

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████.,)
)
Petitioner,)
)
vs.) Case No. 10-1608E
)
BAY COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

A final hearing was conducted in this case on April 26 and 27, 2010, in Panama City, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Franklin R. Harrison, Esquire
Harrison, Sale, McCloy,
Thompson & Duncan
Post Office Drawer 1579
Panama City, Florida 32401

STATEMENT OF THE ISSUE

The issue is whether Respondent is providing Petitioner with a Free Appropriate Public Education (FAPE) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1401, et seq.

PRELIMINARY STATEMENT

On March 12, 2010, [REDACTED]. (Petitioner) filed a request for a due process hearing with Respondent Bay County School Board (Respondent). The request alleged that Respondent was not providing Petitioner with FAPE. Respondent referred the request to the Division of Administrative Hearings on March 24, 2010.

The parties participated in a resolution meeting on March 25, 2010.

On March 31, 2010, the undersigned conducted a telephone conference with the parties. On April 5, 2010, the undersigned issued an Order Memorializing Pre-hearing Conference, a Notice of Hearing scheduling the hearing for April 22 and 23, 2010, and a Pre-hearing Order.

On April 7, 2010, Petitioner filed a revised hearing request. The revised request raised the following issues:

- (a) Respondent failed to provide Petitioner with extended time on the first homework assignment in History;
- (b) Respondent removed the requirement for Petitioner to receive extended time to complete in-class tests and quizzes on the January 12, 2010, Individual Education Plan (IEP);
- (c) Respondent modified Petitioner's make-up tests in History, making them more difficult than the original tests;
- (d) Respondent has not provided access to Petitioner's records;
- (e) Respondent did not ensure that Petitioner received college credit for Digital

Design, a dual enrollment class; (f) Respondent has not properly developed and/or implemented the social/emotional goals in Petitioner's IEP; and (g) Respondent has provided Petitioner with an inappropriate mathematics software program.

On April 15, 2010, Petitioner filed a composite of proposed hearing exhibits and a list of witnesses. That same day, the parties filed a Pre-hearing Joint Written Statement.

Shortly before the hearing, Respondent's counsel made an ore tenus request for a continuance due to a medical emergency. After learning that Petitioner did not object, the undersigned rescheduled the hearing for April 26 and 27, 2010. Respondent filed a Notice of Rescheduling Hearing and a copy of Petitioner's written consent to the rescheduled hearing on April 21, 2010.

During the hearing, Petitioner presented the testimony of ten witnesses, including Petitioner and Petitioner's parent. Petitioner offered 24 exhibits that were accepted as evidence. Petitioner's Exhibit P23 is an audio cassette tape of an IEP meeting.

Respondent presented the testimony of one witness. Respondent offered eight exhibits that were accepted as evidence.

The Transcript was filed on May 12, 2010. Petitioner and Respondent filed Proposed Final Orders on May 24, 2010, though

Respondent's Proposed Order was not placed on the docket until May 25, 2010.

Except as otherwise noted, all references hereinafter shall be to Florida Statutes (2009).

FINDINGS OF FACT

1. At the time of the hearing, Petitioner was a [REDACTED]-year-old [REDACTED]-grade student. Petitioner was enrolled in a high school curriculum designed for students that intend to participate during their 11th and 12th-grade years in the International Baccalaureate Diploma Program (IB Program).

2. The IB Program purports to adhere to the highest academic standards required of any high school in the world. The IB courses are taught at a college level and some, if not all, meet the criteria for Advanced Placement (AP) college credit.

3. As a [REDACTED] grader, Petitioner's curriculum is known as the pre-IB program. Students know when they enroll in the pre-IB program that the work in and out of class will be more challenging and time consuming. The pre-IB program is strictly voluntary. It is not unusual for pre-IB students' grades to drop somewhat in the tenth grade due to the increased demands of the program.

4. Petitioner also is enrolled in Respondent's Exceptional Student Education (ESE) program due to a Specific Learning

Disability (SLD). More specifically, Petitioner has problems writing by hand and suffers from a processing disorder.

5. Petitioner apparently has social/emotional problems that result in a significant reluctance to engage peers and teachers in conversations. Petitioner claims that the difficulty in initiating conversations at school stems from past experiences with bullies.

6. Petitioner does not participate in extracurricular activities beyond the school day. Petitioner does not have an after-school job. Under the current workload, Petitioner is able to sleep approximately nine hours per night.

7. In November 2006, American College Testing, Inc. (ACT) advised Petitioner that submitted documentation did not establish a disability within the meaning of the Americans with Disabilities Act of 1990. Petitioner would have to take the test using standard time unless specified documentation was submitted.

