

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 12-1444E
)
MIAMI-DADE COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a due process hearing was conducted on September 20, 2012, in Miami, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: ██████████
(Address of record)

For Respondent: Mary C. Lawson, Esquire
Miami-Dade County School Board
Suite 430
1450 Northeast Second Avenue
Miami, Florida 33132

STATEMENT OF THE ISSUE

Whether the Respondent (the School Board) denied Petitioner, ██████████ (the Student) a free, appropriate public education (FAPE) within the meaning of the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq.,

and, if so, the relief to which the Student is entitled. More specifically, whether the Individualized Education Plan (IEP) developed by the Student's IEP team on January 25, 2012, contained inadequate goals and made inadequate provisions for speech therapy and occupational therapy.

PRELIMINARY STATEMENT

The Student and the Student's parents are not specifically named in this Final Order to protect the Student's privacy. This Final Order has been written in compliance with the standing request of the Florida Department of Education that DOAH ALJs write orders involving IDEA in a gender-neutral fashion without specifically naming the Student's school. References to "the Student's school" will be to the school the Student attended at the time of the due process hearing. All state statutory references are to Florida Statutes (2012).

At the times relevant to this proceeding, the Student was eligible for and receiving services from Respondent's Exceptional Student Education (ESE) program. The Student transferred from a school in New York City where the Student also received ESE services pursuant to an IEP.

The Student's father filed a Due Process Request on April 16, 2012, contending that the goals and services of the Student's IEP were not comparable to those set forth in the New York IEP. The School Board filed a Notice of Insufficiency

and Response to the Due Process Request on April 26, 2012. On May 2, 2012, the undersigned entered an order finding the Due Process Request to be insufficient, but giving the Student's father the opportunity to file an amended due process request.

On May 11, 2012 the father filed an Amended Due Process Request setting forth the issues described above. On May 22, 2012, the School Board filed a Notice of Insufficiency and Response to the Due Process Request. On May 25, 2012, the undersigned entered an order which found the Amended Due Process Request to be sufficient and advised that all applicable deadlines began to run as of May 11, 2012.

The due process hearing was initially scheduled for July 16 and 17, 2012. On July 3, 2012, the father filed a Request for New Trial Dates due to the need to have an independent evaluation of the Student and to obtain expert witnesses before hearing.^{1/} On July 6, 2012, the undersigned rescheduled the due process hearing to September 20 and 21, 2012. The 45-day deadline for the filing of the final order in this proceeding was, with the agreement of the parties, extended to commence at the conclusion of the formal hearing.

On September 10, 2012, the father filed another request for new trial dates. The School Board opposed the request.

Following a motion hearing, the undersigned denied the motion to continue the hearing. The hearing was conducted and completed on September 20, 2012.

At the final hearing, Petitioner presented the testimony of the Student's father and mother and offered two exhibits, both of which were admitted into evidence over the School Board's objection. The School Board presented the testimony of the following witnesses, each of whom is a School Board employee: Deetra Anderson (Assistant Principal at the Student's school), Edna Waxman (Supervisor of Special Education Compliance), Julissa Varela (teacher), Maite Arsote (occupational therapist), and Teresa Rodriguez (speech/language therapist). The School Board offered 14 sequentially-numbered exhibits, each of which was admitted into evidence without objection.

The Transcript, consisting of one volume, was filed on October 5, 2012.

Petitioner and Respondent timely filed proposed final orders, which have been duly considered by the undersigned in the drafting of this Final Order.

FINDINGS OF FACT

1. The Student was born in [REDACTED]. The Student's school is a public elementary school operated by the School Board.

2. There is no dispute that the Student is eligible for and receiving services from Respondent's ESE program in the area of Autism Spectrum Disorder (ASD).

3. When the Student was aged three, the Student was enrolled in the Student's school's Pre-K program for students with disabilities. That enrollment lasted approximately six months. Ms. Anderson, an assistant principal at the Student's school, knew the Student during that period. Ms. Anderson was a member of the IEP team after the student re-enrolled in the Student's school in January 2012.

4. Between September 2010 and December 2011, the Student was enrolled in a specialized school for students with ASD disabilities located within a public school in New York, New York. During that period, the Student received ESE services pursuant to an IEP. The last New York IEP covered the period September 2011 through August 2012 (the old IEP).

5. The Student's parents are divorced. The father and the Student moved from New York to Florida after the Florida circuit judge presiding over the divorce proceedings ordered that the father return the Student from New York to Miami, where the mother resides.^{2/}

6. The Student re-enrolled in the Student's school in January 2012. An IEP meeting was scheduled for January 4, 2012. That meeting did not occur because the Student's parents were

waiting to receive [REDACTED] immunization records from New York and had not officially enrolled the Student.

