Collier County School District
No. 05-1617E
Initiated by: Parent
Hearing Officer: Jeff B. Clark
Date of Final Order: November 17, 2005

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted] INDIVIDUALLY, AND ON BEHALF OF [redacted] A MINOR,	)	
Petitioner,	)	
vs.	)	Case No. 05-1617E
COLLIER COUNTY SCHOOL BOARD,	)	
Respondent.	)	

FINAL ORDER

A due process hearing was held in this case before Administrative Law Judge Jeff B. Clark of the Division of Administrative Hearings (DOAH) on June 8 and July 13, 2005, in Naples, Florida.

APPEARANCES

For Petitioner: Paul E. Liles, Esquire
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For Respondent: Richard W. Withers, General Counsel
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STATEMENT OF THE ISSUES

The issues are whether Respondent, Collier County School Board, failed to provide Petitioner, [redacted] a child with disabilities, a free, appropriate public education (FAPE), through procedural and substantive acts and omissions, including: (a) failing to design and implement an appropriate Individual Education Plan (IEP), (b) refusing to change the physical therapist for [redacted] (c) requiring [redacted] to undergo physical therapy with a person who was inappropriate for [redacted]'s unique needs, or (d) requiring [redacted] to forego physical therapy. At the due process hearing, Petitioner asserted that Respondent's failure to provide certain "educational records" constituted a procedural omission that denied [redacted] a FAPE.

PRELIMINARY STATEMENT

On May 4, 2005, [redacted] mother of [redacted] requested a due process hearing, which Respondent referred to DOAH on May 4, 2005. On May 5, 2005, a Notice of Telephonic Pre-hearing Conference was issued, scheduling a pre-hearing conference for May 13, 2005. On the same day, a Notice of Hearing was issued, scheduling the due process hearing for June 2, 2005, in Naples, Florida. On May 16, 2005, an Amended Notice of Hearing was issued, rescheduling the due process hearing for June 8, 2005. The due process hearing was initiated as scheduled on June 8, 2005. During the hearing, the case was continued to July 13

and 14, 2005. The taking of testimony was concluded on July 13, 2005. Applicable statutory deadlines were extended by the parties.

Petitioner offered the testimony of six witnesses and offered 11 exhibits, which were received into evidence and marked Petitioner's Exhibits A through K. Respondent presented eight witnesses and offered six exhibits, which were received into evidence and marked Respondent's Exhibits A through F. Recommended final orders were to be submitted ten days after the transcript of the July 13, 2005, portion of the hearing was filed with the Clerk of the DOAH. The Transcript of Proceedings was filed on September 13, 2005. By Joint Stipulation for Extension of Time for Filing Memoranda and Recommended [sic] Orders, the parties agreed that Petitioner would file [redacted] recommended final order on October 7, 2005, Respondent would file its recommended final order 15 days thereafter, and Petitioner would then have an additional ten days to file a reply. This agreement was confirmed by an Order dated October 4, 2005. Both parties filed their Proposed Final Orders and supporting memoranda in a timely manner.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following findings of fact are made:

1. [redacted] is the child of [redacted] who brings this action on [redacted] behalf. At the time of the due process hearing, [redacted] was [redacted] years old and was a [redacted] student at [redacted] Naples, Collier County, Florida.

2. Respondent is the political entity which manages and controls the public schools in Collier County, Florida.

3. [redacted] was born prematurely, weighing one pound and six ounces at birth. [redacted] has experienced myriad medical problems and procedures since birth. The first four months of [redacted] life were spent in a neo-natal intensive care unit.

4. [redacted] has expressive language delays, fine motor and gross motor delay, and Gastroesophageal Reflux Disease (GERD). In addition, [redacted] is a fragile child and has difficulty breathing. [redacted]'s GERD has required surgery and, until recently, has been controlled by medication.

5. [redacted] as a child with disabilities, is entitled to receive specialized educational and related services from Respondent using an IEP. Each IEP is developed by an "IEP team," which comprises educators with specialized training and skills in educating children with disabilities. In addition, the parents of each disabled child are IEP team members. Each IEP is "individualized" to meet the specific needs of each child and assure that each child receives a FAPE.

6. Each individual IEP sets measurable educational goals in an effort to quantify the effectiveness of the IEP and the instruction and related services the child is receiving. In the instant case, the physical therapy portion of the IEP set specific "measurable annual goals" and "short-term objectives or benchmarks," which were evaluated by [redacted]'s teacher and physical therapist. Among the parents' concerns enumerated in the IEP was the following: "interaction with therapists ([redacted] is shy, sometimes non compliant)."

