Orange County School District
No. 04-4076E
Initiated by: Parent
Hearing Officer: Daniel M. Kilbride
Date of Final Order: December 23, 2004

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-4076E
	)	
ORANGE COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

A formal due process hearing was held in this case before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, on December 14, 2004, in Orlando, Florida.

APPEARANCES

For Petitioner: [redacted], parents of [redacted]
(Address of record)

For Respondent: Andrew B. Thomas, Esquire
1625 Lakeside Drive
Deland, Florida 32720-3037

STATEMENT OF THE ISSUES

Whether the Individual Education Plan (IEP) offered by Respondent, Orange County School Board (Respondent), on April 28, 2004, is reasonably calculated to offer Petitioner, [redacted] (Petitioner or [redacted]), meaningful educational progress; and

Whether Respondent must assign Petitioner another regular [redacted] classroom teacher in order for Petitioner to achieve meaningful educational progress under the Individuals with Disabilities Education Act (IDEA).

PRELIMINARY STATEMENT

This matter commenced upon the filing of a Request for Due Process Hearing on November 9, 2004, by the parents of the student, [redacted], with Respondent. The parents consented to mediation; however, Respondent did not refer this matter to the Department of Education, and mediation was not held. This matter was immediately referred to the Division of Administrative Hearings (DOAH) by Respondent on November 11, 2004. The case was assigned to Daniel M. Kilbride, Administrative Law Judge (ALJ), and set for hearing to begin on December 14, 2004. Special counsel was retained by Respondent. The due process hearing was conducted as scheduled.

At the commencement of the hearing, Respondent objected to the introduction of evidence by Petitioner on the grounds that Petitioner had failed to identify any tangible evidence or witnesses until the day of the hearing in violation of Florida Administrative Code Rule 6A-6.03311(5)(e)1.c. However, the Notice of Hearing did not include any specific reference to that evidentiary limitation, so Respondent's objection was overruled,

and Petitioner was allowed to proceed with the presentation of evidence. Petitioner's mother and father, [redacted], testified on behalf of their [redacted] and called three other witnesses including Rhona Lewis, speech/language pathologist. Petitioner offered 16 exhibits, which were admitted into evidence. Respondent called one witness to testify: Paige Tracey, principal of Arbor Ridge Elementary School (Arbor Ridge). Respondent offered one exhibit, which was admitted into evidence. The IEP, Parent Notification Letter, and Informed Notice of Change of Placement were admitted as a joint exhibit. At the conclusion of the hearing, the parents gave a closing statement, and the parties waived the filing of a transcript and stipulated that they would file their post-hearing submittals on or before December 20, 2004.

Petitioner filed [redacted] Closing Statement and Respondent filed its Proposed Final Order on December 20, 2004. All of the parties' proposals have been accepted and given careful consideration in the preparation of this Final Order.

FINDINGS OF FACT

1. Petitioner is a [redacted] child born [redacted], and was [redacted] old at the time of the hearing. Throughout the 2004-2005 school year, [redacted] has been enrolled as a [redacted] student at [redacted], assigned to a regular education classroom taught by June Hagood.

2. At [redacted] years old, Petitioner was diagnosed with a speech impediment. At [redacted] years old, Petitioner had been determined to be eligible for services under the IDEA, 20 U.S.C. Section 1401, et seq. Specifically, Petitioner had been identified as having

speech/language impairment. [redacted] has difficulty pronouncing consonants, which makes [redacted] speech difficult to understand.

3. An IEP was developed for Petitioner at an IEP Team meeting held on April 28, 2004, pursuant to written notice to Petitioner's parents. Petitioner's mother fully participated in the development of the IEP and consented to its implementation.

4. Petitioner is being educated in a regular [redacted] classroom on a regular school campus. [redacted] is only educated apart from [redacted] non-disabled peers during the one hour a week of small group instruction [redacted] receives from Rhona Lewis (Lewis), a speech/language pathologist employed by Respondent. The parents did not dispute the "restrictiveness" of Petitioner's educational placement. Therefore, Petitioner is currently being educated in the least restrictive environment.

5. [redacted], Petitioner's mother, is currently an instructor in foreign languages at the University of Central Florida. She interned at [redacted] in the preschool program and has also taught English for Speakers of Other Languages (ESOL) programs.

6. [redacted] claims that in the spring of 2004, she made a written request to Paige Tracey (Tracey), [redacted]'s principal, that Petitioner be assigned to the [redacted] class taught by a Ms. Deal in the fall of 2004.

7. When Petitioner and [redacted] mother returned early from a vacation in Greece so that Petitioner would not miss the first day of school, she found a purple folder that had been left on her doorstep sometime during the summer. Upon opening the folder, she discovered that it contained materials sent to her

from Hagood, the [redacted] teacher to whose class Petitioner had been assigned. [redacted] became upset by what she considered the sloppy and poorly-organized contents of the folder and began wondering whether Hagood would be a suitable teacher for her [redacted].

