with recognizing letters and with association of letters and letter sounds.

27. Petitioner also was performing satisfactorily in the area of mathematics. In regards to mathematics, Petitioner needed help at home recognizing numerals and matching numeral with groups of objects.

28. At some point in time before November 14, 2004, Ms. Cook reviewed all documents related to Petitioner's speech problem. She concluded that Petitioner was not eligible for ESE speech therapy.

29. On November 14, 2004, Respondent conducted another CST meeting. Ms. Cook had been invited to attend the meeting but was

unable to do so because she was out-of-town for a meeting that had been scheduled for months. Petitioner's father expressed his displeasure due to Ms. Cook's absence at the meeting but did not suggest that the meeting be postponed and/or agree to its postponement.

30. Ms. Cook's presence at the November 14, 2004, meeting was not necessary in order for the CST to meet the procedural or substantive requirements of IDEA. Decisions/recommendations regarding eligibility for ESE speech therapy are made at the individual school level, not at the district level where Ms. Cook works. In this case, the CST included the designee of the principal, Petitioner's classroom teacher, the ESE representative, the speech/language pathologist, and Petitioner's parents.

31. During the November 14, 2004, CST meeting, the team members discussed the results of Ms. Cook's review of Petitioner's eligibility for speech therapy. Over the objections of Petitioner's parents, the CST team concluded that Petitioner was not eligible for ESE services. However, Respondent's staff advised Petitioner's parents that another speech evaluation could be conducted later in the school year if necessary.

32. Petitioner's parents were dissatisfied with the recommendation of the CST. Petitioner's father requested that Respondent provide [REDACTED] with copies of applicable written criteria, and any written policies or procedures, pertaining to eligibility for speech therapy. Respondent did not provide Petitioner's father with the documents immediately.¹

33. Because Petitioner's father had been unable to have a one-on-one meeting with Ms. Cook, Respondent's staff suggested that he speak with Dr. Diane Gillespie before requesting a due process hearing. Dr. Gillespie is Respondent's General Director of ESE Programs.

34. Petitioner's father placed several telephone calls to Dr. Gillespie's office. Each time he left a message for Dr. Gillespie to return the call. On one occasion, Petitioner's father visited Dr. Gillespie's office but was unable to speak with her. Dr. Gillespie never responded to any of these inquiries.

35. In December 2004, Petitioner's parents retained the Brooks Rehab Center in ■■■, Florida, to provide them with an independent speech/language evaluation. The language portion of that evaluation is not at issue here. The speech portion of the independent evaluation indicates that Petitioner received a score of 24 percentile on an older outdated version of the GFTA.2. Otherwise, the information contained in the independent evaluation is not persuasive because it is incomplete.

36. Petitioner is an average student. ■■■ is performing in the mid-range of the middle reading group in ■■■ class. Sometimes Petitioner's teacher has difficulty understanding ■■■ speech, especially when ■■■ talks in sentences. Even so, Petitioner is experiencing academic success at school with no signs of frustration due to a speech deficit.

37. Speech services are available at ■■■ School. Approximately six students in Petitioner's class receive speech

and/or language therapy. These students are performing at various levels within the class.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. See § 1003.57(5), Fla. Stat. and Fla. Admin. Code Rule 6A-6.03311.

39. Petitioner has the burden of proving by a preponderance of the evidence that [REDACTED] is eligible to receive ESE speech therapy. See Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

40. There is no evidence that Respondent committed any procedural errors in determining that Petitioner was not eligible for ESE services. In Doe v. Alabama State Department of Education, 915 F. 2d 651, 661 (11th Cir. 1990, the Court stated as follows with regard to alleged procedural errors:

It is beyond dispute that full parental involvement in the handicapped child's education is the purpose of many of the [IDEA's] procedural requirements.

See also, Weiss v. School Board of Hillsborough County, 141 F. 3d 990, 994 (11th Cir. 1998) (even a per se procedural defect will not warrant relief without a finding that the defect has deprived the student of a free appropriate public education).

