

Collier County School District
Nos. 05-0785E and 05-1539E
Initiated by: Parent
Hearing Officer: William F. Quattlebaum
Date of Final Order: June 24, 2005

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case Nos. 05-0785E
) 05-1539E
COLLIER COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

On April 6 and May 10, 2005, an administrative hearing in this case was held in Naples, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████ on behalf of ██████████ pro se
(Address of record)

For Respondent: Richard W. Withers, General Counsel
Collier County School District
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STATEMENT OF THE ISSUE

The issue in the case is whether the Collier County School Board (Respondent) is providing a free and appropriate public education (FAPE) to [REDACTED] (Petitioner).

PRELIMINARY STATEMENT

On February 25, 2005, [REDACTED] Petitioner's mother, filed a request for a due process hearing with the superintendent of Respondent. On March 3, 2005, Respondent forwarded Petitioner's request to the Division of Administrative Hearings.

A pre-hearing conference was conducted on March 10, 2005, at which time a final hearing was scheduled for March 29, 2005. During the conference, the parties expressed an interest in mediating the dispute and agreed to a brief extension of the deadline established by Florida Administrative Code Rule 6A-6.03311(11)(i) (which requires that a final order be issued no later than 45 days following the school district's receipt of the parent's due process hearing request) to provide an opportunity for mediation to occur.

During a second telephone conference conducted on March 25, 2005, the parties requested that the hearing be rescheduled for April 6, 2005. By Order Granting Continuance and Re-scheduling Hearing, the parties' request was granted, and the hearing commenced on April 6, 2005. At the hearing, Petitioner presented the testimony of two witnesses and had Exhibits 1 through 7 admitted into evidence. Respondent presented the

testimony of four witnesses and had Exhibits 1 through 4 admitted into evidence. At the conclusion of the hearing, the parties established a deadline of ten days from the filing of the transcript to submit the proposed final orders.

On April 19, 2005, Petitioner filed a second due process hearing request with Respondent.

The one-volume Transcript of the April 6 hearing was filed on April 27, 2005. Also, on April 27, 2005, Respondent forwarded Petitioner's second due process hearing request to the Division of Administrative Hearings.

It should be noted that Florida Administrative Code Rule 6A-6.03311(11)(g)2. provides that the school district superintendent is responsible for "[i]mmediately forwarding the Division of Administrative Hearings by facsimile transmission of the parents' request for a hearing upon its receipt." Notwithstanding the rule requirement, approximately a week passed in each instance before Respondent referred Petitioner's due process hearing requests to the Division of Administrative Hearings.

A pre-hearing conference related to the second due process hearing request was conducted on April 29, 2005, at which time the parties determined that the two cases should be consolidated, and that the record should be reopened to permit the taking of evidence related to the issue presented in the

second hearing request. During the pre-hearing conference, the hearing was scheduled to be conducted by telephone conference on May 10, 2005. At the hearing, Petitioner presented the testimony of three witnesses and had Exhibits identified as "c" and "f" admitted into evidence. Respondent presented the testimony of three witnesses and had Exhibit 5 admitted into evidence.

The one-volume Transcript of the May 10 hearing was filed on May 31, 2005. Both parties filed Proposed Final Orders on June 3, 2005.

Generally the dispute between the parties is related to provision of psychiatric services and to development of Petitioner's organizational skills, more specifically stated as follows:

1. Petitioner seeks to have a continuation of psychiatric services provided at Respondent's expense.

2. Petitioner seeks to require that Respondent provide a specific assistive device (a "Tablet P.C.") based on language in the IEP suggesting that the student may choose the assistive technology to be provided.

3. Petitioner seeks to have additional after-school services provided to the student and assistance to develop "organizational skills to perform" at a "gifted level."

4. Petitioner asserts that Respondent's reporting of the IEPs short-term objectives is insufficient.

5. Petitioner seeks to have extended school year (ESY) services provided to develop organizational skills related to whatever assistive technology is provided.

FINDINGS OF FACT

1. At all times material to this case, Petitioner was a ■-year-old ■ student enrolled in the ■ High School in ■, Florida, a unit of Respondent.

