

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. 08-1311E
)
HILLSBOROUGH COUNTY SCHOOL)
BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a final hearing was conducted in this case on September 22 through 26, 2008, in Tampa, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph J. Registrato, Esquire
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For Respondent: Caren R. Skversky, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Petitioner has been provided free and appropriate public education ("FAPE") by Respondent, whether appropriate transition services have been

provided, and whether procedural violations of the Individual Educational Plan ("IEP") process occurred.

PRELIMINARY STATEMENT

Petitioner, [REDACTED] filed a Request for Due Process Hearing on March 17, 2008, and it was duly forwarded to the Division of Administrative Hearings ("DOAH"). The final hearing was scheduled for May 13 through 16, 2008. However, just days prior to the final hearing, counsel for Petitioner moved to withdraw from the case, and Petitioner was required to find substitute counsel immediately. Furthermore, because Petitioner was aging out of the system, it was necessary to make a determination concerning whether Petitioner could "stay-put" within the school system. The final hearing was commenced on May 13, 2008, with Petitioner's new counsel. At that hearing, the stay-put issue was the only issue presented by counsel. An Order was entered denying Petitioner the right to stay-put due to having aged out of the system. The remainder of the final hearing was continued until September 22 through 26, 2008.

At the final hearing, Petitioner called five witnesses: [REDACTED], Petitioner's mother; Shannon Moss, director of the Florida Autism Charter School of Excellence ("FACSE"); [REDACTED] Petitioner's father; Carl Wood, high school intervention teacher at FACSE; and Raymond L. Stiles, special education teacher at Randall Middle School. Petitioner offered Exhibits 1, 2, 9, 18 and 19

into evidence, each of which was admitted. Respondent called five witnesses at final hearing: Jane A. Shriner, exceptional student education ("ESE") specialist for Hillsborough County School District (hereinafter the "District"); Tenille Joplin, speech therapist with Beth Ingram and Associates; Stephanie Kennedy, speech/language therapist at FACSE; Amy Wagner, psychologist and behavioral analyst for the District; and Debra Ann (Dee) Valdes, District ESE supervisor. Petitioner offered into evidence the following exhibits, which were admitted: Nos. 1 through 5, 13, 16, 17 (pages 189-192), 18, and 38 (pages 275-276).

At the conclusion of the final hearing the parties advised that a transcript of the proceeding would be ordered. The parties requested and were given until ten days from submission of the transcript at DOAH to submit proposed findings of fact and conclusions of law. The Transcript was filed on October 22, 2008. By agreement of the parties, an extension for filing proposed findings was granted to November 26, 2008, thereby extending the time for issuance of this Final Order. Each party timely filed a Proposed Final Order, each of which was duly considered in the preparation of this Final Order.

FINDINGS OF FACT

1. [REDACTED] is a [REDACTED]-year-old (former) student with autism spectrum disorder.¹ At all times relevant hereto, [REDACTED] was a

student within the District. ■■■ has been deemed trainable mentally handicapped with significant speech impairment. ■■■ was a student in the District from age ■■■ until aging out of the system last year. ■■■ has not attended a District school since the 2007-2008 school year. ■■■ is currently living at home although there is an effort underway to find an appropriate group home setting for ■■■

2. A review of IEPs created for ■■■ over the past few years pinpoints the relevant issues concerning ■■■'s needs. First, ■■■ has significant difficulty communicating. Next, ■■■ has some history of eloping from the school setting. ■■■ has a habit of leaning rapidly toward a person or thing, giving the appearance of lunging. As a result of autism, ■■■ would sometimes act inappropriately in social settings, having very few social skills. Also, ■■■ has had some difficulty over the years with toileting and personal hygiene. ■■■ engages in self-stimulating behaviors such as hand flapping, rocking, and pouring water out of containers.

3. In the 2004-2005 school year, ■■■ was placed at Eisenhower Exceptional Center ("Eisenhower"), a facility operated by the District to provide educational training to exceptional students who cannot be educated on a regular campus. ■■■'s teachers during that school year were Angelo Fratercangelo and Scott Newton. ■■■ remained at Eisenhower for only about two

months during the 2004-2005 school year due to medical complications that arose; i.e., a diagnosis of PANDAS, a neuropsychiatric disorder associated with strep throat. This disorder sometimes exacerbates behaviors in autistic children. ■■■ attended school for 50 days that school year and was absent for 110 days.

