Orange County School District
No. 08-5177E
Initiated by: Parent
Hearing Officer: R. Bruce McKibben
Date of Final Order: February 10, 2009

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-5177E
	)	
ORANGE COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to notice, a final hearing was conducted in this case on December 2 through 4, 2008, in Orlando, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: [redacted], pro se
(by [redacted], as authorized representative)

For Respondent: Andrew B. Thomas, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent failed to provide Petitioner with a free and appropriate public education (FAPE) and, specifically, whether Respondent has provided

Petitioner appropriate language evaluations; whether Petitioner was improperly placed in different school settings; and whether Petitioner's Individual Education Plan ("IEP") Team meetings contained the appropriate members.

PRELIMINARY STATEMENT

Petitioner, [redacted], is a student within the Orange County Public School ("OCPS") system which is, in turn, governed by Respondent, Orange County School Board (the "Board"). On October 16, 2008, Petitioner's ***, [redacted] (hereinafter the "Parent"), filed a Request for Due Process Hearing alleging that the Board had failed to provide Petitioner with a FAPE. The request was duly forwarded to the Division of Administrative Hearings ("DOAH") and assigned to the undersigned Administrative Law Judge. Respondent moved to dismiss the hearing request based upon lack of subject matter jurisdiction, but that motion was denied. Accordingly, a teleconference was held to determine a mutually-agreeable date for final hearing (December 2 through 4, 2008). Because that date was more than 30 days after filing of the due process complaint, the time for issuing a final order was extended.

A final hearing was held as set forth above. At final hearing, Petitioner called ten witnesses: Maria Aunategui Soong, a certified psychologist for OCPS; Karen Gayle-Penna, a psychologist for OCPS; Elizabeth Padilla, program specialist for

speech and language for OCPS; Angela Greenwood, speech and language pathologist for OCPS; Kimberly Murza, a licensed speech and language pathologist; Linda Wiltz, instructional support teacher for OCPS; Yolanda Fields, students with learning disabilities teacher for OCPS; Anidel Albertorio-Romero, middle school teacher for OCPS; Gloria McGarvey, assistant principal at [redacted] School; and [redacted], Petitioner's parent. Of the exhibits offered into evidence by Petitioner, the following were admitted: Exhibits 1 through 10, 12, 17 through 21, 24, 25, 27, 29 through 35, and 37 through 39. Respondent presented the testimony of two witnesses: Lisa McDonald, behavioral analyst for OCPS; and Jayne Ness-Lee, the Board's representative. Of the exhibits Respondent offered into evidence, the following were admitted: Exhibits 1 through 3.

The parties advised the undersigned that a transcript would be ordered of the final hearing. They were given 14 days from the date the transcript was filed at DOAH to submit a proposed final order ("PFO"). The Transcript was filed on December 31, 2008. Petitioner filed its PFO on January 13, 2009; Respondent filed its PFO on January 20, 2009.[1] Both parties' PFOs were given due consideration in the preparation of this Final Order.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at final hearing and on the entire record in this proceeding, the following Findings of Fact are made:

1. Petitioner is a [redacted]-year-old, who has been in the OCPS system for the past four school years.[2] Petitioner was at [redacted] Elementary for the 2006-2007 school year; at [redacted] School ("[redacted]") for the 2007-2008 school year, but left before the school year ended and was placed in the Hospital Homebound Program ("Homebound") for the remainder of that school year; at [redacted] for the 2008-2009 school year (but is currently taking an abbreviated schedule while taking classes through the Florida Virtual School Program). Petitioner is an "exceptional student" as that term is used in Section 1003.57, Florida Statutes.[3]

2. Petitioner is the adopted child of the Parent. Petitioner suffered physical abuse from his/her biological parents, as well as some effects from the biological [redacted]'s drug and alcohol abuse. Petitioner was placed with the Parent in September 2000, as a foster child and was ultimately adopted by the Parent in December 2003. At the time of Petitioner's initial placement with the Parent, Petitioner was attending a daycare center for regular children.

3. Petitioner has been diagnosed with Attention Deficit Hyperactivity Disorder for which he/she is currently taking medications, including Risperdal. Also, Petitioner has received

a diagnosis of Expressive Language Disorder, indicating difficulty in articulating thoughts. There is no dispute that Petitioner is eligible for Exceptional Student Education ("ESE") services.