2. Petitioner has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and identified as a "gifted" student. Petitioner has participated in extracurricular activities, including sports and academic clubs.

3. At the time of the first due process hearing Petitioner's grade point average was 3.9933. At the second hearing, Petitioner's mother testified that ■ grades declined in the latest grade report, but the effect of any alleged grade decline on Petitioner's GPA was unclear.

4. The evidence of the alleged decline is insufficient to establish causality to the issues relevant to this dispute, or to establish whether the recent grades were an anomaly or indicative of a trend.

5. While enrolled in the Collier County School System, Petitioner has been educated pursuant to an Individual Education

Plan (IEP). During the due process hearing, both parties referenced an IEP dated February 25, 2005, but the most recent complete IEP submitted by the parties into the hearing record is dated February 17, 2005. Petitioner's Exhibit 5 consists of pages five through ten of an IEP dated February 25, 2005. Respondent's Exhibit 5 references an IEP team meeting that occurred on April 5, 2005 (one day before the hearing on the first due process request), that further indicates that team members continued to address the same issues identified herein.

6. While there are some differences between the two dated IEP documents, the relevant issues are reflected in both IEPs and are identified in the preceding Preliminary Statement.

7. Beginning in January 2005, a series of IEP team meetings occurred which were intended to result in a functioning IEP for Petitioner. While there appears to be some disagreement regarding a meeting scheduled for December 2004 (which did not occur), the pending IEP was clearly the focus of numerous meetings between the parties.

Psychiatric services

8. Petitioner seeks to have Respondent fund the continued provision of psychiatric services to the student. Respondent has refused Petitioner's request.

9. Petitioner has previously received psychiatric services from Dr. Brett A. Lovett, at Respondent's expense. Dr. Lovett did not testify at the hearing.

10. A written "psychiatric update" from Dr. Lovett dated January 20, 2005, stated that the treatment being provided to Petitioner is related to management of Petitioner's medication. The update clearly states that the follow-up plan is for the purpose of medication management.

11. There is no credible evidence that Petitioner currently requires psychiatric services for any diagnostic or evaluative purposes.

Organizational skill development

12. A review of previous IEPs and various reports from teachers establishes that Petitioner's lack of organizational skills is identified as related to [REDACTED] disability, and has been a continuing concern of the IEP team.

13. The February 25 IEP states as follows:

Previous comprehensive evaluation reports note that [student] displays a weakness in written expression and it has been noted that [REDACTED] experiences difficulty in organizational areas, attention to tasks and does not plan in advance. Therefore [student] is in need of support in maintaining [REDACTED] general organizational skills relative to class materials, notes and other study materials.

14. The IEP contains "Measurable Annual Goals," as well as "Short-Term Objectives or Benchmarks" that are used to determine the progress towards the Goals.

15. Measurable Annual Goal 1 of the February 25 IEP states as follows:

[Student] will demonstrate academic and organizational skills appropriate for an enhanced high school education as evidenced by daily use of [REDACTED] organizational planner or tool of [REDACTED] choice 100% of the time.

16. The IEP sets forth several Short-Term Objective/Benchmarks related to this Goal. Benchmark 1-2 provides as follows:

[Student] will use tool of choice daily to identify [REDACTED] required assignments, activities, up coming events, that are either academic or non-academic in nature.

17. Measurable Annual Goal 3 of the February 25 IEP states as follows:

[Student] will demonstrate writing skills that meet the expectation of [REDACTED] honors/AP level classes, as evidenced by [REDACTED] graded assignments 90% of the time.

18. The IEP sets forth several Short-Term Objective/Benchmarks related to this Goal. Benchmark 3-3 provides as follows:

[Student] will use [REDACTED] Assistive Tech device to assist [REDACTED] in organizing [REDACTED] written assignments.

19. Respondent has previously provided several different assistive devices to Petitioner. A paper-based day planner was used at some point, as was a notebook computer. The paper-based system was unsuccessful. Petitioner was apparently uncomfortable using the notebook computer in class, and it was returned to school officials. At the time of the hearing, Petitioner maintained a calendar by using [REDACTED] cell phone.

