

Flagler County School District
No. 04-1852E
Initiated by: Parent
Hearing Officer: Diane Cleavinger
Date of Final Order: July 28, 2004

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. 04-1852E
)
FLAGLER COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

A formal hearing was conducted in this case on June 10, 2004, in Palm Coast, Florida, before the Division of Administrative Hearings by its Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioner: Michael L. Boswell, Esquire
Michael L. Boswell, P.A.
Post Office Box 2339
Deland, Florida 32721-2339

For Respondent: Andrew Thomas, Esquire
1625 Lakeside Drive
Deland, Florida 32720

STATEMENT OF THE ISSUE

Whether Petitioner is receiving a free, appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA).

PRELIMINARY STATEMENT

Petitioner, ██████ requested a due process hearing pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. Section 1401, et. seq. As clarified at hearing, Petitioner alleged that ██████ was not being provided a free, appropriate public education because services required by ██████ current IEP had not been provided by the Respondent.

At the hearing, Petitioner presented the testimony of two witnesses and offered two exhibits into evidence. Respondent offered one composite exhibit into evidence.

Neither party filed a proposed final order.

FINDINGS OF FACT

1. ██████ is a disabled student entitled to receive special education services under IDEA. ██████ has been diagnosed with autism and perhaps post traumatic stress disorder. The evidence was not clear on whether ██████ had been formally given a diagnosis of post-traumatic stress disorder. In any event, although the evidence was not specific, ██████ manifests several behavioral and emotional problems sufficient to remove ██████ from any school environment.

2. [REDACTED] current IEP was agreed to by [REDACTED] parents and the Flagler County School Board (School Board). All parties agree that the current IEP is appropriate for [REDACTED] and provides [REDACTED] with FAPE.

3. The IEP calls for educational services to be provided to [REDACTED] at [REDACTED] home. Specifically, the IEP provides for five to 10 hours of instruction in the home per week.

4. The home based services called for in the IEP began shortly after the development of the IEP and continued until August 27, 2003. During that time, instruction was given three times a week for one hour between the hours of 10:00 a.m. and 12:00 p.m. The instruction was terminated because [REDACTED] home-based instructor could no longer provide instruction during those hours for health reasons related to [REDACTED]. The school's instructor offered to continue [REDACTED] instruction at [REDACTED] at around 8:00 a.m., a time which generally falls within a student's ordinary school day, or at the instructor's house during the afternoon with [REDACTED] [REDACTED] present during the instruction. Apparently [REDACTED] does better during instruction periods when [REDACTED] [REDACTED] is present. Both of these offers were reasonable and are currently available to [REDACTED]

5. For reasons not entirely clear, the parents declined both offers. In testimony, the home-based instructor testified that at least one of [REDACTED] parents had variously told [REDACTED]

that the offered morning hour was too early because it would make it too difficult to get the family up and ready, which perhaps might have been related to medication issues with [REDACTED] or that [REDACTED] was not either medically or emotionally ready to return to instruction. The parents did not testify at the hearing and were not present at the hearing. In any event, [REDACTED] has not received any home-based instruction since August 27, 2003. The evidence did not show whether [REDACTED] has received private school instruction since August 27, 2003, which would comply with [REDACTED] parents' statutory duty to provide an education to their [REDACTED].

6. The School Board's other home-based instructors could not provide instruction during the original time period, primarily because most of the home-based instructors available to the School Board are also teachers at various schools in the county and are not available during the hours desired by [REDACTED] parents.

7. Since the parents were not in agreement with the instructor's offered solutions, the School Board advertised and continues to advertise for a special education instructor for [REDACTED]. To date, the School Board has been unable to fill the position. The evidence did not show that the School Board is at fault for not filling the position.

8. Clearly, Respondent has offered FAPE to ██████ by offering home-based educational instruction to ██████ at a reasonable time of day. The parents have declined that offer. The paucity of evidence in this case does not demonstrate that the parents' reasons for refusal are justified. There was also no evidence that the absence of instruction for over nine months has impaired ██████ education. There was evidence that ██████ had made some progress, although that progress was small during the time ██████ was receiving instruction at home. However, given the testimony of the instructor regarding either medical or emotional reasons for ██████ not receiving educational instruction, the lack of ongoing instruction does not form the basis to conclude that FAPE has been denied to ██████. Indeed, the School Board has not sought prosecution of ██████ parents for failing to provide an education to ██████ because it did not wish to be overbearing towards ██████ parents who, again for reasons that are not clear, are felt to be in a very difficult situation regarding their ██████. It is up to ██████ and ██████ parents to take advantage of the opportunity the School Board has offered or to provide evidence why such facially reasonable offers are inappropriate for ██████

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this

proceeding. § 230.23(4)(m)5., Fla. Stat. (2001), and Fla. Admin. Code R. 6A-6.03311(5)(e).

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

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

11. The legal standard to be applied in determining whether a student has received a 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). The first prong is whether Respondent complied with the procedures set forth in the IDEA. The second prong is whether the IEP developed through the IDEA's procedures is 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 and the student is receiving a FAPE. Id. at 206.

12. The IDEA's requirement for 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." 458 U.S. at 201-203.

13. In this case, the evidence was clear and the parties did not dispute that ██████████ IEP provides FAPE. The evidence was also clear that the services required in the IEP have not been provided since August 27, 2003, due to the parents' refusal of the facially reasonable alternate times or locations of those services. Given the limited evidence in this case regarding ██████████ progress, the parents' reasons for refusing the Board's alternative time, that the evidence reflected the possibility that there is a reason why it is not appropriate for ██████████ to receive such instruction, and that the IEP provides FAPE to ██████████ the evidence does not demonstrate that ██████████ has not been provided FAPE by the Respondent. Therefore, Petitioner's claim that FAPE is not being provided is denied.

ORDER

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

ORDERED:

That Petitioner's claim is denied.

DONE AND ORDERED this 28th day of July, 2004, in Tallahassee, Leon County, Florida.

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DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
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this 28th day of July, 2004.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SEEK JUDICIAL RELIEF

The decision and its findings are 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.