

# Summaries of Due Process Hearings

Resulting from Inquiries Conducted by the Bureau of  
Exceptional Education and Student Services



**January–June  
2004**

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## Summaries of Due Process Hearings

The following are summaries of due process hearings conducted by the Division of Administrative Hearings (DOAH), Florida Department of Administration, from January through June 2004. Final orders were issued after the hearings and copies provided to the Bureau of Exceptional Education and Student Services.

These summaries are for informational purposes and are not intended to provide legal advice or assistance. Please refer questions to Patricia Howell, Dispute Resolution Program Director, Bureau of Exceptional Education and Student Services, 614 Turlington Building, Tallahassee, Florida 32399-0400; (850) 245-0476; Suncom 205-0476; or via electronic mail at Patricia.Howell@fldoe.org.

The heading of each summary lists the school board or agency involved in the hearing, the case number, the party who initiated the hearing, the administrative law judge, and the date of the final order.

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**Brevard County School Board**  
**Case Nos. 04-0661E and 04-0691E**  
**Initiated by Parent**  
**Hearing Officer: Daniel Manry**  
**Date of Final Order: March 30, 2004**

**ISSUES:** Whether the student was entitled to an independent evaluation by an occupational therapist and whether the student was eligible to receive occupational therapy (OT) for the student's handwriting.

**FINDINGS OF FACT:** At the time of the hearing the student attended a district charter school and was determined eligible for special programs for students with specific learning disabilities (SLD) and speech impairment (SI). The student's learning disability affected performance in auditory memory, short term memory, and visual motor skills. The student showed some hyperactive behavior which included rushing through assignments, which contributed to the student's difficulty with handwriting.

The student's IEP developed in [specific date] 2003 addressed the handwriting needs through various interventions and accommodations. Improvement in handwriting was a goal on the IEP, but the IEP did not include OT. When that IEP was developed, the student's parent requested an OT evaluation, which was conducted four months later. The school's occupational therapist determined that the student would not benefit from OT because the handwriting difficulties "could" be caused by hyperactivity and inability to focus on a task. The therapist stated that OT addressed fine motor skills needed for writing and did not teach handwriting itself. The therapist stated that the student should be allowed to use electronic devices to achieve the IEP goal of improving writing mechanics, but did not explain how this would help the student achieve that goal.

The student's parent filed a due process hearing requesting an independent OT evaluation. During that hearing the district agreed to accept the parent's private OT evaluation.

The student could not complete written tasks at grade level; however, the student was earning A's and B's. Despite the IEP's focus on handwriting and special instruction provided, the student did not make progress in this area.

The fact that the student's handwriting difficulties "could" have been caused by rushing did not preclude possible eligibility and benefit from OT. The student needed a minimum of one hour per week of OT in school and one hour of private OT in a clinical setting.

**CONCLUSIONS OF LAW:** The Division of Administrative Hearings had jurisdiction over the parties and subject matter in this case. Some of the student's difficulty in handwriting may be attributed to deficits in eye-hand coordination and visual motor speed. The student's then-current IEP was not adequate in that the student was not making progress in handwriting.

**ORDER:** The district must provide the student with private occupational therapy as indicated above.

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**Brevard County School Board**  
**Case No. 04-0469E**  
**Initiated by Parent**  
**Hearing Officer: Jeff B. Clark**  
**Date of Final Order: May 24, 2004**

**ISSUE:** Whether the student's individual educational plan (IEP) was followed at the school.

**FINDINGS OF FACT:** At the time of the hearing the student was eligible for exceptional student education. The student was initially determined eligible for speech impaired and language impaired programs. Due to the ongoing behavior problems, the student's primary disability was determined to be other health impaired (OHI) in [specific date] 2003. A new IEP was developed which included a behavioral component as the student's primary educational need. The new IEP included a daily point checklist, with a target date for review of the plan. However, in [specific date] 2003, the student was withdrawn from the school in question and enrolled at a different school.

In filing the due process hearing request, the student's parents indicated that they did not want any action on the part of the district. In fact, the hearing request was filed ten months after the student had been withdrawn from the school in question. The school presented evidence that it had fully implemented the IEP during the twenty-one days it had been in effect prior to the student's withdrawal. The parents had been kept informed during this time.

**CONCLUSIONS OF LAW:** The Division of Administrative Hearings had jurisdiction over the

parties and subject matter in this case. School districts are required to provide a free appropriate public education (FAPE) to students with disabilities. The real issue in this case was whether the student was receiving a FAPE. The student's IEP was being implemented and the student was given the opportunity to progress. There were no violations of federal regulations.