7. A second meeting was scheduled for January 18, 2012. Because the parents were not able to attend in person, the meeting was conducted by telephone conference call. At that meeting, the Student's IEP team conducted a general discussion without completing an IEP.

8. The IEP meeting occurred January 25, 2012. Upon reviewing the old IEP, the Student's IEP team, with the mother in attendance, determined that the goals contained therein were too broad to be adequately measured. The father arrived at the meeting shortly before it ended. The IEP team decided to make the goals shorter in order to assess the Student's progress in a more reliable manner, thereby making the goals more measurable. The goals, as written on the old IEP, were not in compliance with Florida Department of Education or School Board standards.

9. The Student's father insisted that the goals in the new IEP be identified to the goals in the old IEP. He believed that the IEP Team had overly simplified the Student's goals.

10. The Student's IEP was completed January 25, 2012 (the new IEP), but the parents did not want to sign the IEP at the meeting. The IEP team met again on February 1, 2012, to discuss the IEP that had been completed January 25, 2012, and to request consent to evaluate the Student.

11. At the February 1 meeting the mother signed a "consent to evaluate form," but the father, mistakenly thinking that the mother had consented to the IEP, tore up the signed consent form.^{3/}

12. The Student's new IEP was completed January 25, 2012, without the signature of either parent. The goals set forth in the new IEP are designed to provide the Student FAPE and do not violate any provision of IDEA.

13. The Student's old IEP had assigned [REDACTED] to a special class in a specialized school housed within a New York City public school. That placement provided a 6:1:1 (six students, one teacher, and one paraprofessional) delivery for instruction. The Student's old IEP included both group and individual speech/language therapy and occupational therapy.^{4/}

14. The Student's placement in a separate class by the new IEP is less restrictive than the old IEP placement because the Student's special class is in a traditional school where non-disabled students also attend.

15. The new IEP placement is in a classroom with a ratio of 9:2:1 (nine students, two teachers, and one paraprofessional). That ratio makes the proposed placement comparable to the former placement in New York. The new IEP placement is designed to provide the Student FAPE and does not violate any provision of IDEA.

16. The Student has received occupational therapy and speech/language therapy at all times relevant to this proceeding, and there is no dispute that the Student will continue to require those related services.

17. The old IEP provided individual speech and language therapy three times a week for 30 minutes per session. The old IEP also provided for group (of two students) speech and language therapy two times per week for 30 minutes per session.

18. The old IEP provided for individual occupational therapy three times a week for 30 minutes per session. The old IEP also provided for group (of two students) occupational therapy once a week for 30 minutes. The old IEP noted that occupational therapy requires a prescription.

19. The IEP Team considered all available information about the Student in determining the frequency of the therapy sessions needed by the Student. Included in the available information was the old IEP. The new IEP provides that the Student will have speech/language therapy. At the times relevant to this proceeding the Student received 90 minutes per week provided in sessions determined by the speech/language therapist. The new IEP provides that the Student will have occupational therapy as a related service 90 minutes per week in two 45-minute sessions.

20. The duration and frequency of the therapy sessions on the new IEP were not as intense as compared to those on the old IEP. The father failed to prove that the student required the more intense level of services to receive FAPE. The duration and frequency of the therapy sessions in the new IEP were designed to provide the Student FAPE and do not violate any provision of IDEA.

21. The father did not prove that the new IEP's level of service in occupational therapy or in speech/language therapy is inappropriate.

22. The father contends that the speech/language and the occupational therapy sessions should be on a 1:1 basis and not in a group setting. The IEP team discussed the Student's need to receive individualized therapy, but decided on group therapy because of the Student's need to learn from the other students and to interact in a group setting.

23. The testimony of Ms. Rodriguez (the Student's speech/language therapist) established that group therapy is appropriate for the Student.

24. The speech/language therapy and occupational therapy services provided the Student must be "educationally relevant," meaning that they relate to and assist the Student with accessing the curriculum standards being taught in the classroom. Educationally relevant services are different from

rehabilitative/medical services provided in a clinical setting. Most often, as in this case, the therapists are helping to support goals that the teacher is implementing. The therapy is driven by the IEP goals.

25. The Student is non-verbal and low functioning. The Student is impulsive, has a short attention span, and is easily distracted. The Student requires a lot of repetition and needs assistance with following directions without gestures.

