Nassau County School District
No. 04-3442E
Initiated By: Parent
Hearing Officer: Don W. Davis
Date of Final Order: February 1, 2005

STATE OF FLORIDA
DIVISION
OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-3442E
	)	
NASSAU COUNTY SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings (DOAH) held a final hearing in the above-styled cause on November 29-30, 2004, in Fernandina Beach, Florida.

APPEARANCES

For Petitioner: Doris Landis Raskin, Esquire
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For Respondent: Leonard T. Hackett, Esquire
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STATEMENT OF THE ISSUE

Whether, by retaining [redacted] (Petitioner) in the fourth grade, Respondent's Individualized Education Plan (IEP) failed to offer

Petitioner a free, appropriate, public education (FAPE) in the least restrictive environment.

PRELIMINARY STATEMENT

By letter dated August 9, 2004, counsel for Petitioner requested a due process hearing on behalf of Petitioner. Subsequently, at Petitioner's counsel's request, the matter was referred to mediation, arranged through auspices of the Florida Department of Education.

Following unsuccessful conclusion of mediation efforts, final hearing was initially scheduled for October 20, 2004. At the mutual written request of the parties, dated October 18, 2004, the final hearing date was extended, pending a telephonic conference with the parties. That telephonic conference was held on November 2, 2004. Subsequently, the final hearing was calendared to commence on November 29, 2004.

At the final hearing, Petitioner presented testimony of nine witnesses and 25 exhibits, all of which were admitted into evidence. Respondent cross-examined Petitioner's witnesses and presented 12 exhibits, which were admitted into evidence.

At the conclusion of the hearing, the parties agreed on a submittal date of January 18, 2005, for the filing of proposed final orders and extension of the deadline for the entry of a final order to February 18, 2005. A transcript of the proceeding was filed on January 7, 2005. Both parties filed Proposed Final Orders, which have been utilized to the extent possible in the preparation of this Final Order.

FINDINGS OF FACT

1. During the 2003-2004 school year, Petitioner attended [redacted] School in [redacted], Florida, where [redacted] was in the [redacted] grade. [redacted] was then [redacted]-years-of-age.

2. Stipulation of the parties establishes that Petitioner has been previously diagnosed as suffering from Tourette's Syndrome and Attention Deficit Disorder (ADD). During the 2003-2004 school year, Petitioner received medications consisting of Adderall XR, Albuterol, Advair, Periactin, and Celontin.

3. In the [redacted] grade, Petitioner was presented a regular curriculum with accommodations in accordance with the Section 504 Accommodation Plan developed pursuant to the Rehabilitation Act of 1973. That plan was initially instituted on November 15, 2001, when Petitioner was in the [redacted] grade. Accommodations of the plan consisted of: 1) Petitioner was to be seated near the teacher, 2) Petitioner's handwriting would not be graded, and 3) Petitioner would be allowed extra time for exams.

4. Petitioner's [redacted] attended the meeting in November of 2001, assisted in the development of the 504 Accommodation Plan, and agreed to the accommodations provided through the plan. With the aid of these accommodations, Petitioner passed to the [redacted] grade. The plan stayed in place throughout Petitioner's [redacted] grade of school, and [redacted] passed to the [redacted] grade.

5. In August of 2003, Ms. Devereaux, Petitioner's [redacted] grade teacher, convened a meeting to review the accommodation plan. In attendance at the meeting were Petitioner's [redacted] and, in turn, [redacted]. Petitioner's [redacted] depends heavily upon the judgment of [redacted] and includes [redacted] in most decision-making processes. The school

guidance counselor, Patricia Kelly, also attended the meeting. Although the plan was reviewed, no modifications were made to it.

6. At the beginning of [redacted] [redacted] grade in school, Petitioner frequently returned home unhappy. [redacted] requested a change of teacher for Petitioner. Petitioner was given a new teacher, Paula Thompson, in November of 2003.

7. Under Ms. Thompson's tutelage, Petitioner began to improve and got into the "buzz club" as a result of bringing up three grades during the third nine-week school period. [redacted] was well liked and, with exception of some mild ADD symptoms evidenced by easy distraction, fit in well with the other students. Ms. Thompson moved Petitioner to the front of the room to remove the distractions. None of Petitioner's teachers, or other school personnel who had any association with [redacted], observed any symptoms of Tourette's Syndrome.

8. In spite of [redacted] improvements in Ms. Thompson's class, Petitioner had a considerable attendance problem during the [redacted] grade. [redacted] was absent 16 days and had 21 tardy days. A tardy day permits a student to arrive at school approximately three hours after commencement of classes. Further, [redacted] checked out early on 34 school days, for a time total equaling five full school days.