**ORDER:** The parents' claim was denied.

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**Broward County School Board**  
**Case Nos. 04-0076E, 04-0077E, and 04-0078E**  
**Initiated by Parent**  
**Hearing Officer: Stuart M. Lerner**  
**Date of Final Order: February 10, 2004**

**ISSUES:** Whether the "stay put" injunction had been violated; whether a mandatory injunction should be issued to enforce the "stay put" provision; whether the parents should be reimbursed for services provided privately; and, whether the parents are entitled to reimbursement for attorney's fees.

**FINDINGS OF FACT:** The hearing involved triplets diagnosed with autistic spectrum disorder who received early intervention services under Part C of the Individuals with Disabilities Education Act (IDEA) until their third birthdays. The services were provided based on the students' individualized family service plans (IFSPs) through a contract between the Department of Health and the provider. The district had no part in this arrangement. The students had not yet been evaluated or determined eligible for an exceptional student education program by the district. Upon turning three, the IFSPs expired, early intervention services were terminated, and the students' parent attempted to invoke the "stay put" provision of the IDEA so that the children would continue to receive the services at the expense of the district. The students' parent, also serving as their attorney, disputed the meaning of "current educational placement."

**CONCLUSIONS OF LAW:** The district was not required by the "stay put" provision to follow the students' IFSPs. At the time of filing, the students did not have a current individual educational plan (IEP). The district was required to provide a free appropriate public education (FAPE) for the students upon their attaining the age of three. This must include special individualized instruction designed to confer educational benefit, and any related services required by the students. There is no provision that the program must maximize a student's potential. Prior to initial provision of services, the district must conduct a full, individual initial evaluation to determine eligibility for services under the IDEA. Parents who take issue with any part of this process have a right to a due process hearing. The Division of Administrative Hearings (DOAH) has the authority to conduct due process hearings but does not allow for other legal activities such as discovery. The administrative law judge (ALJ) does not have the authority to legally order an alternative placement. While an ALJ does have the authority to require a school district to reimburse parents of exceptional education students for private instruction under certain circumstances, there is no authority for the ALJ to require reimbursement to the parent for out-of-pocket

educational expenses for students who were never enrolled in the district's public school. The ALJ does not have the same authority as a civil court judge, who is allowed to award attorney's fees.

A position paper from the Office of Special Education Programs (OSEP) stated, in part, "... the public agency responsible for providing FAPE to the child would place that child, with the consent of the parent, in the public preschool program until the completion of authorized review proceedings." In the Federal Register, OSEP also indicated that early intervention services that a "newly Part B eligible three-year-old" received prior to the student's third birthday did not constitute an "educational placement" that a district must maintain under the "stay put" provision, not even on an interim basis during a due process hearing related to eligibility issues.

The discussion in 64 Fed. Reg. 12,406, 12, 558 (March 12, 1999), 1999 WL 128278 (F.R.) states, in part: "IFSP services pursuant to Part C of the IDEA are not the [required] 'stay put' placement [under Part B of the IDEA] for a three-year-old child without an IEP."

**ORDER:** The district's refusal to provide the students with early intervention services did not violate the "stay put" injunction. The request for a mandatory injunction was denied. The parent's request for reimbursement for services provided privately was denied. The parent's request for reimbursement for attorney's fees was denied.

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**Manatee County School Board**  
**Case No. 04-0257E**  
**Initiated by Parent**  
**Hearing Officer: Daniel Manry**  
**Date of Final Order: June 2, 2004**

**ISSUE:** Whether the student was eligible for an individual educational plan (IEP).

**FINDINGS OF FACT:** At the time of the hearing the student had attended the same elementary school for two years and was academically successful there, earning A's and B's. The student did well on standardized tests. In addition, the student had a history of attention deficit hyperactivity disorder (ADHD), which is included under the federal definition of other health impaired. The student had special needs which included inattention, restlessness, anxiety, forgetfulness, and inability to understand directions.

In the beginning of third grade, the student was determined eligible for an educational plan under Section 504 of the Rehabilitation Act of 1973 (504 Plan) because ADHD substantially limited learning. The student had limited alertness, trouble with transitioning between activities, and exhibited some inappropriate behaviors.

The student was repeatedly disciplined for behaviors resulting from ADHD, including talking, fidgeting, impulsive acts, and forgetting homework and was singled out for problems with orga-

nizational skills and deprived of recess for such infractions. This increased the student's anxiety, depression and low self-esteem.