January 13, 2009, IEP

8. On January 13, 2009, Petitioner's ESE team conducted an annual review of Petitioner's IEP. According to the IEP, Petitioner took the Wechsler Individual Achievement Test-II when ■ was in the ■ grade, in November 2008. Petitioner's scores on the test show that Petitioner was reading at the upper 12th-grade level, comprehending what ■ was reading at the

college level, performing numerical operations at the upper 12th-grade level, and spelling at the 12th-grade level.

9. The January 13, 2009, IEP listed Petitioner's results on the 2008 Florida Comprehensive Assessment Test (FCAT). Petitioner's FCAT Reading Comprehension score was at Level 4. Petitioner's FCAT Mathematics Problem Solving score was at Level 5.

10. Level 5 indicates success with the content on the FCAT by answering most questions correctly. Level 4 indicates success with the FCAT content by answering most questions correctly, except for the most challenging. In order to be considered on grade level, student must score Level 3 or higher on the FCAT.

11. The January 12, 2009, IEP specified that Petitioner would have counseling services for 30 minutes per week. The primary purpose of the counseling services was to help Petitioner learn how to interact with peers.

12. According to the January 12, 2009, IEP, Petitioner received the following accommodations. First, Respondent provided Petitioner with a word processor and printer to use at school and home. The computer used software known as "Alpha Smart."

13. The 2009 IEP listed Petitioner's instructional accommodations. These included having flexible

scheduling/setting, having lectures recorded as needed, and having time allotted for class work doubled (time allotted for regular students times two.)

14. The 2009 IEP stated that Petitioner was able to maintain above-average grades in all subjects with reasonable accommodations. Additionally, the IEP stated that Petitioner behaved appropriately in all classroom settings; however, Petitioner had difficulty interacting with other students. Therefore, one of Petitioner's social/emotional goals was to initiate conversations with peers.

15. Petitioner's 2009 IEP had specific short-term goals. One of the goals was for Petitioner to learn self-advocacy skills. For example, Petitioner needed to be able to explain Petitioner's special needs to teachers and to find answers to questions regarding assignments and extra-curricular activities.

16. Another short-term goal in the 2009 IEP was for Petitioner to learn to strike out errors in mathematical operations. This goal was supposed to replace Petitioner's practice of erasing mistakes.

17. The last short-term goal in the 2009 IEP related to Petitioner's social/emotional needs, i.e. "[Petitioner] will initiate conversations with . . . peers across all settings once a week." One objective was for Petitioner to initiate conversations with peers within the classroom once a week.

Another objective was for Petitioner to initiate conversations with peers within extracurricular clubs. The final objective was for Petitioner to develop a list of student contacts from all classes so that Petitioner could call the students for class information. Petitioner did not make any progress on these objectives during the effective period of the January 12, 2009, IEP.

18. As discussed below, the failure to make progress on social/emotional goals was temporary. In all other respects, Petitioner's January 12, 2009, IEP was appropriate and provided FAPE. Additionally, the most persuasive evidence indicates that Respondent properly implemented the January 12, 2009, IEP.

19. Petitioner's [REDACTED] grade report card in the 2008/2009 school year indicates that Petitioner made straight A's in all subjects for each grading period and on all exams. Petitioner finished the [REDACTED] grade with a first and second semester grade point average (GPA) of 4.375.

FALL 2009

20. Petitioner's high school has four 90-minute classes per day on an odd/even schedule. Students can take eight subjects, attending class in four subjects on one day and four subjects the next day. On an even day, students attend their 2nd, 4th, 6th, and 8th period classes. On an odd day, students attend their 1st, 3rd, 5th, and 7th period classes.

21. Because of the odd/even schedule, homework assigned on a Monday would not be due until Wednesday. Tuesday's and Wednesday's homework would be due on Thursday and Friday respectively. Thursday's and Friday's homework would not be due until Monday and Tuesday respectively of the next week.

22. In the fall of 2009, Petitioner enrolled in an AP United States History class taught by Sheila Sexton. Although class schedules were not quite finalized, Petitioner was in Ms. Sexton's class on Wednesday, August 26, 2009, when she assigned the first homework/notebook assignment. The assignment was also listed in the syllabus and on the assignment board in the classroom.

23. Ms. Sexton advised all students that they were required to maintain a notebook. She also advised the students that they were required to timely complete all homework assignments by the next class period and that late work would not be accepted.

24. On Friday, August 28, 2009, Petitioner returned to Ms. Sexton's class. Petitioner, like some other students, did not have the homework assignment completed. Petitioner and other students who failed to complete the work received a zero.

25. Petitioner did not request extended time to complete the homework assignment. Instead, Petitioner erroneously argued that Ms. Sexton had not listed the assignment. Petitioner's

hearing testimony that class schedule changes during the first week of school made it impossible to complete the homework in a timely manner is not persuasive.

