Broward County School District
No. 04-1834E
Initiated by: Parent
Hearing Officer: Florence Snyder Rivas
Date of Final Order: August 11, 2004

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted]	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-1834E
	)	
BROWARD COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

A formal hearing was held in this case in Fort Lauderdale, Florida, on June 29, 2004, before Florence Snyder Rivas, Administrative Law Judge of the Division of Administrative Hearings. The parties were represented as follows:

APPEARANCES

For Petitioner: [redacted]
(Address of Record)

For Respondent: Edward J. Marko, Esquire
School Board of Broward County
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent has failed to provide Petitioner a free appropriate public education (FAPE).

PRELIMINARY STATEMENT

On May 20, 2004, [redacted] (Petitioner or [redacted] submitted to the Respondent School Board of Broward County (Respondent or School Board), a request for a due process hearing. In due course the matter was referred to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct the hearing.

Applicable law and DOAH procedures contemplate that cases of this nature will be concluded with a final order within 45 days of the date the case is filed. In this case, the parties sought and were granted an enlargement of time sufficient to permit review of a transcript of the proceedings and submission of written argument. An additional enlargement of time for filing proposed final orders was sought by the parties, and granted. Both sides submitted written argument by the extended deadline, August 4, 2004. Those submissions have been carefully considered.

The identity of witnesses and exhibits are set forth in the one-volume transcript of the proceedings filed on July 19, 2004.

FINDINGS OF FACT

1. At the time of the hearing, [redacted] an [redacted]-year-old [redacted], had completed [redacted] grade at [redacted].

2. At all times material to this case, [redacted] has been eligible for exceptional student education (ESE) services, qualified as other health impaired by reason of "attention deficit hyperactivity disorder (ADHD)."

3. It is undisputed that pursuant to the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, et seq., Respondent is obligated to provide [redacted] with an appropriate education in [redacted] least restrictive environment (FAPE).

4. Pursuant to IDEA and related Florida statutes and rules, Respondent was required to, and did, develop annual individual education plans (IEPs) for [redacted]

5. It is undisputed that any IEP must, at the time it is developed, be reasonably calculated to enable the student to receive some educational benefit. Once agreed to by the team charged with developing the IEP, it must be implemented until such time as it is superceded by a new IEP, or successfully challenged in a due process hearing.

6. At all times material to this case, Petitioner's parents, Mr. and Mrs. [redacted] were aware of and understood their due process right to challenge the appropriateness of previous IEPs,

as well as the appropriateness of the Respondent's implementation of the current IEP.

7. Similarly, Mr. and Mrs. [redacted] were properly apprised of their right to request evaluations to assist in education planning for of [redacted] and their right to have the IEP team consider alternative educational environments, including private school at public expense.

8. Mr. and Mrs. [redacted] have not, until now, exercised such rights. There is no suggestion that they were intimidated, bullied or silenced by other members of the IEP team or by any School Board employee. Neither is there any evidence that Petitioner's parents were discouraged or otherwise prevented from availing [redacted] of the rights and remedies available to [redacted] under state and federal law.

9. To the contrary, Mr. and Mrs. [redacted]were satisfied the services provided to their [redacted] until they were confronted with the reality that [redacted] would have to repeat [redacted] grade.

10. The reason [redacted] has to be held back is entirely unrelated to IDEA. Instead, it relates to Florida's public policy which disfavors "social promotion" to the next grade for students who have not attained a level of academic mastery prescribed by controlling Florida law.

11. In furtherance of this policy, at all times relevant to this case, students, including ESE students enrolled in

Florida public school grades three though ten, are obliged to participate in a student achievement testing program, in most cases the Florida Comprehensive Assessment Test (FCAT) examination, as part of a statewide assessment program.

12. [redacted] has failed the FCAT each time [redacted] has taken it. However, [redacted] had until [redacted] grade been able to qualify for promotion to the next grade by passing a state-approved alternative assessment.

13. Petitioner concedes that because [redacted] is presently unable to attain a passing score on the FCAT or any of the approved alternative tests, the School Board has no lawful option but to retain [redacted] in the [redacted] grade.

14. Petitioner contends that because [redacted] cannot fulfill the academic criteria for promotion to [redacted] school, it must be inferred that [redacted] was not receiving FAPE at relevant times. This inference is factually and legally insupportable.

15. Mr. and Mrs. [redacted] are, respectively, a pharmacist and a nurse. As such, they are educated well past the minimum level necessary to participate meaningfully in the educational planning process, and to monitor the implementation of their [redacted]'s IEPs.

16. At all times material to this case, the IEP team had the benefit of a psychological evaluation dated September 1,

2000, which was performed by licensed psychologist Dr. Douglas P. Gibson (Gibson).

