

Pasco County School District
No. 05-2051E
Initiated by: Parent
Hearing Officer: Daniel Manry
Date of Final Order: July 19, 2005

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 05-2051E
)
PASCO COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on June 29, 2005, in Land O'Lakes, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: ██████████
(Address of record)

For Respondent: Nancy McClain Alfonso, Esquire
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STATEMENT OF THE ISSUES

The issues are whether Respondent violated 20 United States Code (USC) Sections 1400 et seq., the Individuals with Disabilities Education Act (IDEA), and denied Petitioner a free appropriate public education (FAPE) by classifying a disabled student as educable mentally handicapped (EMH) rather than specific learning disability (SLD); placing the student in a special diploma curriculum; and providing speech and language therapy to the student.

PRELIMINARY STATEMENT

Petitioner's mother requested a due process hearing on May 27, 2005. Respondent referred the matter to DOAH to conduct the hearing, and the undersigned scheduled the hearing for June 23, 2005.

During a preliminary hearing conducted on June 13, 2005, the mother, in relevant part, verbally waived the requirement for a final order to be entered within 45 days of the request for hearing (45-day requirement). Counsel for Respondent prepared a joint motion for continuance and waiver of the 45-day requirement and sent the documents to the mother for her signature. The mother did not sign the motion and waiver. The day before the hearing, the mother verbally notified the ALJ that she "had changed her mind and wanted to go to hearing."

The ALJ convened the hearing on June 23, 2005. The mother and the counsel for Respondent participated in the hearing. The

ALJ granted the contested motion for continuance filed by Respondent at the hearing, rescheduled the hearing for June 29, 2005, and deemed the 45-day requirement to have been tolled for approximately 11 days from June 13 through June 23, 2005.

At the hearing conducted on June 29, 2005, Petitioner testified and submitted eight exhibits for admission into evidence. Respondent presented the testimony of six witnesses and submitted 31 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 filed with DOAH on July 14, 2005. Petitioner and Respondent timely filed their respective proposed final orders on July 6 and 15, 2005.

FINDINGS OF FACT

1. Petitioner is a disabled [REDACTED] student in the Pasco County School District (the District). Petitioner was born on [REDACTED] 19[REDACTED].

2. Petitioner has been enrolled in the District schools for [REDACTED] entire education. [REDACTED] attended [REDACTED] Preschool ([REDACTED]), [REDACTED] Elementary School ([REDACTED]), [REDACTED] Middle School (middle school), and is scheduled to begin the [REDACTED] school year at [REDACTED] High School (high school).

3. Petitioner challenges the IEP that the middle school IEP team developed on May 12, 2005, for Petitioner's transition to high school. The IEP is identified in the record, alternatively, as the proposed IEP, the challenged IEP, and the transition IEP.

4. For reasons discussed in the Conclusions of Law, Respondent, as the party proposing a change in the previous IEP, must show that the proposed IEP is designed and implemented to provide Petitioner with FAPE. The design of the challenged IEP complies with the procedural requirements of the IDEA, and the challenged IEP has yet to be implemented in high school.

5. The IDEA does not require Petitioner and [REDACTED] mother to await implementation of the proposed IEP in high school. If the evidence were to support findings that the challenged IEP is substantially similar to previous IEPs and that Petitioner did not make progress toward the educational goals in [REDACTED] previous IEPs, the challenged IEP would not be designed to provide FAPE notwithstanding that it has yet to be implemented.

6. The request for due process hearing, as explained in testimony by the mother, alleges that the proposed IEP is deficient in three areas (areas of concern). The request for due process hearing alleges that the proposed IEP improperly classifies Petitioner as EMH rather than SLD, places Petitioner in a special diploma curriculum, and unnecessarily provides speech and language therapy to Petitioner.

7. It is undisputed that the challenged IEP is substantially similar to previous IEPs in the three areas of concern. The challenged IEP classifies Petitioner as EMH, continues Petitioner in a special diploma curriculum, and continues speech and language therapy.

8. Previous IEPs provided Petitioner with FAPE. In each previous IEP, Petitioner has consistently made more than de minimis progress toward [REDACTED] unique educational needs. Beginning in the sixth grade, each IEP included speech and language therapy.

9. Respondent first evaluated Petitioner from January 10 through 15, 1996, when Petitioner was attending [REDACTED]. Petitioner displayed a 14-point discrepancy between [REDACTED] verbal comprehension score of 67 and [REDACTED] nonverbal reasoning score of 81; a 43 percent delay in academic skills; a 40 percent delay in communication skills; and a 45 percent delay in visual motor skills. Respondent referred Petitioner to its exceptional student education (ESE) program.

10. In the [REDACTED] grade at [REDACTED], Respondent identified Petitioner as an "early emergent" and developed the first IEP for Petitioner on June 2, 1997. The IEP classified Petitioner as SLD and placed Petitioner in a regular curriculum.

11. Petitioner made progress toward the educational goals in the first IEP. By the end of the first grade, Petitioner had

mastered sound recognition for 21 of 26 letters, was beginning to blend sounds to read words, was able to identify 10 words on sight, and was making progress in writing some alphabet letters.