4. Petitioner is currently approved to receive 60 minutes per week of speech and language therapy at [redacted].

5. While in [redacted], Petitioner has been suspended from school or otherwise punished on numerous occasions due to disruptive behavior, primarily fighting, cursing, and interfering with teachers and fellow students. The Parent believes Petitioner's disruptive behaviors are caused by frustration stemming from Petitioner's speech and language deficiencies, but there was no competent evidence to support that theory. None of the experts called by the Parent to testify at the final hearing supported the Parent's contention concerning this possible causation.

6. Petitioner's behaviors have resulted in sanctions. However, OCPS does not impose the same degree of punishment on ESE students that it imposes on other students. For example, when Petitioner called another student an unacceptable epithet and refused to do assigned class work, a one-class-period in-school suspension (ISS) was assigned. A regular student would have received two full days of ISS. Hitting another student, rolling on the floor, and calling a teacher a rude name garnered

a one-day ISS for Petitioner. A regular student would have been suspended from school for a period of several days.

7. Petitioner has had at least eight disciplinary referrals during the 2008-2009 school year (up until the date of the final hearing in this matter). Those referrals resulted in a number of ISS and out-of-school suspensions, with Petitioner missing ten days of school as a result.[4]

8. Respondent has the responsibility of providing Petitioner with a FAPE as long as Petitioner is in the public school system. An IEP is required for ESE students, and Respondent has developed IEP teams to draft and implement Petitioner's IEPs.

9. The first relevant IEP for purposes of the instant matter was created for Petitioner for the 2007-2008 school year. Pursuant to a negotiated settlement agreement addressing that school year, the 2007-2008 IEP contained a Behavior Intervention Plan ("BIP"). A BIP is used by the school to understand and help manage a student's specific misbehaviors. In Petitioner's case, the targeted behaviors were Non-compliance, Verbal Aggression, Physical Aggression, and Work Avoidance.

10. The BIP was the subject of discussions between the Parent and Anidel Albertorio-Romero, one of Petitioner's teachers. There were efforts by the teacher and Parent, after the initial IEP meeting, to modify the BIP to more accurately

address Petitioner's behaviors. However, Petitioner was withdrawn from [redacted] on February 8, 2008, and the BIP became moot while Petitioner was being schooled at home.

11. After leaving [redacted], Petitioner was home-schooled pursuant to an IEP created under the Homebound program. The Homebound IEP was created on March 28, 2008, but would terminate pursuant to agreement on July 10, 2008.[5] The Homebound IEP was in effect for the period Petitioner was being schooled at home.

12. The Parent, thereafter, attempted to enroll Petitioner in [redacted] School for the 2008-2009 school year. [redacted] is the school for which Petitioner would be normally zoned. However, the last agreed-upon placement for Petitioner had been [redacted] (per the August 22, 2007, IEP). Respondent, therefore, directed the Parent to enroll Petitioner at [redacted] and that an IEP would be developed for the 2008-2009 school year.

13. The 2008-2009 school year commenced on August 18, 2008, but Petitioner was not allowed to attend until such time as an IEP could be established. The Parent maintains that the prior year's IEP was still in effect, however, the effective date of that IEP had been established in a Settlement Agreement signed by the parties; the effective date of the IEP was through and until July 10, 2008. Thus, no IEP was in effect on August 18, 2008.

14. An IEP meeting for the 2008-2009 school year was scheduled for August 22, 2008, and ultimately held on August 25, 2008. It was attended by the Parent and several representatives from [redacted] (including the principal, program specialists, an ESE teacher, an instructional support teacher and others). There was no regular education teacher in attendance at the August 25, 2008, IEP meeting, but inasmuch as Petitioner's specific classes had not been determined at that time, no such teacher could be identified.

15. Goals and benchmarks were discussed at the IEP meeting and several were ultimately agreed upon by the team. A BIP was established to assist the school with management and reduction of Petitioner's behavioral issues. The Parent signed the IEP, indicating [redacted] concurrence (or at least [redacted] acquiescence) with its content.

16. The Parent prepared a unilateral Addendum to the IEP setting forth [redacted] own perspective on the relationship between Petitioner, OCPS, and the Parent. The Addendum was not part of the discussion at the IEP meeting and was not adopted by the IEP team as part of the IEP. The Parent was in the habit of adding an Addendum to IEPs because [redacted] does not feel the IEPs are always consistent with discussions during the IEP team meetings. The Addendum does not reflect the perception of other team members.