4. For the 2005-2006 school year, ■■■ was homebound as a result of the medical condition and received educational services through the District's Hospital Homebound program ("Homebound"). ■■■'s instructor for that time period was Lawrence Satmary, a certified ESE teacher. An IEP was developed for the year ■■■ was in Homebound. ■■■'s mother participated in the development of and approved that IEP.

5. At the end of the Homebound period, ■■■'s IEP team met on two occasions to develop an IEP for the upcoming year. An IEP developed on May 5, 2006, was approved by the team. Then, on May 23, 2006, the team met again and updated the IEP to address ■■■'s transition back into Eisenhower.

6. In the Fall of 2006, ■■■ was re-admitted to Eisenhower for the 2006-2007 school year. ■■■'s teacher during that school year was again Newton. Satmary and Newton co-taught for a brief transitional period at the beginning of the year, but Newton ultimately became the classroom teacher for ■■■ ■■■ had been scheduled (per the May IEPs) to gradually re-enter the formal

school setting by attending only partial days for a period of time before moving to full days. ■ made the transition so well that the partial days lasted for only a short period of time.

7. During the 2006-2007 school year at Eisenhower, ■ received direct speech/language therapy services as part of the classroom curriculum. The services were provided primarily by Tennille Joplin, a certified speech therapist. Joplin worked with ■ to accomplish the goals set forth on the IEP for that time period. Services were provided by Joplin in group sessions held at Eisenhower for periods of 60-to-90 minutes per week.

8. Joplin worked with ■ on understanding and utilizing communication symbols, asking more direct questions, and using more fluent speech patterns. ■ had only limited verbal abilities, often speaking very quickly and unintelligibly. ■ could not articulate words very well and was not easy to understand when speaking.

9. Moreover, ■ would not normally initiate a conversation and was content to remain mute when encountering strangers or strange situations. Joplin attempted to introduce ■ to the concept of using picture cards in order to express needs, but the attempts proved mostly futile. At some point during the 2006-2007 school year, Joplin determined that ■ had reached a plateau. That is, the student was making no further

progress despite the therapies being provided. There was no regression, but the speech skills were not improving either.

10. Midway between the 2006-2007 school year, the IEP team met again to discuss ■■■'s progress. On January 23, 2007, the team met and revised the communications goals and the level of speech services to be provided. Joplin recommended termination of speech services to ■■■. The team did not agree to termination of speech services, but agreed some alteration was warranted. Instead of 90 minutes per week of direct services to ■■■ the IEP team agreed the District would provide "consultative" services, i.e., the therapist would communicate with the student's teacher concerning the student's needs. ■■■'s mother signed off on this change. For the remainder of the 2006-2007 school year, ■■■ received speech therapy by way of consultative services.

11. For the 2007-2008 school year, ■■■ was assigned to FACSE. FACSE is a charter school established specifically for the purpose of dealing with students with autism. The school was established in 2007 and operated under the authority of the District. As a charter school, FACSE was managed by an independent agency, but was nonetheless part of the county school system. FACSE obtained its operating funds from state education funds. ■■■'s parents were satisfied with the educational services provided at FACSE.

12. For each of the schools attended [REDACTED] (including the Homebound period), an IEP was created by [REDACTED]'s IEP team. The IEP team was made up of persons with a direct connection to [REDACTED]'s educational training. [REDACTED] (mother) and [REDACTED] (father) were members of the IEP team, although [REDACTED] did not usually attend the IEP meetings because he was home taking care of [REDACTED]. [REDACTED] was actively and routinely involved in the IEP process. Classroom teachers, therapists, and ESE experts were also part of the IEP team.

13. The IEP at issue in the current proceeding (referred to hereinafter as the "2006 IEP") was created over two meetings held in May 2006. The IEP was established to address goals and objectives for [REDACTED] during the 2006-2007 school year at Eisenhower.