9. Ms. Thompson discovered Petitioner had difficulty with written responses and spoke with Petitioner's [redacted] about the matter. Petitioner would put question marks on papers instead of attempting to answer the questions. Concerned that this could affect Petitioner's Florida Comprehensive Assessment Test (FCAT)

score, Ms. Thompson shared tasks with Petitioner's [redacted] for Petitioner to work with at home. Petitioner's [redacted] responded later that [redacted] could not get Petitioner to do the work.

10. Although [redacted] academic level was normal, Petitioner would often just not try to do the school work in [redacted] grade, despite Ms. Thompson's use of non-verbal clues to keep [redacted] on task. When [redacted] did turn in work, the result showed that Petitioner was quite capable and simply refused to do the assignment. [redacted] exhibited no problems with comprehension, phonemes, fluency, or vocabulary. All school personnel who worked with Petitioner expressed the position that Petitioner was quite capable of doing the work and had no academic problems.

11. Petitioner did have a need for additional work on improving [redacted] handwriting, a matter [redacted] [redacted] was made aware of when [redacted] was in the [redacted] grade of school. But [redacted] was not scored down on that basis.

12. A meeting was held to review and modify Petitioner's 504 Accommodation Plan on January 6, 2004. Attendees at that meeting were the school principal, Petitioner's teacher, the school guidance counselor, the school psychologist, the school district's coordinator of intervention and prevention, and Petitioner's [redacted].

13. As the result of the meeting, the 504 Accommodation Plan was modified. The new accommodations consisted of 1) Petitioner being seated next to the teacher, 2) no assessment or grading of Petitioner's handwriting, 3) provision of additional assessment through assistive technology, 4) provision of extra

time for Petitioner to take exams, 5) permitting Petitioner to have more space on exams for [redacted] written response, 6) cueing the student to stay on task, and implementation of a classroom behavior system for Petitioner.

14. In the course of the meeting, Petitioner's potential eligibility for the Exceptional Student Education (ESE) program and the Individuals with Disabilities Education Act (IDEA) was discussed. The school district's coordinator of intervention and prevention proposed an elaborate evaluation of Petitioner, inclusive of psychological evaluation. Petitioner's [redacted] was not agreeable to further testing of Petitioner. This suggestion was made on subsequent occasions by school personnel to Petitioner's [redacted] only to be met with refusal. Petitioner's [redacted] was also consulted with the same result.

15. An assessment of meeting Petitioner's needs through additional assistive technology was completed on January 9, 2004, with the result that it was determined that a pencil grip and a slant board would be provided Petitioner to assist [redacted] with writing.

16. Based on Petitioner's continuing bad grades, a letter warning of possible retention of Petitioner was sent to [redacted] home in February of 2004.

17. Petitioner was subsequently retained in the [redacted] grade at the conclusion of the school year. The report card and Letter of Retention dated May 13, 2004, stated the reasons for Petitioner's retention. School attendance requirements and 70 percent mastery of the curriculum, based on Sunshine Standards in

reading and writing proficiency on the FCAT for grade [redacted], had not been met. No credible evidence was presented that this action of Respondent's personnel was discriminatory with regard to Petitioner.

18. Petitioner's FCAT Scores for school year 2003-2004 consisted of a scaled score of 677 in reading comprehension, placing [redacted] in the above-average 81st national percentile. On mathematics, [redacted] scaled score of 665 places [redacted] in the 86th percentile. However, [redacted] scored a 2 on the writing section of the FCAT in the spring of 2004.

19. Petitioner's report card stated grades as follows: Conduct-B; Physical Education-S; Music-S; Art-F; Language Arts-D; Reading-F; Spelling-C; Writing-F (although no grade in handwriting); Math-D; Science-D; and Social Studies-F.

20. Numerous consultations were had between Respondent's personnel and Petitioner's [redacted] and [redacted], including telephone conversations between them and the Nassau County School Superintendent. But, the pleas of school personnel to subject Petitioner to testing and evaluation to determine the basis for [redacted] specific problems continued to be met with refusals by [redacted] and [redacted].

21. At no time did Respondent's personnel make a written request to evaluate Petitioner. Likewise, Petitioner's [redacted] never executed a written refusal of such testing. As a consequence, however, of the numerous verbal refusals by Petitioner's [redacted] and [redacted], Respondent simply did not proceed with what appeared to be

futile efforts to obtain further evaluation. Additionally, Respondent did not request a due process hearing with regard to Petitioner's situation since it appeared that Petitioner's [redacted] and [redacted] would not allow the evaluation to go forward and because alienation of the child and family would result.