17. Gibson was engaged by the parents. [redacted] evaluation revealed that [redacted] had below average cognitive ability as measured by intelligence quotient (IQ) testing.

18. School Psychologist, Nancy Kramer (Kramer), revalidated Gibson's results in February 2002.

19. Kramer minced no words interpreting these results for the IEP team, stating, "The results of intellectual functioning are found to be quite consistent with those obtained previously [by Gibson] and suggest that [redacted] can be expected to function as a slow learner in the classroom and will take longer than average to master curriculum objectives and will have great difficulty with tasks which require higher level thinking skills."

20. Kramer advised parents and teachers to "develop realistic expectations for [redacted] school progress."

21. With the benefit of hindsight, it appears that home and school drew different inferences regarding what constituted realistic expectations for [redacted] This misunderstanding appears to have been fueled by the fact that [redacted] unlike many of [redacted] similarly disabled peers, was able to access the educational services reflected on [redacted] IEPs in a general education setting.

22. It is a tribute to the skills of [redacted] teachers, as well as to the support provided by [redacted] parents, and most of all to [redacted], that given [redacted] cognitive limitations, [redacted] IEPs have largely been implemented in a far less restrictive setting than many of [redacted] similarly disabled peers require.

23. In [redacted] grade, [redacted] spent over 80 percent of [redacted] time in a general education classroom, making progress on goals appropriate to [redacted] disabilities.

24. During the 2003-04 school year, it was the consensus of the IEP team, including [redacted] parents, that [redacted] was generally doing well when measured according to the standards incorporated into [redacted] IEP. [redacted] had mastered some of the objectives reflected in [redacted] IEP dated February 25, 2003, including staying on a given topic in writing; identifying consonant and vowel sounds with 95 percent accuracy; and decoding and spelling multi-syllabic words.

25. However, as the time approached when [redacted] graders would be administered the FCAT and, if necessary, alternate testing instruments, [redacted] reading fluency remained poor, and [redacted] had yet to master basic multiplication tables.

26. Thus by the time of the February 19, 2004, IEP meeting, it was entirely foreseeable that [redacted] would likely be unable to pass any of assessments provided by law for [redacted] and

similarly situated [redacted] graders, and would therefore be required to repeat [redacted] grade.

27. Petitioner's proof at hearing consisted mainly of testimony provided by School Board staff, and they did not waver from Respondent's position that [redacted] was at all times provided with an appropriate IEP, which was appropriately implemented.

28. [redacted] parents did not testify, nor did they provide testimony from independent witnesses, expert or otherwise.

29. A painstaking study of the entire record and case law reveals no basis upon which to conclude that [redacted] was denied FAPE.

30. Nothing in this decision forecloses the right and duty of any IEP team member to bring forward any concerns which may be properly considered and acted upon by the team, should Petitioner’s parents choose to keep [redacted] in the Respondent school district. This includes the matter of private school tuition reimbursement at public expense, if and when such a request is properly before an IEP team or DOAH.

31. At the time of the hearing, Respondent was prepared to provide Petitioner with FAPE pursuant to an IEP appropriate to [redacted] present educational needs. This IEP can be implemented at [redacted] .

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 1003.57(5) and 120.57(1), Florida Statutes.

33. IDEA requires school districts to provide and implement for disabled students an IEP "reasonably calculated to enable the student to receive some educational benefit." Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). At the time of the hearing, Petitioner was fulfilling this and all related obligations under IDEA in all material respects.

34. IDEA does not require that an IEP be tailored to assist a disabled child to pass a particular test--even a state-mandated test. Federal courts have considered but rejected the notion advanced by Petitioner, i.e. that if a child does not succeed, it must be inferred that FAPE has not been provided. See Austin Independent School District v. Robert M., 168 F.Supp.2d 635, 640, n.6 (W. D. Tex. 2001) ("For the AISD's part, this Court finds that they did make a free appropriate public education 'available' to Robert, which is all that they are required to do under the IDEA. . . . Schools are not required . . . to spoonfeed students or to maximize . . . potential. They simply must offer a program that is reasonably calculated to confer an educational benefit upon the student. Failing classes

is not by itself sufficient evidence that an educational benefit is not being conferred upon the student."); Mandy S. ex rel. Sandy F. v. Fulton County School District, 205 F. Supp. 2d 1358, 1366 (N.D. Ga. 2000)("Plaintiff is advocating a 'guaranteed outcome' standard that is inapplicable to the IDEA.").

ORDER

Based on the above Findings of Fact and Conclusions of Law, it is ORDERED that the Petitioner has failed to prove a denial of FAPE.

DONE AND ORDERED this 11th day of August, 2004, in Tallahassee, Leon County, Florida.

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FLORENCE SNYDER RIVAS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of August, 2004.

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 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.