14. The 2006 IEP was signed (approved) by [REDACTED], teacher Wood, teacher Stiles, therapist Kennedy, Donna Cutler as the evaluation representative, an Agency representative, and several other persons. The 2006 IEP addressed goals for communication skill development, increased classroom participation, daily living skills, behavior modification and minimal transition skills.²

15. The 2006 IEP contained the following goals relating to communication skills:

Goal 1: In a variety of settings, [] will increase [] expressive and receptive communication skills to 60 percent accuracy over a nine-week grading period.

A. [] will ask/answer questions on topic three out of five trials.

B. [] will imitate modeled fluent speech patterns in three of five trials.

C. [] will meet and greet people with intonation, words, or body language.

D. Using a variety of modalities, [] will identify and use curriculum (daily classroom activities) using a picture exchange system to make [] wants/needs and frustration known in three of five trials.

16. [] believes the communication goals set forth in the 2006 IEP are inadequate or insufficient. According to [], [] began using more words while a student at FACSE. She reasons that the 2006 IEP should have provided more communication goals for the student's time at Eisenhower. [] says [] is using full sentences for the first time ever, something that never occurred while [] was at Eisenhower. The bulk of the testimony at final hearing, however, establishes that []'s communication skills are essentially stagnant. The extremely slow development of words, phrases, and use of communication cards by [] over the past several years does not suggest that the 2006 IEP was

deficient. Despite ■■■'s limited abilities, the teachers continued to look for ways to teach and improve ■■■

17. While at Eisenhower, during Homebound and then at FACSE, ■■■ had received speech and language therapy. When Joplin determined that ■■■ had essentially maxed out as far as communication skill development was concerned, she asked the IEP team to terminate the therapy. The team, however, decided to move ■■■ to consultative status, meaning that ■■■ would be monitored and assistance or guidance would be provided as deemed necessary and appropriate. ■■■ signed off on this change in status, and it was documented in the IEP.

18. Elopement seems to be another recurring issue for ■■■. While at Eisenhower, ■■■ was known to elope on a number of occasions as witnessed by teachers and staff. ■■■ was also known to walk away from groups during field trips or outings. While technically an "elopement," such behavior was expected due to ■■■'s condition and was monitored to prevent reoccurrence.

19. ■■■ had eloped from the classroom on several occasions. But it appears Newton and his teaching aide were able to prevent elopement simply by maintaining a presence near the classroom exit. Wood did not remember any elopement occurring while ■■■ was at FACSE, but the school director remembers perhaps one such instance. Elopement was not an extremely major concern by ■■■'s caregivers and teachers.

20. Behaviors within the classroom setting were sometimes an issue, however. ■■■ is very fond of water and will often grab containers of water and dump them out. Often this behavior is wrong because the water belongs to someone else, the water is dumped on the floor inside a room, or it is otherwise inappropriate to the circumstances. ■■■ is encouraged not to engage in that behavior and is offered rewards as an incentive not to dump water. Wood devised a scheme of gluing the tops of water bottles so that ■■■ could not pour out the contents. This resulted in some frustration for ■■■ but was a successful means of curtailing the behavior.

21. Another behavior involved the twirling of a plastic clothes hanger. ■■■ would often bring a hanger to school and twirl it absently back and forth. Because the behavior was distracting and possibly disruptive to fellow students, ■■■'s teachers would attempt to stop the behavior. Some teachers attempted to hide the hanger or lock it up. Others tried to substitute a more socially acceptable item, such as a tennis racket. Others would take the hanger away, but leave it nearby so that when ■■■ attempted to get it, the teacher could reinforce that it was not appropriate. There were periods when the hanger was completely forgotten by ■■■ as a result of intervention techniques utilized by teachers.

22. Yet another behavior was referred to as "lunging." In effect, ■■■ was prone to move rapidly into other people's personal space during one-on-one communications. ■■■'s head would be thrust forward toward the other person, but without actually touching them; or ■■■ might thrust toward a wall or window, again without making contact. The appearance of this behavior was disconcerting to some, so it had to be addressed. Newton and other teachers worked on using a handshake or verbal greeting in place of the lunging. This goal was met with some varying degrees of success.

23. At some point in time, ■■■ developed a problem with toileting. While this issue had not been extant for some time, ■■■ again began having problems getting to the restroom when it was necessary while at Eisenhower. Several theories were hinted at during final hearing, but there was no definitive reason identified for the problem. Nonetheless, the issue was discussed by the IEP team and goals were established. Some progress was documented for that goal.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction pursuant to 20 U.S.C. Section 1415(b)(6)(A).