26. The Student is unable to follow the visual schedule that the other classmates follow. However, the Student has made progress on that skill.

27. Although the Student needs verbal prompting and hand-over-hand assistance, the Student has made progress on the IEP goal of tracing lines.

28. Although the Student remains non-verbal, the Student has made progress expressing needs by using the Picture Exchange Communications System, which, as the name implies, uses pictures as a means of communicating. The Student uses some utterances, but the Student does not demonstrate spontaneous attempts to communicate, which indicates that the Student's language development is severely delayed.

29. In spite of the Student's need for maximum assistance, the Student has made some progress on all of the Student's goals. That progress was meaningful for the Student.

30. The Student's father presented two video recordings of the Student during private speech/language therapy sessions. The first video was taken in New York City on December 21, 2011, at the residence of the Student's paternal grandparents. The second video was taken in Miami on September 12, 2012, at the residence of the Student's mother by the Student's mother. The undersigned has viewed both videos. The Student was more engaged with the therapist in the first video as compared to the second video, and it appeared that the Student was functioning at higher level in the first video. There was no evidence that the apparent differences from the levels of functioning can be attributed to any services, or lack thereof, provided the Student by the School Board pursuant to the new IEP.

CONCLUSIONS OF LAW

31. DOAH has jurisdiction over the subject matter and parties to this case pursuant to sections 120.569, 120.57(1), and 1003.57(5), Florida Statutes. See also Fla. Admin. Code R. 6A-6.03311(11).

32. Petitioner has the burden of proving by a preponderance of the evidence that Respondent failed to offer the Student FAPE. Petitioner must prove the elements of their case by a preponderance of the evidence. Schaffer v. Weast, 126 S. Ct. 528 (2005).

33. Section 1003.01(3) defines the terms "exceptional student" and "special education services." There is no dispute that the Student is an exceptional student and is entitled to special education services.

34. 20 U.S.C. Section 1401(9), defines the term FAPE as follows:

(9) Free appropriate public education. The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 614(d) [20 USC §1414(d)].

35. The instruction and services provided in the IEP must be reasonably calculated to enable the child to receive educational benefits. The United States Supreme Court has determined that the applicable standards only require that a program of specialized instruction and related services be reasonably calculated to provide educational benefit to the child, not that the program maximize the child's potential. See Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982). However, the educational benefits

under IDEA must be more than trivial or de minimis. See J.S.K. v. Hendry Cnty. Sch. Dist. 941 F.2d 1563 (11th Cir. 1991).

36. 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 (9th Cir. 1999).

Based on the foregoing, it is ORDERED that the Miami-Dade County School Board has not denied the Student FAPE, and Petitioner's request for relief is denied.

DONE AND ORDERED this 26th day of October, 2012, in Tallahassee, Leon County, Florida.

S

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of October, 2012.

ENDNOTES

^{1/} The father presented no expert testimony at the due process hearing.

^{2/} During his examination of one of the School Board's witnesses, the father represented that he and the mother share custody of the Student.

^{3/} The father is very distrusting of the IEP Team. At the February 1 meeting, the father stated that he does not believe in the field of psychology, and he opined that all evaluations should be done by a professional of the healing arts. By tearing up the signed consent for evaluation form, the father substantially delayed the evaluation of the Student by School Board personnel. The father subsequently agreed to have the Student evaluated, but the evaluation had not taken place as of the formal hearing.

^{4/} The NYCPS IEP also made provisions for Physical Therapy, and the Amended Request for Due Process attempts to make an issue as to the Physical Therapy being provided by the Student's school. However, Physical Therapy was not an issue at the due process hearing because Physical Therapy requires a prescription from a medical professional. It is undisputed that the Student's parents have not provided the Student's school with such a prescription. Consequently, the Student's school could not provide Physical Therapy services for the Student.

COPIES FURNISHED:

Mary C. Lawson, Esquire
Miami-Dade County School Board
Suite 430
1450 Northeast Second Avenue
Miami, Florida 33132

Lindsey Granger, Program Director
Bureau of Exceptional Education
and Student Services
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400


(Address of record)

Lois Tepper, Interim General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Alberto M. Carvalho, Superintendent
Miami-Dade County School District
1450 Northeast Second Avenue
Miami, Florida 33132-1308

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

- a) brings a civil action in the appropriate state circuit court pursuant to Section 1003.57(1)(b), Florida Statutes (2009), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2) of the Individuals with Disabilities Education Act, and Florida Administrative Code Rule 6A-6.03311(9)(w).