8. On the first day of school, [redacted] met with the school principal to determine why [redacted]'s earlier request for Petitioner's assignment to Ms. Deal's class had not been honored. At that conference, Tracey indicated that she had not seen [redacted]'s request, but offered to allow Petitioner to transfer into the class of another [redacted] teacher, a Ms. Kiczula. At that time, Tracey determined that Kiczula had the smallest number of students assigned to her class. [redacted] did not accept that offer because she learned that 16 of 20 students in that classroom were identified as speaking English as a second language, and this would not be beneficial to [redacted]'s progress in speech.

9. [redacted] is the mother of a mainstream kindergarten student who was originally assigned to Hagood's class. She asked the principal for a transfer and her child was assigned to the classroom taught by Ms. Miller.

10. Petitioner's report card indicates that Petitioner is performing well in his [redacted] curriculum. However, [redacted] felt that the report card did not fairly represent Petitioner's performance in writing. Specifically, [redacted] felt that Petitioner's writing grades should have been lower. She did not dispute her [redacted]'s grades in the areas of reading development, mathematics, or social development.

11. Dawn Garrett teaches one of the five [redacted] sections at [redacted]. The other sections are taught by Mss. Deal, Hagood, Kiczula and Miller.

12. [redacted] privately retained Garrett to evaluate Petitioner in the area of writing. Based on her brief evaluation, Garrett concluded that Petitioner appeared to be performing below grade level in that one subject area. She expressed no opinion regarding Petitioner's level of performance in the other [redacted] subject areas.

13. Garrett presented no base-line data for Petitioner establishing [redacted] level of performance at the start of the year. Her testimony cannot gauge Petitioner's progress in the area of writing during the current school year. Garrett can demonstrate [redacted]'s level of performance in writing development on the day of the evaluation, but not how far [redacted] has come since the beginning of the school year.

14. Lewis testified about Petitioner's progress in the area of speech and language. She holds a master's degree in communication disorders and is presently completing her residency requirement at [redacted]. She will be eligible for licensure by the State of Florida in February 2005. Petitioner received speech/language services twice a week from Lewis. Each session lasts 30 minutes and is conducted in a very small group setting.

15. In Lewis' opinion, the April 28, 2004, IEP for Petitioner established achievable, but challenging goals and benchmarks for addressing his disability. The IEP adequately addresses [redacted] needs and is appropriate for [redacted].

16. Petitioner has made significant improvement in his speech during this school year. [redacted] has already met several of the IEP benchmarks and appears reasonably likely to master all of [redacted] benchmarks and the annual goal before the end of the school year.

17. [redacted], Petitioner's father, is an economics professor at Rollins College. He acknowledged that Petitioner has made significant improvement in [redacted] speech since starting at [redacted].

18. Petitioner has failed to establish that [redacted] cannot make meaningful educational progress in [redacted] current placement. To the contrary, the evidence demonstrates that [redacted] has made significant progress toward attaining the objectives of [redacted] IEP, and the parents do not dispute this assessment. Therefore, in this case, it is clear that Petitioner will receive educational benefits from the IEP currently in place.

19. According to [redacted]'s report card, [redacted] is performing satisfactorily in other areas, as well. However, the parents dispute this claim.

20. The parents point to Section 23 of the IEP, which indicates that the student "[r]equires specialized instruction, smaller class size and [a] very structured environment." They argue that, as stated in the IEP, [redacted] needs a very structured environment in [redacted] regular classroom and that, based on the mother's observation, [redacted] is not receiving it in [redacted] present classroom placement. They are seeking to have [redacted] placed in a different classroom that will facilitate [redacted] learning to speak, read, and write at the [redacted] level, be well-structured, and is an

"inclusive classroom," meaning that it includes exceptional education students. The parents are seeking that [redacted] be transferred to a specific teacher's classroom.

21. The principal, without full knowledge of the IEP or the parents' request, selected [redacted]'s current placement for [redacted] regular [redacted] classroom. In August, she met with [redacted] and, upon the parents' request, offered to transfer [redacted] to a different classroom. Prior to the meeting, Tracey had reviewed the IEP. She also reviewed Section 23 of the IEP, but noted that this section applied to those periods when [redacted] was out of his regular classroom and was receiving speech therapy. She based her offer to transfer [redacted] on several criteria. However, the criteria used was not the same as that insisted upon by the parents, and the parents declined the offer.

22. The principal continues to offer to allow [redacted] to transfer to a different [redacted] teacher, but not the specific person that the parents have requested. She insists that as the principal, she has the responsibility for all final decisions regarding placement.