17. The August 25, 2008, IEP established [redacted] as Petitioner's school for the 2008-2009 school year. The Parent considers the assignment to be a "unilaterally changed placement location" despite the Parent's execution of the IEP. The bases for assignment to [redacted] were discussed by the IEP team. Petitioner's need for a learning strategies class, a social personal class, and a behavioral specialist could be best met at [redacted].

18. The August 25, 2008, IEP contained a BIP which had been prepared by [redacted]. The Parent is somewhat concerned about the use of any restraints as a part of the BIP implementation, but such measures are to be used only in case of emergency, i.e., to prevent imminent harm to Petitioner or others.

19. Yolanda Fields, a certified instructor for students with specific learning disabilities, was part of the IEP team. Fields is one of Petitioner's teachers at [redacted]. Fields was one of the persons responsible for implementing Petitioner's BIP from the August 25, 2008, IEP. The BIP provides a number of proactive measures that can be taken to deal with Petitioner's behaviors, and Fields and others have utilized some of those measures. For example, Petitioner is given a designated area of the classroom to "cool down" when there is outside agitation leading to aggression. Also, Petitioner is allowed to make requests of his/her teacher by way of secret hand signals, so

that the other students are unaware of the request. This procedure helps Petitioner avoid unwanted peer pressure regarding special requests he/she might make.

20. Petitioner entered [redacted] some days after the school year started. The BIP was in place, and Petitioner's behaviors were under control for a period of time. Then, on October 2, 2008, a follow-up IEP meeting was held to allow the Parent to meet Petitioner's teachers and for [redacted] to give the teachers information about Petitioner's history. Certain behavior interventions and proactive measures were discussed by the team at the October 2, 2008, meeting.

21. The IEP team notes were dated as of October 2, 2008, and signed by all participants in the meeting. Next to [redacted] signature, the Parent wrote "Addendum to Follow." As is [redacted] custom, the Parent then filed a unilateral Addendum to the IEP meeting, again expressing [redacted] personal perception of what occurred at the meeting.

22. Shortly after the October 2, 2008, meeting, Petitioner began to exhibit some of the target behaviors resulting in a series of suspensions and ISS. Disciplinary referrals were issued to Petitioner on October 6, 15, 16, 29, 31, November 4, 14, and December 1, 2008. These behaviors have required implementation of procedures in the BIP in an effort to stem the behaviors. Despite the best efforts of the Parent and

Petitioner's teachers, the procedures have only been moderately successful.

23. In recent educational tests, Petitioner has been shown to have a discrepancy between verbal (89) and non-verbal (128) scores. This discrepancy was discussed at the October 2, 2008, IEP meeting, and Petitioner was given speech language services as a result. At present, Petitioner is allowed 60 minutes per week of language therapy by a certified speech pathologist, Angela Greenwood. Greenwood does not believe Petitioner has an expressive language disability based on her observation and work with Petitioner.

24. Maria Aunategui Soong, a certified psychologist, evaluated Petitioner and found no clinically significant difference between Petitioner's verbal index and perceptual reasoning index. Rather, Petitioner generally performed in the average range of achievement, commensurate with Petitioner's ability. Another psychologist, Karen Penna, found that Petitioner's reading, math and written language scores were commensurate with Petitioner's IQ. Those scores do not warrant further referral for speech and language evaluation.

25. Respondent's program specialist for its speech and language department, Elizabeth Padilla, reviewed Petitioner's information concerning speech. Padilla found no significant deficit in Petitioner's expressive language ability. Padilla

deems the speech language services currently being provided to Petitioner as appropriate.

26. As far as reading is concerned, goals were established in the August 25, 2008, IEP meeting. Linda Wiltz, a certified reading specialist, who is also certified in specific learning disabilities and in elementary education, attended the meeting and deemed the goals appropriate. Wiltz also conducted a reading assessment of Petitioner and found Petitioner's overall reading ability to be above average.

27. Yolanda Fields, who also attended the IEP meeting, is certified in specific learning disabilities instruction. Fields is Petitioner's learning strategies teacher at [redacted]. According to Fields, Petitioner has already met the IEP goal of 129 words per minute, evidencing substantial progress in that area.

28. All in all, Petitioner has made progress and has shown some success in achieving goals set forth in the IEP. Respondent has implemented procedures and protocols to assist Petitioner and have complied with the BIP concerning behaviors to be addressed. While these efforts have not been completely successful, Respondent is acting appropriately in its efforts to provide for Petitioner's needs.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this

proceeding pursuant to 20 U.S.C. Section 1415(b)(6)(A); Section 1003.57(1)(e), Florida Statutes; and Florida Administrative Code Rule 6A-6.03311(11).