26. Petitioner's IEP does not include providing Petitioner with extended time on homework assignments. Ms. Sexton's handling of Petitioner's grade on the first homework assignment did not violate Petitioner's IEP. There is no evidence that Ms. Sexton failed to properly implement Petitioner's IEP in this regard.

27. On September 14, 2009, Petitioner's IEP team met to discuss some concerns raised by Petitioner's parent. During the meeting, Respondent agreed to supply Petitioner with a Universal Serial Bus (USB)-drive voice recorder. Petitioner's math teacher, Diane Bates, agreed to add additional space on tests so that Petitioner and other students would have room to show their work. The IEP team also agreed to provide Petitioner with help on computer software known as "Alpha Smart."

28. At the September 14, 2009, meeting, Petitioner's parent wanted an explanation why Ms. Bates would not allow Petitioner to use a calculator. According to Ms. Bates, it was not in Petitioner's best interest to be dependent on a calculator to work math problems.

29. During the hearing, Ms. Bates, explained that IB examinations would not allow the use of calculators. Ms. Bates

also stated that showing one's work was important because students sometimes received partial credit on IB examinations for problems even though the final answer was incorrect.

30. Petitioner's IEP team held a parent conference on September 22, 2009, to discuss Petitioner's assistive technology for math. During the meeting, the IEP team discussed several issues and made the following decisions in part: (a) Petitioner would use "Math Type," a new non-computational mathematics software program; (b) Petitioner would have additional extended time to take tests in class using "Math Type" or writing by hand; (c) Petitioner's math tests would be divided into thirds; (d) Petitioner's extended time for in-class math tests would be triple the regularly allotted time; and (e) Petitioner would use time during lunch, after school, and on IB Study Day to complete tests.

31. The IEP team held a parent conference on October 16, 2009. At the meeting, the IEP team discussed the specifics of Petitioner's having triple time to take math quizzes and tests and double time to complete math class assignments that do not require computation. The team also discussed dividing the United States History exam into two sections and giving Petitioner extended time for all final exams. Respondent agreed to supply staff members to proctor before and after school test sessions.

32. At the October 2009 meeting, Petitioner's parent was advised that Petitioner's dependence on extended time to complete class work would not prepare Petitioner for taking AP and IB exams. The IEP team also reminded Petitioner's parent that community service hours were due to be completed by April 15. Florida Bright Futures Scholarships, as well as the IB Program, require service hours.

33. During the October 2009 meeting, the IEP team added/revised some annual goals. The first one involved Petitioner's ability to self-advocate for needed accommodations. The second goal related to Petitioner's social/emotional/behavioral needs such as (a) demonstrating the ability to state two positive ways to approach a peer in a group setting and identifying two potential topics of interest for a social conversation with the peer; and (b) demonstrating the ability to engage a peer in a conversation with a topic of mutual interest.

34. Respondent's policies relative to make-up work for excused absences states as follows:

I. MAKE-UP WORK FOR EXCUSED ABSENCES.
Students are expected to make up all work missed during excused absences. The student must contact the teacher on the first day back in school in order to make arrangements to make up the work within five school days. The teacher or principal may grant additional time for making up work at his or her discretion. All assignments, including tests and exams, announced in advance of the student's absence must be made up on the day

the student returns to school. Teachers have the prerogative to require a student on school or administrative leave to complete work assigned in advance of the leave.

35. Prior to Thanksgiving in 2009, Ms. Sexton announced to the United States History class, including Petitioner, that she would give a test before the holidays. Due to emergency surgery, Petitioner missed the announced test. Petitioner was not prepared to take the make-up test on the day Petitioner returned to school after the Thanksgiving holidays.

36. Ms. Sexton agreed to give Petitioner the make-up test the next day. Petitioner completed one-half of the make-up test during lunch period on December 1, 2009. Because Petitioner was absent on December 2, 2009, Petitioner took the second-half of the test on December 3, 2009.

37. Petitioner used double-time to take the history test. Petitioner has never failed to finish a history test within the allocated extended time.

38. The original history test was all multiple-choice questions and one essay. The make-up test was multiple choice, fill-in-the-blank, and one essay. The two tests were the same, except that Ms. Sexton converted some of the multiple-choice questions into fill-in-the-blank questions on the make-up test. Everyone who took the make-up test took the same make-up test.

39. It is common practice for teachers to make some changes to make-up tests in order to ensure the security of the tests. The test Petitioner took was no more difficult than the original test. Petitioner received a "B" on the make-up test.

40. Respondent does not need to alter its policy regarding make-up work/tests in order to accommodate Petitioner's disability. FAPE does not require Respondent to give Petitioner an original test as a make-up test or to allow Petitioner to drop any test grade on tests that have been modified to serve as make-up tests.