23. The IDEA does not empower this tribunal to override the placement decisions of a school principal.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties of this proceeding pursuant to Subsection 1003.57(5), Florida Statutes (2003), and Florida Administrative Code Rule 6A-6.03311(11).

25. The IDEA, 20 U.S.C. Section 1400, provides that the local education agency must provide children with disabilities with a free, appropriate public education (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).

26. 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.

27. 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).

28. As noted above, the first inquiry that must be made is whether the local educational agency has complied with the statutory procedures. There is no allegation that the

educational agency has failed to follow the procedural guidelines, except that it did not offer the parents mediation prior to the referral of this case to the Division of Administrative Hearings. Although beneficial at times, mediation is not a required element necessary to ensure procedural safeguards.

29. 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.

30. 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 his educational program. Rowley, 458 U.S. at 198.

31. 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.

32. 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 Act. 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 him "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."

33. 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.

34. 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 April 28, 2004, temporary 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 a 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.

35. The IEP developed on April 28, 2004, offered two 30-minute sessions per week of speech therapy by a speech/language pathologist in a small classroom setting with other speech impaired students. 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). Speech/language pathologists in Florida must meet specific guidelines for certification. Fla. Admin. Code Chap. 64B20-2. Florida state law provides that speech/language pathologists hold: (1) a valid license in speech/language pathology; (2) a valid certificate of clinical competence; or (3) a master's or higher degree with a minimum of 60 semester college credits in speech/language pathology. Lewis meets this criteria and is eligible to provide the required services.

36. 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 speech therapy, and Lewis is competently providing those services called for in the IEP to [redacted]. Respondent has complied with Rowley in this regard.

37. Following the April 28, 2004, IEP meeting, the parents became concerned about the qualifications of the prospective teacher that would be used to teach their child in the regular classroom setting. They were most concerned about his/her organizational skills and structure that they believed their child needed in order to progress when [redacted] entered [redacted] in the fall. The parents submitted a request that [redacted] be placed in the classroom of a specific teacher. When [redacted]'s mother returned to their home in August, she learned that Hagood had been selected to be [redacted]'s [redacted] teacher beginning the fall semester. Hagood was not the teacher that the parents had requested.

38. It is standard procedure that Respondent does not put the name of the teacher in the IEP and, also, that the school principal has the authority to place a child in the appropriate classroom setting. However, the law is clear that Respondent does have an obligation of providing a teacher who is qualified and possesses the skills necessary to provide the services required by the child's disabilities. Although there are concerns, there is no convincing evidence that [redacted]'s current classroom teacher does not possess the skills necessary to provide the services required of a regular [redacted] teacher.

39. It is commendable that the parents are actively involved in [redacted]'s education and are concerned about [redacted] progress. Although they can make suggestions and requests to the school

administration about [redacted]'s placement, they cannot make the selection themselves. It is well-settled that the choice of educational methodology and placement is a matter of discretion within the authority of school personnel. 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) (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".)

40. The law does not require Respondent to accede to a parent's educational preferences. Rather, the law merely requires Respondent to provide "appropriate" educational services to enable [redacted] to receive "some educational benefit." It is irrelevant whether placement of the student in a "very structured environment" would be "better" than the placement 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 placement meets the FAPE standard.

41. [redacted]'s parents are asking this tribunal to order Respondent to place their child in a classroom of their own choosing. 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 him. 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 no legal right to demand the placement of [redacted] in a particular classroom so long as Respondent's staff members, who are providing a regular classroom curriculum, are trained to do so, and they are. It is the principal's responsibility to make all final decisions regarding [redacted]'s regular classroom placement.

42. The evidence establishes that Petitioner'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 classroom teachers 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 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 classroom teachers to receive a FAPE. However, it is recommended that the school administration should make a classroom transfer available to [redacted], should the parents renew their request. It is, therefore,

ORDERED that

1. 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.

2. Petitioner's request that [redacted] be assigned to a specific classroom teacher for the remainder of the school year is denied in that this tribunal is without authority to so assign.

DONE AND ORDERED this 23rd day of December, 2004, in Tallahassee, Leon County, Florida.

S

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings

The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of December, 2004.

COPIES FURNISHED:

Eileen L. Amy, Administrator
Exceptional Student Education Program
Administration and Quality Assurance
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

Honorable Ronald (Ron) Blocker
Superintendent of Schools
Orange County School Board
Post Office Box 271
Orlando, Florida 32802-0271

Andrew B. Thomas, Esquire
1625 Lakeside Drive
Deland, Florida 32720-3037

[redacted]
(Address of record)

Harriet P. Brown, Esquire
Orange County School Board
445 West Amelia Street
Post Office Box 271
Orlando, Florida 32802-0271

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.