30. Subsection 1003.57(1)(a), Florida Statutes, requires each school district to "provide the necessary professional services for diagnosis and evaluation of exceptional students." It is undisputed in this case that Petitioner is an exceptional student for whom such services must be provided.

31. The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400, provides that the local education agency must provide children with disabilities a FAPE, which must be tailored to the unique needs of the handicapped child by means of an IEP program. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982).

32. 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(1)(e), Fla. Stat.

33. Petitioner has the burden of proof to establish, by a preponderance of the evidence, that Respondent failed to provide appropriate language evaluations, that Petitioner was improperly placed into or removed from school settings, and that the IEP

team meetings were not properly conducted. See Schaffer v. Weast, 546 U.S. 49 (2005).

34. 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). And, even when the IDEA requires the IEP team to consider behavioral intervention, it does not establish any express statutory or regulatory standards governing the content of such a program. Lessard v. Wilton-Lyndeborough Cooperative School District, No. 05-CV-192-5M, 2007 U.S. Dist. LEXIS 30293 (D.N.H. April 23, 2007) (citation omitted).

35. In the present action, the propriety of the August 25, 2008, IEP is being questioned due to the absence of a general education teacher, per se, at the meeting. It is clear that Petitioner's classes at [redacted] had not yet been identified. Nonetheless, [redacted] assembled a very capable team to draft the IEP and included one ESE teacher who also co-taught with a general education teacher. Based on a review of the IEP content and the issues taken by the Parent in this case, it is clear the absence of a general education teacher did not affect the propriety or completeness of the August 25, 2008, IEP.

36. Respondent acknowledges Petitioner's need for language and speech therapy and has provided the therapy through a

certified professional. In M.M. v. School Board of Miami-Dade County, Florida, 437 F.3d 1085, 1102 (11th Cir. 2006), the court, quoting Lachman v. Illinois Board of Education, 852 F.2d 290, 297 (7th Cir. 1988), said, "'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.'" Petitioner is already receiving speech and language therapy. The evidence does not support the need for additional testing or further evaluation of Petitioner's speech issues at this time. Petitioner has not met the burden of proof concerning this allegation in the due process complaint.

37. It is clear from the evidence that Petitioner is attending a school outside the prescribed school zone of residence. However, the reason for this placement has been sufficiently justified by Respondent. See, e.g., Schuldt v. Mankato Independent School, 937 F.2d 1357 (8th Cir. 1991). Furthermore, Petitioner's contention that the placement was done without notice does not have merit. The last IEP in place prior to Petitioner's period of Homebound instruction listed [redacted] as the appropriate school for Petitioner. That IEP was signed and acquiesced to by the Parent.

38. The Parent theorized at final hearing that Petitioner's absence from school due to disciplinary referrals also constituted improper placement. There is no basis in law or fact for that contention, and it is rejected.[6]

39. Petitioner did not meet the burden of proof concerning the issue of improper or unjustified placement.

40. The totality of the evidence in this case indicates that Petitioner is receiving all necessary and appropriate educational benefits at [redacted] to achieve a FAPE. In the words of the Court in Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 201 (1982), Petitioner has been provided 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." Therefore, Petitioner has not met its burden of proof in this case to prove that Respondent failed to provide Petitioner with a FAPE.

ORDER

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

ORDERED that Petitioner's Request for Due Process Hearing, as amended, is DISMISSED.

DONE AND ORDERED this 10th day of February, 2009, in Tallahassee, Leon County, Florida.

S

R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of February, 2009.

ENDNOTES

[1/] Respondent's Proposed Final Order was submitted 14 business days after the Transcript was filed. Petitioner did not object to the filing on that date, and there is no prejudice to Petitioner.

[2/] References to Petitioner will be gender neutral throughout this Final Order.

[3/] Unless otherwise specifically stated herein, all references to Florida Statutes shall be to the 2008 version.

[4/] The Parent would sometimes take Petitioner out of school if an ISS was imposed, rather than allow Petitioner to serve the punishment while in school.

[5/] The original 2007-2008 IEP would have remained in existence until commencement of the next school year.

[6/] 20 U.S.C Section 1415(k)(1)(B), school personnel may remove an exceptional student who violates a code of conduct from their current placement to an appropriate interim placement, including suspension, for not more than ten days. To the extent Petitioner relies on this section as authority for its theory, the reliance is misplaced.

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 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.