41. Ms. Sexton's modification of the history test did not violate Petitioner's IEP. Giving Petitioner slightly modified questions on the make-up test was not an improper implementation of the IEP.

42. Ms. Sexton conducts review sessions for her students to help them with preparation for the national exam in United States History. Beginning around the time of spring break, the review sessions take place after school between 2:35 p.m. and 4:00 p.m. Petitioner has never attended any of the review sessions. However, Petitioner has recordings of Ms. Sexton's lectures to review.

43. Petitioner's parent requested copies of the two History tests. Respondent's staff did not give Petitioner's parent copies of the tests due to the need for test security.

However, Respondent agreed to let Petitioner's parent review the original and make-up tests in the IB Coordinator's office.

Respondent has not failed to provide Petitioner with access to records as required by IDEA.

44. Petitioner missed about one week of classes due to the emergency surgery. While Petitioner was at home, Petitioner's parent picked up Petitioner's homework assignments.

45. During the time that Petitioner was absent from school, one of the United States History assignments was to write an essay on "Fanaticism in the 1850's." Ms. Sexton's written instructions provided a list of five topics and an outline for the essay. Ms. Sexton also provided the rubric she would use to grade the essay.

46. When Petitioner's parent picked up the history essay assignment, the documents included Ms. Sexton's written instructions and the grading rubric. Ms. Sexton also added hand-written notes advising that Petitioner needed to use outside sources and citations and include a bibliography.

47. When Petitioner turned in the History essay, the paper did not properly cite sources, did not include outside sources, and did not include a bibliography. Ms. Sexton did not take points off Petitioner's grade because the paper was not double spaced. Petitioner earned a C on the essay.

48. Respondent did not deprive Petitioner of FAPE by failing to reevaluate Petitioner's essay without reference to the rubric. There is no evidence that Respondent failed to follow Petitioner's IEP in grading Petitioner's essay pursuant to the rubric.

49. In the fall of 2009, Petitioner registered to take Digital Design, a dual-enrollment course in cooperation with Gulf Coast Community College (Gulf Coast). Petitioner understood that college credit would be given for the course.

50. In time, Respondent advised the students in the Digital Design class that they would not receive college credit because some of the students in the class were not taking the course for college credit. Additionally, Gulf Coast was undergoing an accrediting process that set the standards for dual-enrollment classes. Gulf Coast, and not Respondent, made the decision not to give college credit for the Digital Design class. Respondent did not have a say in the matter.

January 12, 2010, IEP

51. On January 12, 2010, Petitioner's IEP team met to conduct an annual review. The IEP indicates that Petitioner's strengths are as follows:

[Petitioner] continues to have strengths in . . . academic ability. [Petitioner] does well in math with the new software program, performs above grade level in reading, enjoys working with computers, is very

persistent and able to over come [sic] some obstacles.

52. The January 12, 2010, IEP states as follows relative to the concerns of Petitioner's parent:

Previous parent input indicated a concern in the following: Social Skills are a concern, would like for [Petitioner] to have the ability of a signature and still receive all accommodations for . . . processing disorder.

53. The January 12, 2010, IEP contained results for the Asperger Syndrome Diagnostic Scale, administered to Petitioner on December 10, 2008. According to the evaluation, it is unlikely that Petitioner suffers from Asperger Syndrome.

54. The January 12, 2010, IEP listed Petitioner's Preliminary Scholastic Aptitude Test/National Merit Scholarship Corporation (PSAT/NMSQT) scores as of October 14, 2009. On that test, Petitioner scored in the 86th percentile for critical reading, 84th percentile for math; and 94th percentile for critical writing.

55. The January 12, 2010, IEP provided Petitioner's scores on the March 1, 2009, FCAT. Petitioner received a Level 5 in reading with a score of 2460 based upon a determined grade level score of 1970. Petitioner received a Level 5 in math with a score of 2185 based upon a determined grade level score of 1901.

56. Regarding Petitioner's progress on previous goals and objectives, the January 12, 2010, IEP states as follows:

Goals written for curriculum and learning addressing production of a written product when writing by hand through striking out incorrect response instead of erasing has been addressed through the use of a portable word processor for the majority of written assignments. Input from teachers indicates [Petitioner] is asking questions when ■ feels ■ needs clarification; this would indicate [Petitioner] is demonstrating self-advocacy in the classroom setting. [Petitioner] is not yet initiating conversation with . . . peers, however [Petitioner] is responding when a peer speaks to [Petitioner]. [Petitioner] is also engaging in conversation with . . . teachers and is now making eye contact when engaged in conversation. [Petitioner] is also engaging in classroom discussions in some . . . classes. [Petitioner] is able to advocate for [Petitioner] during team meetings. No progress on social emotional goals.