7. [redacted] (also referred to herein as "Miss [redacted] a licensed educational physical therapist with 14 years of experience, was assigned by Respondent to [redacted] for the 2004-2005 school year to provide physical therapy services to students requiring those services, including [redacted] Ms. [redacted] was a member of the IEP team that developed [redacted]'s IEP plan for the 2004-2005 school year.

8. [redacted] enjoyed physical therapy and made progress through most of the school year. In March 2005, an incident occurred wherein [redacted] fell; [redacted] sat momentarily on the floor, but was not injured. Later, during another physical therapy session, the child cried, asked for [redacted] mother, and was returned to [redacted] classroom. Otherwise, each physical therapy session was successful with no indication of sickness or anxiety being experienced by [redacted] as observed by Ms. [redacted] No evidence was

received that the physical therapy services being provided by Ms. [redacted] deviated from acceptable norms. To the contrary, independent observations reflected appropriate conduct.

9. During the months of March and April 2005, [redacted]s parents noticed a change in their [redacted] which included an exacerbation of [redacted] GERD symptoms which had previously been under control. The parents attributed this change to "something" that happened during physical therapy as the child reported, " Miss [redacted] is mean to me," "Miss [redacted] screams at me," "Miss [redacted] throws balls at me," and similar complaints. As a result of their concern, [redacted]'s parents visited Corkscrew Elementary School and observed [redacted]'s physical therapy sessions; however, the parents did not identify anything inappropriate.

10. In addition to observing [redacted]'s physical therapy sessions, [redacted]'s parents sought the services of medical professionals, who being informed of [redacted]'s recent history of disenchantment with physical therapy, suggested that Ms. [redacted] assigned physical therapist, be replaced. In mid April of 2005, Dr. [redacted] [redacted]'s treating gastroenterologist, signed a letter, authored by [redacted]'s mother, [redacted] urging Respondent to change physical therapists for [redacted]

11. The opinions expressed in this letter have little credibility; Dr. [redacted] indicates that the letter reflects the mother's feelings, which he supports. Importantly, he indicates

that [redacted] has sensory issues that causes [redacted] to experience anxiety/fear in educational settings, and his records reflect that [redacted] continued to have exacerbated symptoms in July 2005, several months after physical therapy ended.

12. Contemporaneously, [redacted]'s parent(s) advised Respondent that they did not want Ms. [redacted] to provide physical therapy services to [redacted] The parents indicated that they wanted a different physical therapist. Respondent did not acquiesce to this request. For the remaining weeks of the 2004-2005 school year, Ms. [redacted] was available to provide physical therapy services in accordance with [redacted]'s IEP, but, in deference to the parents' expressed wishes, did not.

13. Dr. [redacted] a gastroenterologist, testified that there was no objective evidence to support the claim that interaction with Ms. [redacted] was increasing [redacted]'s symptoms. He indicated that neither exposure to a particular physical therapist or to physical therapy is capable of producing the degree of gastroesophageal reflux conditions indicated by the parents. I find that Dr. Botoman's testimony is credible.

14. In [redacted]'s September 2004 IEP, the IEP team established measurable goals to assess the effectiveness of the specialized educational and related services. The relevant annual measurable goal for [redacted]'s 2004-2005 IEP was: "[redacted] will demonstrate functional fine and gross motor, balance and

coordination to participation in [redacted] learning environment with 80% target achievement prior to the next IEP." [redacted]'s IEP progress report of May 2, 2005, indicated that [redacted] has "mastered" the measurable goal. In addition, [redacted] "mastered" four of five short-term objectives or benchmarks. The totality of the evidence, including other performance tests, suggests that [redacted] was making dramatic progress as a result of the physical therapy provided by Ms. [redacted] [redacted] is receiving educational benefits from the IEP currently in place; Petitioner has failed to establish that [redacted] is not making meaningful educational progress in [redacted] current placement.

15. No evidence was presented that Ms. [redacted] would be assigned to [redacted] after the 2004-2005 school year.

16. While there is no question that in late March and April 2005 the child reacted negatively to physical therapy, no evidence was presented that attributed this reaction to anything done or not done by Ms. [redacted] The child was receiving this needed, related service and the service was being appropriately administered by a qualified therapist as required by [redacted]'s IEP. In addition, the IEP goals related to physical therapy were being met, and the child was making progress. While [redacted] was evaluated by an independent physical therapist on April 18, 2005, in the presence of both parents, Petitioner has provided

no evidence that changing the educational physical therapist will change the child's attitude toward physical therapy.