22. Prior to commencement of this proceeding, the parties participated in attempts at mediation of their dispute with the Florida Department of Education. Following those mediation proceedings and on advice of [redacted] legal counsel, Petitioner's [redacted] consented to a partial evaluation of Petitioner, limited solely to tests evaluating Petitioner's intellectual and information processing abilities. Emotional and behavioral evaluations were not permitted. Unable to undertake a full evaluation, the Nassau County School psychologist was unable to conclude that Petitioner qualified for ESE or IDEA on the basis of [redacted] alleged ADD.

23. As to the limited testing that the school was permitted to do, a Woodcock Johnson test was administered to Petitioner by the school psychologist on September 1, 2004. Petitioner achieved a broad reading score of 103; a broad math score of 110; a rating of 107 for math problem skills; 108 score for basic learning skills; and a score of 108 for academic skills. These results demonstrate that Petitioner is bright, capable, and has normal intelligence. [redacted] is not deficient in any of the tested areas.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause, pursuant to Subsection 1003.57(5), Florida Statutes (2004), and Florida Administrative Code Rule 6A-6.03311(5)(e). The assigned Administrative Law Judge has final order authority.

25. Section 1003.57(5), Florida Statutes, reads, in pertinent part, as follows:

> 1003.57 Exceptional students instruction.--Each district school board shall provide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable, including provisions that:
>
> * * *
>
> (5) No student be given special instruction or services as an exceptional student until after he or she has been properly evaluated, classified, and placed in the manner prescribed by rules of the State Board of Education. The parent of an exceptional student evaluated and placed or denied placement in a program of special education shall be notified of each such evaluation and placement or denial. Such notice shall contain a statement informing the parent that he or she is entitled to a due process hearing on the identification, evaluation, and placement, or lack thereof.

26. In the current case, Respondent has done all that can be expected to define the needs of Petitioner in the absence of parental consent for a complete evaluation of Petitioner in accordance with administrative rules of the State Board of Education.

27. The IDEA defines FAPE at 20 U.S.C. Section 1401(a)(8), as:

> [S]pecial education and related services that -
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the state educational agency;
>
> (C) include an appropriate preschool, elementary, or secondary school education in the state involved; and
>
> (D) are provided in conformity with the individualized education program required under Section 1414(d) of this title.

28. The legal standard to be applied in determining whether Petitioner's proposed placement will allow [redacted] to receive FAPE is a two-pronged test described by the United States Supreme Court in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982).

29. First, has the state complied with the procedures set forth in the IDEA; and second, is the IEP developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress. Id. at 206. Under the present circumstances, Respondent cannot be expected to do more, absent the necessary consent of Petitioner's [redacted].

30. The IDEA's requirement for a FAPE has been interpreted in Rowley to be satisfied when the school system provides the

student with a "basic floor of opportunity consist[ing] of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U.S. at 201-203.

31. As to provision of specialized instruction and related services, Respondent has, within the limited area permitted by Petitioner's [redacted], complied with requirements of Rowley.

32. In School Board of Martin County v. A. S., 737 So. 2d 1071 (Fla. 4th DCA 1999), the court discussed the nature and extent of the educational benefits that Florida school districts must provide to exceptional students, stating:

> Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits under IDEA must be more than trivial or de minimis. J.S.K. v. Hendry County School District, 941 F.2d 1563 (llth Cir. 1991); Doe v. Alabama State Department of Education, 915 F.2d 651 (llth Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 at 192, 198, 102 S.Ct. 3034. Id. at 1074.

33. Notably, where a student such as Petitioner, has not submitted to required testing to determine the existence or extent of a handicap or special need, then the Respondent educational institution cannot be held responsible. The subject student is not considered qualified to receive special benefits. See, Schwartz v. The Learning Center. 2001 WL 311247 (W.D.Mich.)

34. Applying these standards, it is abundantly clear that absent express parental consent the immortal words of Plato that "I shall assume that your silence gives consent"[1] are not

applicable here, Respondent's placement of Petitioner is appropriate. That placement will provide Petitioner with a FAPE.

ORDER

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

ORDERED:

That Petitioner's claims are denied.

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

S

DON W. DAVIS
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] Plato (c. 427–347 B.C.), Greek philosopher. Cratylus, 435 B.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SEEK JUDICIAL RELIEF

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 230.23(4)(m)5, Florida Statutes; or
c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 230.23(4)(m)5 and 120.68, Florida Statutes.