57. According to the January 12, 2010, IEP, Petitioner's accommodations/modifications continue to include a flexible schedule in a flexible setting "per student request to complete in-class assignments/tests due to extended time." Petitioner has 200 percent extended time as requested to complete lengthy written class assignments and/or written tests and 300 percent extended time to complete math assignments/tests when Petitioner uses the non-computational math software in class.

58. Petitioner's IEP's have never specified that Petitioner needed extended time to complete homework. There is no persuasive evidence that Petitioner now needs extended time to do math homework using the Math Type software.

59. The January 12, 2010, IEP lists a portable word processor and non-computational software as accommodations/modifications that are available to Petitioner. Petitioner also is allowed to have all lectures recorded to supplement note taking.

60. The January 12, 2010, IEP states as follows relative to Petitioner's present level of educational performance for Petitioner's curriculum and learning needs:

Based upon: student records, student, parent and teacher input, and IEP team input, [Petitioner] is currently able to: maintain above average grades in all subjects [sic] areas, as reflected with a 4.375 weighted GPA as a result of straight As during [REDACTED] [REDACTED] grade school year. Teacher reports indicate [Petitioner] is successful in . . . classes when [Petitioner] attends to lecture and accesses [Petitioner's] accommodations when they are needed. [Petitioner] is an excellent reader and one of approximately 5 students out of 85 who scored a 100/A on his [Petitioner's] intensive "Did you read it" test for the summer reading.

When [Petitioner] uses the math software program to complete . . . math homework, [Petitioner] does a good job of showing all of [the] work utilizing this format. [Petitioner] has needed no extended time for vocabulary quizzes in Algebra, however, [Petitioner] continues to need extended time to take . . . math tests. [Petitioner] still requires the use of triple time to take . . . math tests with the use of the non-computational math software and [Petitioner] states [that Petitioner] requires extended time when the non-computational software is used for homework.

[Petitioner's] FCAT scores have gone up since the 2006 administration to the 03/01/09 administration which reflects a level 5 in both math (379) and reading (411). (A numeric score of 300 . . . is the score required for the grade 10 FCAT to meet graduation criteria.) [Petitioner] participated in the October administration of the PSAT with standard administration. [Petitioner's] scores for the assessment reflected the following: Critical Reading 86th percentile; Math 84th percentile; Critical Writing 94 percentile.

Effects of the disability on [Petitioner's] progress in the general curriculum: noted visual-motor deficiencies impact [Petitioner's] ability to put lengthy written responses and mathematical problems on paper.

Priority education need: to continue to access the non-computational math software for . . . Algebra II class and use a portable work processor as needed to complete some written assignment and take notes in class.

61. The January 12, 2010, IEP states as follows regarding Petitioner's present level of educational performance for Petitioner's social/emotional needs.

Based upon: input from teachers, guidance, administrators, parent and student, [Petitioner] is currently able to: Interact appropriately in the classroom setting and participate verbally in some classes during classroom activities, discussions and assignments. [Petitioner] is able to hold a conversation with adults and is improving [redacted] eye contact during conversation. [Petitioner] is also responding when peers speak to [redacted] [Petitioner] in the classroom setting. Input from the counselor who sees [Petitioner] on a weekly basis indicates

[Petitioner] has begun to attend to peers who are engaged in conversation.

Effects of the disability of [Petitioner's] progress in the general curriculum: [Petitioner] does not initiate conversations with [redacted] peers. This may inhibit [redacted] [Petitioner's] ability to socially interact with peers and transition to the expectation of the social "norm" as an independent adult.

Priority educational need: To initiate social conversations with peers.

62. The January 12, 2010, IEP sets forth Petitioner's annual measurable goals. The first goal is related to Petitioner's curriculum and learning needs and states as follows: "When in a setting that requires access to assistive technology, [Petitioner] will demonstrate the ability to self-advocate through request of the technology needed."

63. Petitioner has made progress on the curriculum and learning goal. Respondent has properly implemented the IEP in this respect.

64. The first goal related to Petitioner's social/emotional needs states as follows: "[Petitioner] will be able to state two positive ways to approach a peer in a group setting and two potential topics of interest for social conversation with the peer." The second social/emotional goal states as follows: "[Petitioner] will be able to apply one of two previously learned positive ways to approach a peer in a group, or individual, setting with a potential topic of interest

to the peer with the intent to initiate conversation." These two goals are interrelated but broken into two parts so that Petitioner can achieve success in completing them.

65. The ESE counselor, Gerry Bailey, continues to provide Petitioner with counseling 30 minutes per week. Since January 12, 2010, Petitioner has made some progress relative to Petitioner's ability to interact with peers.