20. Most recently, Respondent provided Petitioner with a "Dana" device. The Dana is somewhat smaller than a notebook computer and operates in a manner similar to a Palm personal organizer. The Dana provides various capabilities, including maintenance of a calendar, task lists, notepad, and personal address book.

21. The Dana is relatively lightweight, and contains a full-sized keyboard and a small screen. The Dana contains a built-in word processor function compatible with Microsoft Word.

22. Data can be input into the Dana by typing on the Dana keyboard or by writing on the Dana screen with a stylus. Data created and stored on a Dana can be transferred onto a personal computer. Similarly, data can be created on and transferred from a personal computer into the Dana.

23. Additional software is available that increases the functionality of the device and the compatibility between the device and standard personal computer functions.

24. Apparently for social reasons, Petitioner was uncomfortable with the Dana and used it for no more than five school days. [REDACTED] returned the Dana to school officials approximately two weeks after it was provided to [REDACTED].

25. Petitioner's mother asserted that the Dana was used by students with lower functional ability than that of Petitioner, and that use of the Dana would harm Petitioner's social interactions with [REDACTED] peers.

26. Petitioner has requested that Respondent provide a "Tablet P.C." for use as an assistive device.

27. A Tablet P.C. is a type of computer similar to a notebook with essentially the same operational abilities; however, with the Tablet P.C., a user can make handwritten notes on the screen and the device can convert the handwriting to text. It should be noted that Petitioner's handwriting abilities are very poor, and the effect of poor handwriting on the efficiency or speed of text-conversion is unclear.

28. Petitioner's mother asserts that a Tablet P.C. would be "more socially acceptable."

29. Respondent has declined to provide a Tablet P.C. to Petitioner. By written notice dated February 25, 2005, Respondent explained the refusal as follows:

The District refuses to provide the student with a TABLET P.C. (parent's preferred assistive technology device) because the

Dana wireless by Alphasmart is an appropriate one-to-one computing solution for writing papers, taking notes, collecting and organizing information.

30. The written notice further provides as follows:

The Dana wireless offers the student the convenience and affordability of a handheld device, providing wireless connectivity for home, classroom, and school campus. This ultra-light portable device can be easily carried in a backpack or under your arm and has access to an array of applications. This full featured word processor gives the student the power to read and write anywhere and easily synchronizes documents with the student's desktop computer at home and at school.

31. There appears to be some confusion as to whether the device actually provided to Petitioner was a "Dana" or a "Dana Wireless." With a "Dana," data transfer is accomplished by using a standard computer USB cable attachment. With a "Dana Wireless," the data transfer can occur over a wireless network connection. Data transfer with a Tablet P.C. can occur over a wireless network.

32. There are no wireless capabilities at [REDACTED] High School, and therefore no wireless transfer of data would occur in a school setting regardless of the device used.

33. In any event, the confusion is immaterial because the greater weight of the evidence establishes that the reason Petitioner rejected the Dana device is applicable to both models.

34. Although Petitioner asserted that the supplied Dana did not have the appropriate capabilities to allow the student to successfully use the device, the evidence establishes otherwise.

35. The greater weight of the evidence establishes that Petitioner's rejection of the Dana device had little if anything to do with the capabilities of the provided device, and was based essentially on the physical appearance of the device and the perception that a social stigma attached to other students who used them.

36. Petitioner asserts that the IEP provides that the student may have any assistive tool [REDACTED] chooses, whether or not such a device is currently available at the school.

37. Respondent asserts that the IEP reference was intended to mean that the student could use [REDACTED] choice of the systems (i.e. paper-based systems, a notebook computer, a Dana device) discussed with the student during the IEP meeting [REDACTED] attended.

38. The evidence fails to establish that Respondent ceded to Petitioner the right to obtain any assistive device Petitioner desired. The greater weight of the evidence establishes that the IEP was written to allow Petitioner to make a selection from the assistive systems and devices discussed at the meeting.