17. While it is unclear if certain "educational records" requested by [redacted]'s parents pursuant to Section 1002.22, Florida Statutes (2004), were or were not produced, there were documents, in particular personal notes kept by school personnel, and other records which were inadvertently not timely produced. These documents were produced when they became known to Respondent's counsel. Given the opportunity, Petitioner did not cite any specific instance where failure to have early access to these documents created a hardship, hindered Petitioner's case, or otherwise negatively effected Petitioner.

18. On May 4, 2005, [redacted]'s parents requested both a new IEP and this due process hearing.

CONCLUSIONS OF LAW

19. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Subsection 1003.57(5), Florida Statutes (2004), and Florida Administrative Code Rule 6A-6.03311(11).

20. The Individuals with Disabilities Act (IDEA), 20 U.S.C. Section 1400, provides that the local education agency must provide children with disabilities with a FAPE, which must be tailored to the unique needs of the handicapped child by means of an IEP program. Board of Education Hendrick Hudson

Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982).

21. The determination of whether a school district has provided or made available to an "exceptional" student a "FAPE" involves a "twofold" inquiry as the United States Supreme Court explained in Rowley:

> First, has the State [or district school board] complied with the procedures set forth in the Act [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. at 206-207.

22. If these two questions are answered in the affirmative, then "the State [school district] has complied with the obligations imposed by Congress and the courts can require no more." Id. at 207. Specifically, "[t]he statute may not require public schools to maximize the potential of disabled students." Disabled students should have opportunities "commensurate with the opportunities provided to other children." Renner v. Board of Education of Public Schools of the City of Ann Arbor, 185 F.3d 635, 644 (6th Cir. 1999).

23. As noted above, the first inquiry that must be made is whether the local educational agency has complied with the statutory procedures. While Petitioner alleges that Respondent's failure to timely provide educational records

effected a procedural denial of a FAPE, there is scant evidence to support the allegation. Given the fact that [redacted] is a [redacted] student, Respondent produced an incredible volume of documents evidencing the care and consideration given [redacted]'s unique educational needs. Not surprisingly, a few documents "slipped through the cracks." The evidence reflects that Respondent made every attempt to provide Petitioner with documents requested and when the existence of documents was discovered, they were immediately produced. There is no evidence that Petitioner suffered any detriment as a result of the late production of documents.

24. Petitioner suggests that Respondent failed to timely produce certain "educational records" as required by Section 1002.22, Florida Statutes (2004). In the event Respondent fails to produce "educational records," Subsection 1002.22(5), Florida Statutes, provides, as follows:

> In the event that any public school official or employee, district school board official or employee, career center official or employee, or public postsecondary educational institution official or employee refuses to comply with any of the provisions of this section, the aggrieved parent or student shall have an immediate right to bring an action in the circuit court to enforce the violated right by injunction. Any aggrieved parent or student who brings such an action and whose rights are vindicated may be awarded attorney's fees and court costs.

As indicated in paragraph 21, supra, there is insufficient evidence to suggest a procedural denial of a FAPE; otherwise, DOAH's jurisdiction in this matter is specifically limited by Subsection 1003.57(5), Florida Statutes. As a result, the undersigned does not have jurisdiction to entertain additional issues regarding Respondent's purported failure to produce educational documents.

25. The second prong in the Rowley test to determine the appropriateness of an IEP is whether the "[IEP] developed through the Act's [IDEA] procedures [is] reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 207.

26. Pursuant to the IDEA, Respondent is required to provide Petitioner with a "FAPE." See 20 U.S.C. § 1401. In Rowley, the Court stated that, "in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." Rowley, 458 U.S. at 192. More importantly, the Court further stated that "the intent of the [IDEA] was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." Id. The Supreme Court has opined that the IDEA does not require a school district to provide an "equal" education to a handicapped

child. Rowley, 458 U.S. at 198. Rather, the IDEA requires Respondent to ensure that Petitioner receives "some benefit" from [redacted] educational program. Id. at 199.

27. The U.S. Court of Appeals for the Eleventh Circuit has carefully followed the U.S. Supreme Court's analysis of the FAPE standard in requiring local school systems to provide "some" educational benefit to eligible children with disabilities. See Devine v. Indian River County School Board, 249 F.3d 1289 (11th Cir. 2001); J.S.K. v. Hendry County School Board, 941 F.2d 1563 (11th Cir. 1991); Drew P. v. Clarke County School District, 877 F.2d 927 (11th Cir. 1989). In Drew P., the Court stated, "[t]he state must provide the child only with 'a basic floor of opportunity.'" Id. at 930.

