Marion County School District
No. 05-0621E
Initiated by: Parent
Hearing Officer: Harry L. Hooper
Date of Final Order: August 10, 2005

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted]	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-0621E
	)	
MARION COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on June 21, 2005, in Ocala, Florida.

APPEARANCES

For Petitioner: [redacted]
(Address of Record)

For Respondent: Sidney M. Nowell, Esquire
Knight, Dwyer & Nowell, P.A.
1100 East Moody Boulevard
Bunnell, Florida 32110

STATEMENT OF THE ISSUE

The issue is whether Respondent Marion County School Board (School Board) is providing [redacted] a free and appropriate education (FAPE).

PRELIMINARY STATEMENT

On February 22, 2005, [redacted] through [redacted] grandmother, requested a due process hearing. [redacted] alleged that [redacted] was not receiving FAPE. Specifically, [redacted] requested (1) that the School Board implement a policy providing that support facilitators or individual Exceptional Student Education (ESE) teachers would not be used as classroom substitutes and (2) that the School Board implement a plan to ensure better inclusion, in the case of ESE students.

On the same day in which [redacted] made [redacted] request for a hearing, the School Board forwarded it to the Division of Administrative Hearings.

The case was set for hearing on March 8, 2005. On March 4, 2005; however, the parties filed a Joint Stipulation for Mediation and Continuance and requested mediation pursuant to Florida Administrative Code Rule 6A-6.03311(5)(k). (Undoubtedly the parties were referring to Florida Administrative Code Rule 6A-6.03311(5) generally because there is no subsection [k] in the rule.) The parties specifically and voluntarily waived the 45-day decision requirement set forth in Florida Administrative Code Rule 6A-6.03311(11)(i)11. By an Order

Granting Continuance and Placing Case in Abeyance, the case was continued and the parties were required to inform the Administrative Law Judge of suggested hearing dates by May 12, 2005.

On April 7, 2005, the School Board moved to set the hearing. The hearing was set for April 21, 2005. On April 7, 2005, [redacted] through [redacted] Advocate, requested that the hearing be set after May 20, 2005, so that [redacted] grandmother's husband, a member of the U. S. Navy, serving at sea, could attend. The hearing was set for May 24, 2005. The School Board thereafter moved to have the hearing continued into June and [redacted] agreed with the motion. The hearing was set for June 21, 2005, and was heard on that date.

At the hearing, both Petitioner and Respondent presented the testimony of four witnesses. The parties entered into evidence a single joint exhibit consisting of [redacted] cumulative file and Respondent entered into evidence a single exhibit.

Petitioner filed [redacted] Proposed Final Order on July 6, 2005. A Transcript was filed on July 21, 2005. Respondent moved, with Petitioner's agreement, for an enlargement of time for Respondent to file a Proposed Final Order, and the Motion was granted. In accordance with the Order on Respondent's Motion

for Extension of Time, Respondent timely filed its Proposed Final Order on August 8, 2005.

References to statutes are to Florida Statutes (2004) unless otherwise noted.

FINDINGS OF FACT

1. The Marion County School District, territorially, encompasses all of Marion County, Florida. It is supervised by the School Board.

2. [redacted] was born on [redacted] [redacted] attended the Virginia Beach City Public Schools until [redacted] moved with [redacted] grandmother to Marion County, Florida, immediately prior to August 8, 2004. [redacted] grandmother and [redacted] have legal custody of [redacted].

3. [redacted] was enrolled as a [redacted] grade student at [redacted] School of the Marion County School District during the school year 2004-2005. [redacted] was [redacted] years of age during the school year. [redacted] has been diagnosed as having an Attention-Deficit/Hyperactivity Disorder (ADHD) with a borderline range of intelligence.

4. [redacted] is classified as a special education student. In Marion County, regular students are categorized by

level based on the result of the Florida Comprehensive Assessment Test. A level 1 student is one who performs at the lower end of standards. A student who is categorized as level 2 or 3 achieves somewhat better. The highest category is level 5.

5. [redacted] Individual Education Plan (IEP), at the time of enrollment, provided for self-contained placement. Self-contained placement means that exceptional education students are taught with other exceptional education students. When [redacted] was enrolled in [redacted] School on August 8, 2004, [redacted] was provided with a continuation of an IEP which was scheduled to expire on December 11, 2004.

6. At an IEP meeting on August 17, 2004, it was agreed by both the school representatives and [redacted] grandmother, that [redacted] would be "mainstreamed" into a regular class. A regular class is defined as having more than 79 percent non-ESE students. This is also called "inclusion." The IEP also provided that [redacted] would be provided support facilitation services.

7. Support facilitation services means that a counselor qualified to respond to the educational needs of exceptional students is provided to help mainstream ESE students. The support facilitator also works with and aids teachers assigned to special education students.

8. Mr. W. G. Humphries was designated as [redacted] ESE facilitator. Mr. Humphries is qualified and certified to work in this position. He worked with [redacted] and made sure [redacted] assignments were completed and that notes were provided to [redacted]. He talked to [redacted] teachers in order to inform himself of [redacted] needs.