25. Under the IDEA, parents who have "complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the

provision of a free appropriate public education to such child," must "have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(b), (f).

Petitioner has availed itself of this opportunity as evidenced by the final hearing held in this matter.

26. In Florida, by statute, a DOAH Administrative Law Judge must conduct the "impartial due process hearing" to which a complaining parent is entitled under the IDEA. § 1003.57(5), Fla. Stat.³

27. Absent the district school board's consent, the administrative law judge may only consider those issues raised in the parent's due process complaint. See 20 U.S.C. § 1415(f)(3)(B) ("The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.") In addition, an administrative law judge should limit the issues he considers in reaching his determination to those that were raised prior to the hearing. In the present action, Petitioner is challenging the appropriateness of the FAPE as provided pursuant to the 2006 IEP. Petitioner raised a number of issues in the due process complaint, but only provided competent and substantial

evidence at final hearing as to issues relating to the 2006 IEP as set forth above.

28. The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. Schaffer v. Weast, 546 U.S. 49, 62 (2005); see also Brown v. Bartholomew Consolidated School Corp., 442 F.3d 588, 594 (7th Cir. 2006) and Devine v. Indian River County School Board, 249 F.3d 1289, 1292 (11th Cir. 2001). It is, therefore, Petitioner's burden in the present matter.

29. The appropriateness of an IEP must be judged prospectively, taking into consideration the circumstances that existed at the time of the IEP's development. See Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999) "We do not judge an [IEP] in hindsight; rather, we look to the [IEP]'s goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [Petitioner] with a meaningful benefit."

30. In the present action, we are looking at the circumstances and conditions that existed in May 2006, when the 2006 IEP was created. At that time, ■■■ was coming out of the Homebound program and was preparing to re-enter the school system. The 2006 IEP addressed ■■■'s needs and provided for transitional services, e.g., ■■■'s Homebound teacher was allowed to co-teach with the Eisenhower teacher for a period of time to

assure continuity. ■ progressed quickly and was able to transition into Eisenhower sooner than expected. While at Eisenhower, ■ received appropriate instruction and assistance pursuant to the relevant IEPs.

31. It is not the function of the Administrative Law Judge, in passing upon the appropriateness of an IEP, to determine the "best methodology for educating [the] child. That is precisely the kind of issue which is properly resolved by local educators and experts" and is not subject to review in a due process hearing. O'Toole By and Through O'Toole v. Olathe District Schools Unified School District No. 233, 144 F.3d 692, 709 (10th Cir. 1998); see also M. M. v. School Board of Miami-Dade County, Florida, 437 F.3d 1085, 1102 (11th Cir. 2006), quoting Lachman v. Illinois Board of Education, 852 F.2d 290, 297 (7th Cir. 1988) ("Rowley and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the [statute] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child.").

32. It is clear that the District addressed all appropriate goals for ■ and then established processes to achieve those goals. The goals were somewhat limited, but that was a function of ■'s abilities, not a failure by the

District. The goals were pursued vigorously by each of [REDACTED]'s teachers and progress, albeit small, was made.

33. [REDACTED] has failed to prove that the education provided by the District was insufficient or improper. There was not substantial evidence that the 2006 IEP was deficient or that the District failed to carry it out appropriately. [REDACTED] has not met the established burden of proof.

RECOMMENDATION

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

ORDERED that Petitioner's request for relief is denied.

DONE AND ORDERED this 10th day of December, 2008, in Tallahassee, Leon County, Florida.

S

R. BRUCE MCKIBBEN
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of December, 2008.

ENDNOTES

1/ All references to [REDACTED] herein will be gender neutral in order to preserve confidentiality.

2/ It is clear that [REDACTED] will not be able to transition into employment absent constant and skilled supervision by a one-on-one aide. Nonetheless, the 2006 IEP does express goals for teaching [REDACTED] to identify and complete activities that could potentially become employment-like actions later.

3/ Unless otherwise stated, all references to Florida Statutes will be to the 2008 version.

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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(1)(e), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(e) and 120.68, Florida Statutes.