12. During the first grade, Petitioner also made progress in math. By the end of the school year, Petitioner was able to tell time by the hour, recognize numbers, and was working on measurements such as taller, shorter, smallest, and shortest.

13. By the end of the first grade, Petitioner had earned grades of "successful" (S) in 15 academic subjects and "needs assistance" (N) in five academic subjects. Petitioner earned no grades of "well below expectations" (U).

14. On May 4, 1998, Respondent evaluated Petitioner again. Petitioner advanced to the [REDACTED] grade for the 1998-1999 school year, and Respondent developed a [REDACTED] grade IEP. In relevant part, the [REDACTED] grade IEP continued the SLD classification for Petitioner.

15. Petitioner made progress toward the educational goals in the second grade IEP. Petitioner made progress in blending letter sounds, recognizing sight words, and completing assignments. In mathematics, Petitioner was able to add numbers with sums less than 10 using touch math and manipulatives. By the end of the second grade, Petitioner had earned N's in communications, literature, and mathematics. Petitioner had earned S's in science and social studies.

16. The progress Petitioner made in the second grade was far below grade level despite a great deal of assistance in the classroom. Petitioner was reading on an emergent level and was unable to use or understand number concepts over 10.

17. The delayed academic progress of Petitioner prompted another evaluation on November 16, 1998. The evaluation arose, in relevant part, from concern over the appropriateness of the placement of Petitioner in the SLD program.

18. Petitioner displayed an IQ score of 61 on the Stanford-Binet Intelligence Scale. That score placed Petitioner within the mentally deficient range of intelligence. The Woodcock-Johnson Tests of Achievement ranked Petitioner in the one percentile for skills, letter-word identification, and dictation; and in the second percentile for applied problems. Petitioner demonstrated the need for a significant adjustment in curriculum to accommodate [REDACTED] unique educational needs.

19. Petitioner continued to display delayed academic performance. Respondent conducted a third evaluation on March 29, 1999. Petitioner demonstrated a full scale IQ of 48 on the Wechsler Intelligence Scale for Children, Third Edition. Petitioner demonstrated little to no peer interaction. Petitioner required instruction in small repetitious units, ample time for guided practice, the review of previous lessons before introduction to new material, linkage between new material and

previous mastery, and manipulatives and visual aids as much as possible. It was no longer appropriate to measure the educational progress of Petitioner by peers of the same age or grade level.

20. On May 19, 1999, Respondent developed a [REDACTED] grade IEP for Petitioner. In relevant part, the IEP changed the primary exceptionality for Petitioner from SLD to EMH. Respondent continued the EMH classification through the date of the challenged IEP.

21. At the time the IEP team developed the [REDACTED] grade IEP, Petitioner recognized all letters of the alphabet and most of their sounds. [REDACTED] recognized words from familiar books when they were accompanied by picture clues. [REDACTED] was able to write phonetically spelled words with letter-sound prompts. Petitioner recognized numbers and objects up to 10 and simple patterns and shapes.

22. Petitioner made educational progress in the [REDACTED] grade. Petitioner successfully completed book one of the Reading Mastery series. Petitioner scored a "100 on every spelling test," expanded [REDACTED] vocabulary, and was able to sound out unfamiliar words. Petitioner learned to count accurately and add numbers up to 12 with assistance.

23. On May 31, 2000, Respondent developed a [REDACTED] grade IEP for Petitioner. Petitioner made progress toward [REDACTED] unique

educational needs during the [REDACTED] grade. Petitioner earned a grade of "C" in communications and literature and a "B" in science and social studies.

24. By the end of the [REDACTED] grade, Petitioner was learning how to blend consonant and vowel sounds to form words. [REDACTED] demonstrated an appreciation for the content of what was being read to [REDACTED] and an understanding of rhymes. Petitioner was able to subtract to nine and skip count by two. Petitioner was able to add and subtract two digit numbers, regroup, and count coins and dollars. Petitioner was also able to identify a triangle, square, rectangle, and circle.

25. Petitioner learned how the lung, heart, brain, and muscular and skeletal systems function together for a healthy body; the six food groups; the use of wind for power; and the use in machinery of the lever, wheel, wedge, inclined plain, and screw. In social studies, Petitioner learned some of the countries in Europe; and learned some concepts about [REDACTED] community, as well as responsibility and respect.

26. On May 2, 2001, Respondent developed a [REDACTED] grade IEP for Petitioner. Petitioner made progress toward [REDACTED] unique educational goals. By the end of the fifth grade, Petitioner had earned a grade of "B" in science and social studies and a grade of "C" in communications, literature, and mathematics.

Petitioner was improving the quantity and quality of the use of consonants and was learning to decode words in text.

27. On May 8, 2002, Respondent developed a [REDACTED] grade IEP for Petitioner for [REDACTED] school. Petitioner exhibited some difficulty in adjusting to middle school, but continued to make progress toward [REDACTED] unique educational goals. Petitioner earned a letter grade of "D" in social studies, a "C" in language arts and science, and a "B" in mathematics. Petitioner made progress toward language and math goals defined in the IEP by 80 percent accuracy rates.