Halfway through the fourth grade the student was transferred to another teacher who provided an individualized behavior plan, multiple accommodations, and special seating. It was, in effect, exceptional student education, without having been determined for eligibility for a special program. The student was successful with these interventions and the student's achievement, conduct, and self-esteem progressed significantly. The district evaluated the student's need for a special program solely on the student's academic performance and test scores, which were satisfactory. Because the student's academic performance did not decline, the district maintained that the 504 Plan adequately met the student's needs. However, the 504 Plan did not meet the student's needs in conduct and citizenship. Evidence showed that the district did not follow the 504 Plan that was in place, in that it punished the student for ADHD related behaviors and failed to complete behavior forms required by the Plan. Depriving the student of recess violated the student's rights in a number of areas.

The student's parent requested evaluation for eligibility under the Individuals with Disabilities Education Act (IDEA) in August at the beginning of the fourth grade. The school Child Study Team (CST) met and determined the student ineligible, citing high test scores. In September, the CST met again and offered to revise the student's 504 Plan. The parent had an independent evaluation conducted, which considered information from a wide variety of sources. The private psychologists' report was presented to the CST; however, the members did not read the report prior to the CST meeting or consider it at the meeting. Further, staff told the student's parent they could not determine the student eligible without input from the school psychologist, who was not present at the meeting. In [specific date] school staff did conduct behavioral observations which were all done in a quiet setting without distractions. Inter-observer agreement was not established. In [specific date] a CST was held which included attorneys for both sides as well as the private psychologist and district school psychologist. Policy memoranda from the district appeared to indicate that eligibility for other health impaired (OHI) would be based solely on a student's academic achievement and standardized test scores. The parents were told that eligibility determination would be made in [specific date]. In [specific date], the parents were told that the student was determined ineligible for OHI.

**CONCLUSIONS OF LAW:** The Division of Administrative Hearings had jurisdiction over the parties and subject matter in this case. The student's disability adversely effected overall educational performance, if not academic performance. The student's academic performance was intact largely because of the special education services received from the second fourth grade teacher. The student's success with this teacher confirmed the need for these services. It was inappropriate to base eligibility for OHI solely on academic performance. The IDEA required that input from a variety of sources must be considered in making eligibility determinations.

**ORDER:** The student was a student with a disability under the IDEA and as such was entitled to an IEP, which must be developed in accordance with the IDEA.

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**Palm Beach County School Board**  
**Case No. 04-0684E**  
**Initiated by Parent**  
**Hearing Officer: Claude B. Arrington**  
**Date of Final Order: March 25, 2004**

**ISSUE:** Whether the proposed individual educational plan (IEP) would provide the student with a free appropriate public education (FAPE) in the least restrictive environment (LRE).

**FINDINGS OF FACT:** At the time the student was determined eligible for special programs for students with emotional handicaps (EH) and specific learning disabilities (SLD), and was diagnosed as having attention deficit hyperactivity disorder (ADHD).

During the 2001-02 and 2002-03 school years the student attended regular classes at a district charter school, with class sizes smaller than typical middle school classes. Exceptional student education (ESE) services were provided via monthly consultation. The IEP developed on [specific date] 2003 indicated that the student was having difficulty with behavior, participation, and achievement on grade level.

At the beginning of the 2003-04 school year the student was enrolled in a regular district middle school, and placed in regular classes, with math and language arts being co-taught by a regular education teacher and an ESE teacher. The student was not successful at the new school. The student demonstrated the ability to do the work, but generally refused. In addition, the student's behavior was highly distracting to the other students.

Based on an [specific date] 2003 child study team meeting, the student was given a complete reevaluation, which confirmed that the student had the cognitive ability to succeed but was prevented from doing so by emotional problems. The report noted that, to date, regular class placement was not giving the student what was needed to succeed. The proposed 2004 IEP would place the student in a special class for students with emotional handicaps (small class size and full-time behavioral intervention). The student's parent agreed that the student needed a smaller class size but disagreed that the student needed the more restrictive placement of the special class rather than a co-taught class. Evidence showed that the student would benefit from the more restrictive placement.

**CONCLUSIONS OF LAW:** The Division of Administrative Hearings had jurisdiction over the parties and subject matter in this case. There was no dispute that the student needed ESE services to provide with a FAPE in the least restrictive environment.

**ORDER:** The IEP requiring the more restrictive environment was ordered to be implemented.

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**Polk County School Board**  
**Case No. 03-4282E**  
**Initiated by Parent**  
**Hearing Officer: Daniel M. Kilbride**  
**Date of Final Order: May 17, 2004**

**ISSUES:** Whether the district provided the student with meaningful progress in reading; whether the individual education plan (IEP) was reasonably calculated to offer meaningful progress in reading; whether the district violated procedural safeguards by refusing to provide the parents with specific information about the offered educational program; whether the draft IEP contained measurable goals and objectives; and, whether the district was required to reimburse the parents for private school placement.