28. The U.S. Court of Appeals for the Fifth Circuit has articulated a standard for determining whether a student has received a FAPE in compliance with the IDEA. In Cypress-Fairbanks Ind. School District v. Michael F., 118 F.3d 245, 247-48 (5th Cir. 1997), the Court opined,

> [A]n . . . IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit [redacted] "to benefit" from the instruction. In other words, the IDEA guarantees only a "basic floor of opportunity" for every disabled child, consisting of "specialized instruction and related services which are

> individually designed to provide educational benefit."

29. The U.S. Supreme Court has held that school districts satisfy the FAPE requirement "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Rowley, 458 U.S. at 203. Moreover, the Court opined:

> [T]he IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Rowley, 458 U.S. at 203-204.

30. The IDEA creates a presumption in favor of a school system's educational plan, placing the burden of proof on the party challenging it. See White v. Ascension Parish School Board, 343 F.3d 373 (5th Cir. 2003); Teague Independent School District v. Todd L., 999 F.2d 127, 132 (5th Cir. 1993). In this case, the parents, as the party challenging the IEP, have the burden of proof to demonstrate that the September 30, 2004, IEP did not offer a FAPE to [redacted] Devine, 249 F.3d at 1291-1292. In Devine, the Eleventh Circuit explicitly adopted the Fifth Circuit's position that the party challenging the IEP bears the burden of proof to show that it does not offer a FAPE. The Fifth Circuit said: "We have previously held--as have the

majority of federal courts that have considered the issue--that [IDEA] 'creates a presumption in favor of the education placement established by [a child's] IEP, and the party attacking its term should bear the burden of showing why the educational setting established by the IEP is not appropriate.'" Devine, 249 F.3d at 1291, quoting from Christopher M. v. Corpus Christi Independent School District, 933 F.3d 1285, 1290-1291 (5th Cir. 1991). The Eleventh Circuit, thereby, rejected the minority view of the Third Circuit that the school district has the burden of proof in determining that an IEP is appropriate. On November 14, 2005, The U.S. Supreme Court, held that "[t]he burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district." Schaffer v. Weast, 2005 WL 3028015 (U.S.).

31. The IEP developed on September 30, 2004, offered two 30-minute sessions per week of physical therapy by a qualified physical therapist who was assigned to [redacted]'s school by Respondent. The IDEA requires the provision of educational services by "qualified personnel." 34 C.F.R. § 300.23. "Qualified personnel" means "personnel who have met SEA-approved or SEA-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are providing special education or related

services." Id. Each state is responsible for determining "the specific occupational categories required to provide special education and related services within the State." 34 C.F.R. § 300.136(b)(2). Ms. [redacted] [redacted]'s and [redacted] physical therapist, was licensed by the State of Florida and had 14 years of educational physical therapy experience. There is no evidence that Ms. [redacted] is not a "qualified person[nel]."

32. The Supreme Court has held that the "'basic floor of opportunity' provided by [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefits to the handicapped child." Rowley, 458 U.S. at 201. Respondent has designed an individualized program which, on its face, meets the child's unique needs in physical therapy, and Ms. [redacted] is competently providing those services called for in the IEP to [redacted] Respondent has complied with Rowley in this regard.

33. In April 2005, [redacted]'s parents became concerned as a result of [redacted]'s apparent reaction to Ms. [redacted] While no fault was found with Ms. [redacted] [redacted] was reacting negatively to physical therapy. The parents submitted a request to [redacted] [redacted] principal that [redacted]'s physical therapy be provided by a different physical therapist and refused further physical therapy provided by Ms. [redacted] It should be noted

that as reflected in the September 2004 IEP the parents expressed concern regarding [redacted]'s "interaction with therapists ([redacted] is shy, sometimes non compliant)."

34. It is standard procedure that Respondent does not put the name of the physical therapist in the IEP; the physical therapist is assigned to the school (and it's students) by Respondent. However, the law is clear that Respondent does have an obligation of providing a physical therapist who is qualified and possesses the skills necessary to provide the services required by the child's disabilities. Although the parents expressed concerns, there is no evidence that [redacted]'s current physical therapist does not possess the skills necessary to provide the services required for [redacted] unique educational needs.