66. Ms. Bailey has observed, on at least one occasion, Petitioner initiating and participating in a conversation with a peer during a group counseling session. In discussions with Ms. Bailey, Petitioner has identified two topics of interest that would be of mutual interest to peers.

67. On weekends, Petitioner's parent has a booth at the local flea market. Petitioner is beginning to make conversation with customers at the flea market who, like Petitioner, are interested in electronics and computers.

68. Petitioner has made minimal progress in meeting the social/emotional goals. However, Petitioner has not made a good faith effort to follow the protocol suggested by Ms. Bailey for overcoming a fear of interacting with one's peers. In fact, Petitioner thinks that Ms. Bailey's recommendations are "laughable."

69. During the hearing, Petitioner indicated that the goal of identifying ways to approach a peer and initiate a

conversation on a topic of mutual interest with the peer was met at the time it became part of the IEP. When asked on direct examination to identify ways to meet this goal, Petitioner responded as follows: "You could say "hi" to them, you could say "hey, how's the weather", you could say, "what's up." During the hearing, other than referring to the weather, Petitioner did not identify topics that likely would be a topic of mutual interest with a teenage peer.

70. It is true that the first of the two social/emotional goals seems to be something that Petitioner would have known at a very early age. However, the fact that Petitioner has made minimal progress in applying what ■ knows about the first goal to achieve success with the second goal shows that the two goals remain appropriate.

71. Petitioner's parent stated during the hearing that an independent evaluation is needed to determine why Petitioner finds it so difficult to converse with peers and to provide more productive methods to deal with the problem. There is no evidence that prior to the hearing, Petitioner's parent had requested such an evaluation from Respondent. Consequently, before the hearing, Respondent did not have an opportunity to consider and grant or deny such a request.

72. During the hearing, the question arose whether the amount of Petitioner's homework was affecting Petitioner's time

for socialization. There is no persuasive evidence to show that Petitioner has so much homework every night as to prevent Petitioner from participating in social or extracurricular activities.

73. There is no evidence that an independent psychological evaluation is necessary at this time. The current IEP contains appropriate social/emotional goals. Petitioner did not suggest any new or revised social and/or emotional goals.

74. Given Petitioner's refusal to make a good faith effort to follow the protocol outlined by Ms. Bailey, Respondent has properly implemented the IEP with respect to Petitioner's social/emotional goals. There is no persuasive evidence to the contrary.

75. Conference notes taken during the January 12, 2010, IEP meeting reviews the team's discussion of some issues not referenced above. First, Ms. Bates stated that Petitioner did not use the Math Type on the last two tests because it was quicker for Petitioner to write by hand. Petitioner stated that Petitioner did not know how to work matrices using the Math Type. However, Petitioner had not asked anyone for help even though asking for help was an option.

76. On January 12, 2010, the IEP team discussed the appropriateness of the Math Type computer program and Petitioner's option to triple extended time when using the

software. At the hearing, Petitioner complained that use of the software for math homework was too slow and time consuming.

77. Petitioner is a very fast and accurate typist. Petitioner is also extremely knowledgeable about computers, including rebuilding or repairing them. The greater weight of the evidence indicates that, with practice, Petitioner could learn to use the Math Type software more efficiently and be able to complete math class work and homework much faster.

78. Petitioner initially used the Math Type program to successfully complete homework assignments. Since that time, Petitioner stopped using the program at home. Petitioner's testimony that additional practice using Math Type would not make it possible to complete assignments in less time is not persuasive.

79. It does not take Petitioner any longer to do a math test using Math Type than it does for Petitioner to take the test using a pencil. Petitioner has never requested help in learning to use Math Type even though such assistance has been offered by Respondent's Resource Teacher in Assistive Technologies.

80. Respondent has used the Math Type software successfully with at least one other student who was physically disabled. The most persuasive evidence indicates that Math Type

software also is appropriate to accommodate Petitioner's disability.

81. During the January 12, 2010, IEP meeting, the team discussed the following additional issues: (a) Petitioner's tests will continue to be split into parts on all tests that require multiple testing sessions; (b) Petitioner will let Ms. Bates know before a math test that use of the Math Type will require triple time; (c) Petitioner's parent felt that Petitioner would have scored higher on the PSAT if accommodations had been available; and (d) IB examinations typically allow 25 percent extended time and assistive technology as accommodations.

82. One of the most difficult problems in implementing Petitioner's IEP has been finding time to double or triple Petitioner's time to complete class work. For the first half of the 2009/2010 school year, Petitioner primarily used the lunch period to complete tests. This resulted in Petitioner's missing an opportunity for lunch on a significant number of days.

83. On days that Petitioner did not work during lunch, Petitioner usually spent the lunch period in the library. Petitioner prefers not to be in the lunchroom with other students.