**FINDINGS OF FACT:** The student had a specific learning disability in reading. The student was in exceptional student education (ESE) classes until fourth grade and was not progressing well. The parents requested that the student be educated solely in general education classes with supports and services and receive specialized instruction in a specific reading program. The district agreed and the student did well in fifth grade. The student earned passing grades in fifth through seventh grade. A learning strategies ESE class was recommended by the IEP team for seventh grade; however, the parents and their advocate insisted on only regular education classes. The parents felt the student did not make meaningful educational progress in the seventh grade. The student was reevaluated and the parents strongly disagreed with the district's proposed IEP and were very upset with their perceived lack of progress on the part of the student. When the district would not provide the specific services requested by the parents, the parents withdrew the student to a private school and informed the district that they expected reimbursement. The district attempted to complete the IEP begun over the summer and the parents provided a list of specific demands. If these were met, they would keep the student in public school. They were not met and the student was withdrawn.

Another IEP was drafted after the student was at the private school but the parents rejected it because it proposed educating the student in a varying exceptionalities (VE) classroom. The parents requested that the student's psychologist be permitted to visit the classroom and evaluate the program. The district refused and sent a notice to that effect. Finally, the psychologist was allowed to interview the teacher. The student's academic achievement was slow and below grade level but commensurate with the student's disabilities.

The parent stated that the student would not return to public school unless the parent approved the student's teacher and specific curriculum. The district refused because district staff assign teachers and the teacher chooses the methodology to employ. The parents demanded that the student be in a class only with other learning disabled students. The district correctly determined that this was not necessary. There was no evidence that the student required individual instruction to make academic progress. Experts testified that the student should not be expected to make a year's progress each academic year and because of this slower pace of learning the student would likely remain below grade level even when progress was being made. The student's psychologist testified that the teacher and the proposed methodology would be appropriate for

the student. He also found the proposed IEP to be appropriate. The student's performance on an intelligence test dropped but there was no speculation as to the reason. The proposed program would meet the student's educational needs.

**CONCLUSIONS OF LAW:** The Division of Administrative Hearings had jurisdiction over the parties and subject matter in this case. The district could not refuse to provide information about the teacher or the teacher's curriculum. The district was unwilling or unable to define the student's education plan as individualized. Although the name of the teacher does not need to appear on the IEP, the district has the responsibility to provide qualified teachers. The refusal to let the private psychologist evaluate the program was a serious violation of procedural safeguards. The district did not track the student's progress in what worked and what did not work. When the district finally did name the teacher, she proved to be appropriately trained with many years experience. The goals on the IEP do not refer back to the student's present levels and although they provide a percentage, there was no evidence of what that percentage would be measured against. There was no other usable way to measure progress on the IEP. District staff specifically refused to change the goals when challenged. As written the IEP did not provide the student with a FAPE. The parents violated the ten day notice requirements when they withdrew the student to a private school. They also failed to indicate the reason for the removal. The parents did not cooperate and act in good faith with the district in trying to develop an IEP that conveyed a FAPE. There were no regular education students at the private school and no demonstrable evidence that it was an appropriate placement. Therefore, reimbursement was denied.

**ORDER:** The district failed to draft an IEP which was reasonably calculated to confer educational benefit, because the IEP lacked measurable annual goals, failed to define the student's educational program and failed to address the serious nature of the student's reading disability. The student's rights were denied because of the lack of potential to assess the effectiveness of the IEP. The student's withdrawal to a private school did not contain all required components and reimbursement was denied. If the parents return the student to the public school, an appropriate IEP reasonably calculated to convey educational benefit must be prepared for the student.

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**Polk County School Board**  
**Case No. 03-1727E**  
**Initiated by Parent**  
**Hearing Officer: Daniel Manry**  
**Date of Final Order: June 4, 2003**

**ISSUE:** Whether the student's individual education plan (IEP) provided the student with a free appropriate public education (FAPE).

**FINDINGS OF FACT:** The parent objected to an earlier IEP as well as the current IEP, claiming to have had no input into its development or implementation. The current IEP was not implemented and, therefore, there was insufficient evidence to determine if the IEP provided a FAPE. The parent sought to establish that the student and the parent were entitled to damages because of

the current IEP.

**CONCLUSIONS OF LAW:** The Division of Administrative Hearings had jurisdiction over the parties in this case but not the subject matter. The ALJ had no jurisdiction to determine if the student was entitled to damages.

**ORDER:** The hearing was dismissed for lack of jurisdiction of subject matter.