28. On May 8, 2003, Respondent developed a [REDACTED] grade IEP for Petitioner. Petitioner made progress toward [REDACTED] unique educational goals. Petitioner earned a grade of "B" in language arts, mathematics, science, and social studies. Petitioner continued to make progress toward language and math goals defined in the IEP by 80 percent accuracy rates.

29. On May 20, 2004, Respondent developed an [REDACTED] grade IEP for Petitioner. Respondent conducted a fourth evaluation of Petitioner on September 16, 2004. Petitioner demonstrated a full scale IQ of 48 on the Stanford-Binet Intelligence Scale, Fifth Edition. There was no significant difference between [REDACTED] verbal and nonverbal scores. Petitioner fell within the mentally deficient range of intelligence.

30. The evaluation also included the Woodcock-Johnson Tests of Achievement, Third Edition. Petitioner performed at a very low range relative to [REDACTED] peers of the same age. Petitioner had difficulty in reading, writing, and mathematics beyond grade level equivalent to the middle of the first grade.

31. Results for speech and language tests were very low. Petitioner ranked below one percentile in expressive vocabulary and language. [REDACTED] scored in the fifth percentile in picture vocabulary.

32. During the eighth grade and at the request of Petitioner's mother, Respondent placed Petitioner in a Diagnostic Teaching Study to assess the appropriateness of an SLD curriculum for Petitioner. Respondent placed Petitioner in a class comprised predominantly of students classified as SLD, who were working below their grade level, to ascertain the progress of Petitioner in that curriculum over a period of 13 days.

33. The SLD curriculum is not appropriate for the unique educational needs of Petitioner. Petitioner performs poorly at that academic level. Petitioner never turned in any work assignments and did not interact with [REDACTED] peers.

34. The mother obtained an independent evaluation of Petitioner on April 27, 2005. The written report is dated June 13, 2005. The results are consistent with previous evaluations conducted by Respondent.

35. Petitioner has a full scale IQ of 40 on the Wechsler Intelligence Scale for Children, Fourth Edition. Petitioner has a verbal comprehension index of 53, a perceptual reasoning index of 45, a working memory index of 50, and a processing speed index of 50.

36. The mother also obtained an independent evaluation by a local Sylvan Learning Center (Sylvan). Petitioner scored in the very low range in receptive vocabulary and oral reading and less than one percentile on the California Achievement Test.

37. Based on the testimony of the teachers involved with Petitioner during the eighth grade, Petitioner made progress toward [REDACTED] unique educational goals. The EMH classification and curriculum and speech and language therapy in the challenged IEP are appropriate for the unique educational needs of Petitioner.

38. In relevant part, the mother seeks to place Petitioner in Sylvan, a private school, and to require Respondent to pay the private tuition. The record evidence does not support a finding that the District has failed to provide Petitioner with FAPE or that the mother has provided the notice that the IDEA requires the mother to provide to Respondent as a prerequisite to payment of private tuition by a public school district.

CONCLUSIONS OF LAW

39. DOAH has jurisdiction over the parties to this proceeding pursuant to Subsection 1003.57(5), Florida Statutes

(2004); Florida Administrative Code Rule 6A-6.03311; and the IDEA. DOAH provided the parties with adequate notice of the due process hearing.

40. Respondent is the party proposing a new IEP that purports to change an existing IEP identified in the record as the eighth-grade IEP. It is undisputed that Respondent has the burden of proof. In relevant part, Respondent must show by a preponderance of evidence that the proposed IEP is designed to provide Petitioner with FAPE. Devine v. Indian River County School Board, 249 F.3d 1289, 1292 (11th Cir. 2001); JSK v. Hendry County School Board, 941 F.2d 1563, 1573 (11th Cir. 1991); Christopher M. v. Corpus Christi Independent School District, 933 F.2d 1285, 1290-1291 (5th Cir. 1991).

41. Respondent satisfied its burden of proof. Respondent showed that the proposed IEP is substantially similar to previous IEPs in which Petitioner made progress toward educational goals that are appropriate for the unique educational needs of Petitioner.

42. The IDEA does not require Respondent to maximize the educational progress of Petitioner. The challenged IEP need only provide Petitioner with some educational benefit. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 192 (1982); School Board of Martin County v. A.S., 727 So. 2d 1071, 1074 (Fla. 4th DCA 1999); Hendry County School

Board v. Kujawski, 498 So. 2d 566 (Fla. 2d DCA 1986). See also
Adam J. v. Keller Independent School District, 328 F.3d 804, 810
(5th Cir. 2003)(incremental progress satisfies IDEA); Todd D. v.
Andrews, 933 F.2d 1576 (11th Cir. 1991)(schools not required to
maximize potential); Doe v. Alabama State Board of Education, 915
F.2d 651 (11th Cir. 1990)(maximizing progress not required).

ORDER

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

ORDERED that the proposed IEP provides Petitioner with FAPE.

DONE AND ORDERED this 19th day of July, 2005, in
Tallahassee, Leon County, Florida.

S

DANIEL MANRY
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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.