84. Petitioner rarely brings a lunch or even any snacks to school. Petitioner, unlike other students taking make-up tests,

never brings a lunch or goes to the cafeteria to get a lunch and take it to the room where a make-up test is being given.

85. Petitioner's teachers gave Petitioner an opportunity to use time before and after school for extended time. However, Petitioner and Petitioner's parent claim that it is inconvenient for them to have Petitioner to arrive at school early or stay late.

86. Because Petitioner's parent was concerned that Petitioner was missing lunch, Petitioner's IEP team discussed some recommendations for extended time on January 12, 2010. Some of these suggestions would provide Petitioner with time to work on homework, the Math Type software, and/or social skills.

87. First, Petitioner could enroll in a Learning Strategies Class. Petitioner did not accept this suggestion because ■ was teased about being in such a class at a former school.

88. Second, Petitioner could schedule a study hall. Petitioner did not accept this recommendation because study hall is a non-credit course.

89. Third, Petitioner could take exams before school, after school, and during lunch. As stated above, Petitioner and Petitioner's parent objected to these options.

90. Fourth, Petitioner could use an additional class period of the same subject. At the time of the hearing,

Petitioner was using this recommendation for extended time and make-up tests. The disadvantage of using the next class period(s) in the same subject for extended time is that Petitioner is unable to be present and participate in the introduction of new material and reviews of prior lessons in that class.

91. Petitioner's parent also made several recommendations for extended time. First, Petitioner could miss lunch one day per week. However, at the hearing, Petitioner's parent objected to Petitioner's missing lunch.

92. Second, Petitioner could stay 30 minutes after school. During the hearing, Petitioner's parent made it clear that this option was unacceptable.

93. Petitioner usually walks from school to a business location after school. Petitioner's parent picks Petitioner up at that location. Petitioner and Petitioner's parent then go shopping and/or home to fix supper.

94. According to Petitioner's parent, it is necessary to eat an early supper every day for the following reasons:

(a) Petitioner does not eat at school and has a lot of time-consuming homework; and (b) Petitioner's parent has a medical condition that makes it necessary to eat meals at the same time everyday.

95. Third, Petitioner could miss 15 minutes of the following class. The IEP team rejected this option due to concerns that Petitioner's performance in the second class, primarily Chemistry, would suffer.

96. Finally, Petitioner's parent suggested that Respondent could reduce the length of tests. The IEP team did not agree that reducing the length of tests was an acceptable solution.

97. The day after the January 12, 2010, IEP meeting, the assistant principal at Petitioner's high school, Helen Mitchell, wrote a letter to Petitioner's parent. In relevant part, the letter advised that Petitioner had exceeded the time allowed for extended time on an incomplete math test. After learning that this statement was based on incorrect information, Ms. Mitchell rewrote the letter, explaining that Petitioner still had time to complete the math test.

Spring 2010

98. Petitioner's counsel and Respondent's counsel both attended the January 12, 2010, IEP meeting. In a letter to Respondent's counsel dated February 9, 2010, Petitioner's counsel raised several issues.

99. First, Respondent had not provided a copy of Petitioner's PSAT booklet at the meeting. Second, Respondent had provided copies of only the most recent tests in Algebra II and United States History instead of all tests of disabled and

non-disabled students in those classes. Third, Petitioner's answer sheet on a United States History test did not correspond with the make-up test that was administered to Petitioner's non-disabled peers. Finally, Respondent had not contacted Petitioner's parent to indicate that all tests are available for review.

100. Respondent's counsel responded in a letter dated March 5, 2010. According to the letter, Petitioner's parent received a copy of PSAT booklet at the January 12, 2010, meeting. Persuasive evidence at the hearing supports this statement.

101. The March 5, 2010, letter also stated that there were no separate tests for disabled and non-disabled students. Additionally, Petitioner's counsel was advised that all tests in United States History and Algebra II would be made available for review, but that copies would not be provided.

102. The March 5, 2010, letter stated that Respondent did not know whether Petitioner took an original test or a make-up test in each instance because Petitioner had the actual tests. Lastly, the letter advised Petitioner's parent that the tests were available for review.

103. In a letter dated March 31, 2010, Petitioner's counsel denied that Respondent provided a copy of Petitioner's PSAT booklet at the January 12, 2010, meeting. Petitioner's

counsel requested that a copy of the booklet be provided immediately.

104. In a letter dated March 31, 2010, the College Board denied Petitioner's request for accommodation on the Scholastic Aptitude Test/National Merit Scholarship Corporation (SAT/NMSC). The letter advised that more information was needed before a decision on accommodations could be made.