41. In this case, Petitioner's parents were afforded every opportunity to participate in the eligibility determination and appropriately provided the procedural safeguards. Ms. Cook and Dr. Gillespie were not members of the CST; therefore, their

presence at the CST meetings was not required. All other members of the CST attended both staffings and participated in making the decision.

42. Petitioner argues that Respondent should provide [REDACTED] with ESE speech services now in order to prevent speech problems from occurring in the future. Petitioner's argument fails to recognize that Respondent is not required to maximize Petitioner's potential. See Doe v. Alabama State Department of Education, 915 F. 2d at 665. Appropriate education does not mean the absolute best or a "potential maximizing education." See Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 690 (1982). Furthermore, Respondent is not required to provide an education according to the parent's dictates. See Weis, 141 F. 3d at 994.

43. With regard to eligibility for speech services, the Court in Mary P. v. Illinois State Board of Education, 919 F. Supp. 1173, 1180-1181 (N.D. Ill 1996), stated as follows in relevant part:

[2] The first step is to determine eligibility based upon statutory criteria and expert opinion. . . . To be eligible for special education, the student must fit the statutory definition of a "child with a disability." 20 U.S.C. § 1401(a)(1)(A); . . . All of the statutory definitions require that the disability "adversely affect the child's educational performance." See 34 C.F.R. § 300.7(b)(1-13); . . .

The C.F.R. specifies evaluation procedures to be used to determining whether a child fits the statutory definition of a "child with disabilities." See 34 C.F.R. §§ 300.7(a)(1), 300.500(b), 300.530-300.534. These procedures require the examination of "a variety of sources, including achievement tests, teacher recommendations, physical

condition, social or cultural background, and adaptive behavior." 34 C.F.R. § 300.533(a)(1).

* * *

[3] . . . The C.F.R. defines speech impairment as "a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment that adversely affects a child's educational performance." 34 C.F.R. § 300.7(b)(11)(1995).

* * *

[6] . . . "Educational performance" means more than a child's ability to meet academic criteria. It must also include reference to the child's development of communication skills, social skills, and personality, as the Code, it self, requires. See 34 C.F.R. § 300.533(a)(1) (requiring analysis of a "variety of sources"). Whether the balance of these factors tips towards eligibility depends on the manner in which the specific disability afflicts the student. Today, the court simply holds that a child whom experts determine suffers from a speech impairment so severe as to inhibit his ability or desire to communicate with his teachers and peers meets the criteria of "speech impairment" which "adversely affects the child's educational performance" under 34 C.F.R. § 300.7(b)(11) and thus is a "child with a disability" under 20 U.S.C. § 1401(a)(1).

44. Petitioner has not met ■■■ burden of showing that ■■■ is eligible for speech therapy. Respondent evaluated Petitioner appropriately and correctly determined that ■■■ had a mild impairment but no disability.

45. Petitioner's mild speech deficit does not adversely impact ■■■ ability to benefit from the regular education program. ■■■ scores on both GFTA evaluations are too high for ■■■ to be qualified for ESE speech therapy. Although Petitioner's teacher sometimes has difficulty understanding Petitioner when ■■■ speaks

in sentences, Petitioner is performing successfully and without frustration in school. There is no persuasive evidence that [REDACTED] is eligible for ESE speech therapy under criteria established by the state and the district.

ORDER

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

ORDERED:

Respondent has complied with all procedural safeguards and Petitioner is not eligible for ESE speech therapy.

DONE AND ORDERED this 1st day of February, 2005, in Tallahassee, Leon County, Florida.

S

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of February, 2005.

ENDNOTE

^{1/} For reasons which are not clear in the record, Respondent's staff could not or would not provide Petitioner's parents with the requested documents until after they made a request for a due process hearing.

COPIES FURNISHED:

Eileen L. Amy, Administrator
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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.