35. It is well-settled that the choice of educational methodology and placement is a matter of discretion within the authority of Respondent. Although parents are active participants in an IEP process, they do not single-handedly control the outcome of this process. As the U.S. Supreme Court has stated, "[t]he primary responsibility for formulating the education to be accorded a handicapped child and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." Rowley,

458 U.S. at 207. See generally Lachman v. Illinois State Board of Education, 852 F.2d 290 (7th Cir. 1988), cert. denied, 488 U.S. 925 (1988), where the court recognized, "[o]nce it is shown that the Act's requirements have been met, questions of methodology are for resolution by the responsible authorities." Lachman, 852 F.2d at 292. Lachman holds that a state-proposed IEP that meets the substantive requirements of the IDEA cannot be defeated merely because the parents believe a better educational program exists for their child. Other Federal courts, including the U.S. Court of Appeals for the Eleventh Circuit, have followed Lachman. See Greer v. Rome City Schools, 950 F.2d 688 (11th Cir. 1991). See also Barnett by Barnett v. Fairfax County School Board, 927 F.2d 146, 152 (4th Cir. 1991), cert. denied, 502 U.S. 859 (1991) (the IDEA (then EHA) mandates an education that is responsive to the handicapped child's needs, "but leaves the substance and the details of that education to state and local school officials"); Roland M. v. Concord School Committee, 910 F.2d 983, 993 (1st Cir. 1990), cert. denied, 499 U.S. 912 (1991) (the issue is not whether the program preferred by the parents is better, but whether the program proposed by the school district "struck an 'adequate and appropriate' balance on the maximum benefit/least restrictive fulcrum.")

36. The law does not require Respondent to accede to a parent's preferences. Rather, the law merely requires Respondent to provide "appropriate" educational services to enable [redacted] to receive "some educational benefit." It is irrelevant whether the parents' approve of the physical therapist offered by Respondent. The only relevant issue is whether Respondent has offered a FAPE in accordance with the requirements of the IDEA and Florida state law. The clear weight of the evidence shows that the IEP and [redacted]'s current physical therapist meets the FAPE standard.

37. Effectively, [redacted]'s parents are asking this tribunal to order Respondent to provide [redacted] a different physical therapist because they believe their child is unhappy with the current physical therapist. The courts have uniformly rejected parental demands for schools to hire or assign particular individuals to assist their children with disabilities. See, generally, where a Federal court in California recently held that parents do not have the right to demand that a particular individual be hired as an aide for an 11-year-old child with autism. In Gellerman v. Clalaveras Unified School District, 34 IDELR 33 (E.D. Cal. 2000), the court rejected the parents' claims that the aide must know the child well and must have previously worked with [redacted]. This demand, according to the court, would "impose too high a standard" for school districts

and was not required by the IDEA. Rather, the court characterized the parents' demands as statements of desirable features in an aide, having slight legal effect, if any. See also Michael P. v. School Board of Indian River County, 34 IDELR 30 (S.D. Fla. 2001) (parents could not demand placement in a classroom where the teacher was a personal friend of the mother.) In this case, [redacted]'s parents have demonstrated no legal right to demand the replacement of [redacted]'s physical therapist so long as Respondent is providing a qualified individual who is meeting the educational objectives of the IEP.

38. The evidence establishes that [redacted]'s IEP was appropriate for [redacted] in light of [redacted] individual educational needs. That is, it was reasonably calculated to enable [redacted] to receive educational benefits. The evidence also establishes that Petitioner has actually made educational progress while the IEP has been in effect, which lends further support to the appropriateness of the IEP. Therefore, Petitioner has failed to carry [redacted] burden of establishing that [redacted] requires a change in physical therapist to receive a FAPE.

ORDER

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

FOUND AND DETERMINED that:

1. Respondent drafted, with the cooperation of the parents, an appropriate IEP which was reasonably calculated to confer educational benefits for [redacted] in that: (a) the IEP provides measurable goals and objectives; (b) the IEP defines the educational program proposed for [redacted] in clear, objective terms in order to assure a truly individualized, specially designed program to meet [redacted]'s unique educational needs; and (c) the IEP is reasonably calculated to confer meaningful educational benefits.

2. Petitioner has failed to establish that [redacted] requires a change in [redacted] physical therapist to receive a FAPE.

3. Respondent's designated physical therapist was fully qualified and readily available to provide the educational services required by [redacted]'s IEP from and after the time [redacted]'s parents refused to allow [redacted] to provide services.

4. Respondent's inadvertent failure to provide documents did not rise to the level of a procedural denial of a FAPE.

It is, therefore,

ORDERED that Respondent has drafted, with the cooperation of Petitioner's parents, an appropriate IEP which is reasonably calculated to confer meaningful educational benefits for [redacted] based on [redacted] special needs for the current school year.

DONE AND ORDERED this 17th day of November, 2005, in Tallahassee, Leon County, Florida.

S

JEFF B. CLARK
Administrative Law Judge
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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.