105. The IB program at Petitioner's high school has two math programs. Mathematical Studies is recommended for students whose collegiate plans do not involve a major reliance on mathematics. Standard Level is recommended for students planning to pursue further studies in such fields as chemistry, engineering, and medicine. On or about April 12, 2010, Respondent's staff recommended that Petitioner enroll in the IB program's Mathematical Studies.

106. At the end of the first two nine-week grading periods for the 2009/2010 school year, Petitioner had a GPA of 4.375. After exams for the first semester, Petitioner's GPA was 4.250, a slight decrease from Petitioner's ██████-grade average.

107. As of the end of the third nine-weeks grading period in April 2010, Petitioner had the following grades: (a) an A in Marketing Applications, pre-IB English II, pre-IB Chemistry I, and Digital Design I; (b) a B in AP Art/Art History and AP United States History; (c) a C in pre-IB Latin II; and (d) no

grade in Algebra II Honors. At that time, Petitioner had an overall academic GPA of 3.8750.

108. Petitioner's grades are lower for the most recent grading period. However, it is not unusual for a student's grades to fluctuate while transitioning into the IB program. Any number of causes can cause a lower GPA, such as the increased difficulty of a course, a higher level of work required, and increased expectations in general, all of which are true here.

109. In this case, there is no persuasive evidence that Petitioner's grades have dropped because Petitioner's IEP is inadequate in any way. There is no evidence that Petitioner's lower GPA is caused by improper implementation of Petitioner's IEP.

CONCLUSIONS OF LAW

110. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to Sections 120.569, 120.57(1) and 1003.57(3) (i) (e), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311.

111. Petitioner has the burden of proving by a preponderance of the evidence that Respondent is not providing Petitioner FAPE. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005); Devine v. Indian

River County School Board, 249 F.3d 1289, 1291-92 (11th Cir. 2001); cert. denied, 537 U.S. 815, 123 S. Ct. 82, 154 L. Ed. 2d 19 (2002).

112. The IDEA defines FAPE at 20 U.S.C. Section 1401(a)(8), as:

[S]pecial education and related services that have been provided at public expense, under public supervision and direction, without charge; meet the standards of the State educational agency; include an appropriate preschool, elementary, or secondary school education in the state involved; and are provided in conformity with the individualized program required under section 1414(d).

113. The legal standard to be applied in determining whether a student has received FAPE is a two-pronged test described by the United States Supreme Court in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), which states as follows in pertinent part:

First, has the State complied with the procedures set forth in the IDEA? And second, is the individualized education program developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress.

114. IDEA's requirement for FAPE has been interpreted in Rowley to be satisfied when the school system provides the

student with a "basic floor of opportunity consist[ing] of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U.S. at 201-203.

115. In School Board of Martin County v. A.S., 727 So. 2d 1071, 1074 (Fla. 4th DCA 1999), the court discussed the nature and extent of the educational benefits which Florida school districts must provide to exceptional students, stating:

Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Education benefits under IDEA must be more than trivial or de minimis. J.S.K. v. Hendry County Sch. Dist., 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198.

116. As the Eleventh Circuit stated in Devine, in characterizing the Supreme Court's decision in Rowley, "a student is only entitled to some educational benefit; the benefit need not be maximized to be adequate." Devine, supra, 249 F.3d at 1292.

117. In this case, Respondent has provided Petitioner with the necessary accommodations to enable Petitioner to achieve passing marks and advance from grade to grade. In fact, Petitioner is performing at a high level in a very challenging curriculum. There is no evidence that a drop in GPA for one

grading period is related to a failure to provide FAPE or a failure to properly implement Petitioner's IEP.

118. It is true that Petitioner made no progress on the social/emotional goals in the January 13, 2009, IEP. However, the social/emotional goals in that IEP was amended by the January 12, 2010, IEP.

119. Since January 2010, Petitioner has begun to make progress on the agreed upon social/emotional goals. Given Petitioner's failure to cooperate with Ms. Bailey regarding the protocol for overcoming a fear of interacting with peers, it is not surprising that Petitioner's progress is slow.

120. If Petitioner begins to take the counseling sessions with Ms. Bailey more seriously and continues to make minimal progress, it may be that Respondent will agree to provide Petitioner with an IEE upon a proper request to determine the cause of Petitioner's social/emotional problem. Until then, Petitioner cannot say that Respondent is not providing FAPE or that Respondent is not properly implementing the IEP.

ORDER

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

ORDERED:

That Petitioner's claims are denied and dismissed.

DONE AND ORDERED this 2nd day of June, 2010, in
Tallahassee, Leon County, Florida.

S

SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of June, 2010.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 90 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 90 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(b), Florida Statutes; or
- c) only if the student is identified as "gifted", files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(b) and 120.68, Florida Statutes.