39. Sandra K. Osborn performed an Assistive Technology Assessment at Petitioner's request. In her report dated March 23, 2005, Ms. Osborn recommended that Respondent make available to Petitioner both a Dana and a Tablet P.C., and that sufficient data should be collected to permit a determination of which device is appropriate under the circumstances.

40. Although the Tablet P.C. appears to be a more sophisticated device than the Dana, there is no credible evidence that a Tablet P.C. is required in order to meet the relevant Goals. There is no evidence that Respondent's refusal to provide a Tablet P.C. to Petitioner constitutes a denial of FAPE.

41. The evidence establishes that any of the assistive technology previously made available to Petitioner (i.e. the notebook computer and the Dana) would permit the student to meet the relevant Goals.

42. The IEP assigns the responsibility for implementation of the organizational skill Goals to various teachers and to the student. The evidence establishes that the primary reason for the lack of meaningful progress towards meeting these Goals is Petitioner's refusal to use the available assistive devices.

43. Petitioner's mother seeks to have the student's education essentially become "paperless" so that the opportunity for the student's paperwork to become misplaced is eliminated.

Respondent has rejected the suggestion that the student's IEP should eliminate the use of paper, essentially because "the world" isn't paperless, and Petitioner's education should prepare the student for life outside school. The evidence fails to establish that Respondent's refusal to move the student to a "paperless" system results in a denial of FAPE.

44. Petitioner asserts that the reporting of short-term objectives is deficient. Insofar as short-term goals are related to development of organizational skills, the evidence establishes that Respondent's methodology of progress reporting to Petitioner's parents fails to reflect whether progress in organizational skill development is occurring.

45. The IEP provides that Petitioner's progress related to this Goal is to be "reported to the student's family by progress report at least as often as that of the general education peers."

46. Historically, the only report being provided to Petitioner's parents is the grade report that is provided to all students attending [REDACTED] School. The grade report contains no information specific to whether any organizational skill progress is being made towards meeting the organizational goal. The grade report reflects only academic skill development.

47. Petitioner's mother seeks to require the student's teachers to report organizational goal progress by weekly emails to her. Respondent has suggested that while teachers would respond to emails from the parents, the teachers should not be required to initiate the email reporting. Petitioner's mother declines to request by email the periodic reports from Petitioner's teachers.

48. The evidence fails to establish that Respondent's failure to provide organizational skill progress reporting to Petitioner's parents constitutes a denial of FAPE. There is no evidence that Petitioner's parents have been unaware of the lack of progress towards meeting organization skill Goals. To the contrary, Petitioner's mother has been intimately involved with the child's progress and clearly understands that the Goals are not being met.

49. Petitioner further seeks the provision of extended school year (ESY) services designed to provide training in the use of the assistive technology, as well as an expansion of extended school day (ESD) services currently provided to Petitioner to assist in organizing [REDACTED] assignments.

50. As to the requested ESY services, Petitioner's request was essentially directed towards training the student to use a Tablet P.C., the only assistive device Petitioner deems

acceptable. Based on the foregoing findings of fact, ESY services are not required for Tablet P.C. training.

51. Further, Respondent acknowledged that ESY services may also be provided in cases where there is potential for educational regression during school breaks. In this case, there is no evidence that Petitioner has experienced any substantial educational regression during school breaks. Accordingly, the failure to provide ESY services does not constitute a denial of FAPE.

52. Petitioner has been receiving ESD services to assist in organizing work assignments. Petitioner asserts that the services being provided are insufficient and seeks additional time with a tutor, which Respondent has declined to provide. There was no evidence offered to establish that Respondent's refusal to provide expanded ESD services to Petitioner constitutes a denial of FAPE.

CONCLUSIONS OF LAW

53. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 1003.57(5), Fla. Stat. (2004).

54. The Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq. (IDEA), provides the right of all disabled children to FAPE.

55. The IDEA defines "free appropriate public education" at 20 U.S.C. § 1401(8), as follows:

The term "free appropriate public education" means special 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.