9. In a report of psychological consultation dated October 22, 2004, a licensed clinical psychologist recited [redacted] mental test scores and opined that [redacted] continued to suffer from ADHD. The report concluded, "[redacted] could benefit from additional tutoring or individualized instructional programs in mathematics, and other measures to 'level the playing field,' such as additional time on tests, peer note-taking, and individualized instructional programs."

10. In an IEP dated December 6, 2004, [redacted] was provided a new accommodation to address [redacted] special needs in mathematics. School staff attended this meeting as well as [redacted] grandmother.

11. In an IEP dated February 7, 2005, accommodations were put into place which granted preferential seating, extra time for "processing/responding," extra time for exams, extra time for assignments, and allowed [redacted] to use a calculator. It also provided for the use of written notes, outlines, and study guides.

12. [redacted] complained about a boy who was harassing [redacted] in one class, and Mr. Humphries ensured that [redacted] was transferred to another class.

13. There is no correlation in the composition of inclusion classes between Florida Comprehensive Assessment Test (FCAT) results and student assignment. About 78 percent of the student population in [redacted] is level 1 or 2. Only a handful of the student population is level 5. It is therefore impossible for [redacted] to be in a class with a large population of bright students.

14. [redacted] received the following grades at the end of the 2004-2005 school year: Language Arts, A; Mathematics 2, C; Chorus 3, A; Physical Fitness, A; Science, B; and Geography, C.

CONCLUSIONS OF LAW

15. 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 R. 6A-6.03311(11).

16. This case arises out of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, et seq., and corresponding Florida law. See § 1003.57, Fla. Stat. and Fla. Admin. Code R. 6A-6.03311.

17. Petitioner has the burden of proving by a preponderance of the evidence that [redacted] is not receiving FAPE. See Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

18. The legal standard to be used in deciding this case is (1) whether the School Board has complied with the procedures set forth in the IDEA, and (2) whether the IEP developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982).

19. IDEA imposes extensive evaluative obligations upon school systems. See 34 C.F.R. §§ 300.530-300.536 and Fla. Admin. Code R. 6A-6.03311 (1)-(4), and (7), and (11). The evaluations must be designed to determine the nature and extent of the child's disability and the special education and related services that the child needs. See 20 U.S.C. § 1414(b); 34 C.F.R. § 300.500(b)(2) and §§ 300.530-300.535.

20. After the initial evaluation, school districts must re-evaluate special education students "if conditions warrant" or "if the child's parent or teacher requests a re-evaluation, but at least once every three years." See 20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.536; and Fla. Admin. Code R. 6A-6.0331(7).

21. There is no evidence that the School Board committed any procedural errors in determining the level of services to provide Petitioner. See 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 pubic education).

22. Section 1003.57 provides that:

> 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:
>
> * * *
>
> (2) The district school board provide the special instruction, classes, and services, either within the district school system, in cooperation with other district school systems, or through contractual arrangements with approved private schools or community facilities that meet standards established by the commissioner.
>
> * * *
>
> (6) In providing for the education of exceptional students, the district school superintendent, principals, and teachers shall utilize the regular school facilities and adapt them to the needs of exceptional students to the maximum extent appropriate. Segregation of exceptional students shall occur only if the nature or severity of the exceptionality is such that education in

> regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

23. Petitioner's assertion that [redacted] education would be enhanced if [redacted] were placed in a classroom with level 4 and 5 students who could help [redacted] with note-taking is undoubtedly correct. However, achievement levels are not taken into consideration when assigning students to classes at [redacted] School. In any event, there is a paucity of level 4 and 5 students available at [redacted].

24. Petitioner asserted that the ESE support facilitator should not be assigned as a substitute teacher from time to time. However, the important question is whether the ESE support facilitator is available for [redacted] on a regular basis. During the school year 2004-2005 Mr. Humphrey was generally available when needed and the evidence indicates that an ESE support facilitator will be available to [redacted] in the ensuing school years.

25. [redacted] understandably wishes the highest level of support as [redacted] continues [redacted] education. However, the School Board is not required to maximize Petitioner's potential. See Doe v. Alabama State Department of Education, 915 F.2d 651, at 665 (11th Cir. 1990). Appropriate education does not mean the absolute best or a "potential maximizing education." See Rowley, supra. Furthermore, Respondent is not

required to provide an education according to the parent's dictates. See also Weiss v. School Board of Hillsborough County, 141 F.3d 990, 994 (11th Cir. 1998).

26. The School Board used the proper procedure as set forth in IDEA in developing [redacted] IEP, and thereafter provided [redacted] FAPE.

ORDER

Based upon the Findings of Fact and Conclusions of Law, it is

ORDERED that:

The Marion County School Board is providing a free and appropriate education to [redacted] and [redacted] petition is dismissed.

DONE AND ORDERED this 10th day of August, 2005, in Tallahassee, Leon County, Florida.

S

HARRY L. HOOPER
Administrative Law Judge
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Filed with the Clerk of the
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this 10th day of August, 2005.

COPIES FURNISHED:

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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 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.