56. The issue in the case is whether Respondent has provided FAPE to Petitioner.

57. In order to satisfy the IDEA requirement of FAPE, the School Board must provide personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. The School Board is not required to maximize the child's educational benefit or guarantee a specific level of success. The child is entitled to an individual plan of instruction that contains goals and objectives reasonably calculated to provide educational benefit. The issue at an administrative hearing is to determine whether the School Board has complied with statutory procedures, and

then determine whether the individualized program developed through such procedures is reasonably calculated to enable the child to receive educational benefits. Board of Education v. Rowley, 458 U.S. 176 (U.S. 1982); J.S.K. v. Hendry County School Board, 941 F.2d 1563 (11th Cir. 1991).

58. The nature and extent of services which must be provided to an exceptional student was addressed in School Board of Martin County v. A.S., 727 So. 2d 1071, 1074 (Fla. 4th DCA 1999) as follows:

Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits provided under IDEA must be more than trivial or de minimis. J.S.K. v. Hendry County Sch. Dist., 941 F.2d 1563 (11th Cir.1991); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198, 102 S. Ct. 3034. The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer." Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997)(citing Board of Educ. of Community Consol. Sch. Dist. 21 v. Illinois State Bd. of Educ., 938 F.2d at 715, and Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988)).

59. In this case, the evidence establishes that Respondent has met the requirement to provide FAPE to Petitioner. Insofar as is relevant to this proceeding, the February 25, 2005, IEP is reasonably calculated to provide an educational benefit to [REDACTED]

60. Petitioner's objections to the IEP essentially focus on two broad areas: the provision of psychiatric services and the development of organizational skills.

61. As to Petitioner's request for a continuation of psychiatric services at Respondent's expense, there is no credible evidence that psychiatric services are currently being provided or are necessary. Psychiatric services are classified as a "related service" at 34 C.F.R. § 300.24, which provides in relevant part as follows:

Section 300.24 Related services.

(a) General. As used in this part, the term related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent

counseling and training. (emphasis supplied)

(b) Individual terms defined. The terms used in this definition are defined as follows:

* * *

(4) Medical services means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

62. The treating psychiatrist did not testify at the hearing. According to the "psychiatric update" document dated January 20, 2005 (the only current clinical information in the record), the psychiatric services being provided to Petitioner are for purposes of managing [REDACTED] medication, not for any diagnostic or evaluative purposes. Petitioner offered no credible evidence that psychiatric services other than medication management are necessary at this time. Respondent's refusal to provide psychiatric services does not constitute a denial of FAPE.

63. Petitioner's other objections are related to the student's organizational skills (or lack thereof), including the provision of appropriate assistive technology and related training, and Respondent's monitoring and reporting of whatever progress is being made by the student.

64. The evidence establishes that Respondent has provided assistive devices sufficient to permit the student to develop the skills identified in the IEP and that the student refuses to use the devices. Petitioner's mother insists that the student be provided with a Tablet P.C. The parent has no right to compel a specific methodology or program. See Lachman, at 297 (citing Rowley, at 208).

65. As to the issue of Respondent's monitoring and reporting of organizational skill development progress, the IEP provides that such progress is to be periodically reported. The evidence establishes that Respondent is failing to report specific information related to organizational skill development progress; however, not every procedural defect results in a denial of FAPE. The question is whether the impact of the defect results in a failure to provide an educational benefit to the student. See School Bd. of Collier County v. K.C., 285 F.3d 977 (11th Cir. 2002).

66. In this case, Respondent's failure to meet its reporting obligation is of no consequence. Petitioner's parents are clearly aware that progress in organizational skills is not being made. While school officials could (and perhaps should) establish a structured system for reporting organizational skill progress to the student's parents, it is unlikely that the

student will make such progress while refusing to utilize the tools made available to [REDACTED].

67. Finally, Petitioner asserts that Florida Administrative Code Rule 6A-6.030191 requires the provision of "enhancements" to the student, such as the specific assistive device requested. The cited Section governs the development of Education Plans (EP) for students who are "identified solely as gifted" and is inapplicable to this case.

FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is determined that the Collier County School Board has met its obligation to provide a free and appropriate public education to [REDACTED].

DONE AND ORDERED this 24th day of June, 2005, in Tallahassee, Leon County, Florida.

S

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Filed with the Clerk of the
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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.