

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

█,)
)
Petitioner,)
)
vs.) Case No. 08-2395E
)
HILLSBOROUGH COUNTY SCHOOL)
BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a final hearing was conducted in this case on June 30 through July 3 and July 10 and 11, 2008, in Tampa, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark S. Kamleiter, Esquire
Kamleiter & Kirk
2509 First Avenue South
St. Petersburg, Florida 33712

For Respondent: Gregory A. Hearing, Esquire
Caren R. Skversky, Esquire
Thompson, Sizemore, Gonzalez
& Hearing, P.A.
201 North Franklin Street, Suite 1600
Tampa, Florida 33602

STATEMENT OF THE ISSUES

The issues in this case are whether Petitioner has been provided a free and appropriate public education by Respondent,

whether appropriate transition services have been provided, and whether procedural violations of the IEP process occurred.

PRELIMINARY STATEMENT

Petitioner filed a Request for Due Process Hearing on May 16, 2008, and it was duly forwarded to the Division of Administrative Hearings. A preliminary hearing was held via telephone, and the parties agreed to a four-day final hearing commencing on June 30, 2008. The hearing was not completed on the fourth day and was re-scheduled for July 10 and 11, 2008.

At the final hearing, Petitioner called seven witnesses: [REDACTED], Petitioner's mother; Robert Carlton, transitional specialist for Hillsborough County School District (hereinafter the "District"); Norceiva Shumpert, offered and accepted as an expert in transitional education of students and employment and employability of students who are transitioning; Nila Benito, Florida Developmental Disabilities Council; Anne Wissner, coordinator of the Transition Program for the District; Debra Davis, supervisor of Transition and Secondary Education for the District; and Lisa Freidman-Chavez, technical assistance specialist. Petitioner offered into evidence the following exhibits which were admitted: Nos. 2 (pages 18 and 2 through 26), 5, 6, 7, 8, 9, 10, 12, 25 (pages 537 through 539), 26, 29, 34, 35 (pages 781 through 783), and 36.

Respondent called five witnesses: Jacqueline Sizemore, Petitioner's teacher at Durant High School ("Durant"); Barbara Marking, ■■■'s one-on-one aide at Durant; Suzette K. Sample, supervisor of Exceptional Student Education (ESE) staffing for the District; Gail Saltzman, Educable Mentally Handicapped (EMH) teacher at Durant; and Cristina Benito, supervisor for ESE Compliance for the District. Respondent offered the following exhibits which were admitted into evidence: Nos. 17 (pages 330-332, 299-305, 306-308, and 311-319), 21 (pages 571-596 and 659-664), 22 (pages 694-695), 24 (pages 694-695), 27, and 28.

At the conclusion of the final hearing, the parties advised that a transcript of the proceeding would be ordered, which was filed on July 25, 2008. The parties requested and were given until July 31, 2008, to submit proposed findings of fact and conclusions of law. Each party timely filed a Proposed Final Order, each of which was duly considered in the preparation of this Final Order.

The fourth day of final hearing (July 3) was 45 days from the date the due process complaint was filed in this case. The parties acknowledged this fact at the final hearing and agreed that the Final Order in this case could be filed beyond the required date.

FINDINGS OF FACT

1. ■ is a ■ -year-old student with Downs Syndrome and has been diagnosed as trainable mentally handicapped (TMH). ■ has some physical impairment, making it difficult to climb stairs, and also has other ambulatory issues.¹ ■ has been a student in the District since age 5. ■ was most recently enrolled in a class established at Durant High School for TMH students. The teacher in that class for the prior school year was Jackie Sizemore. An aide, Barbara Marking, is assigned solely to ■ to provide one-on-one assistance and guidance during each school day.

2. ■ is a friendly, sociable person. One of the personal attributes for ■ is to greet every person encountered with a smile and short greeting. Also, ■ is well known for telling "knock knock jokes" to anyone and everyone. While standing outside the classroom, ■ will address each fellow student, whether disabled or not, with a greeting. One recognizable attribute assigned to ■ is that ■ is very willing to help others when possible. ■ also enjoys playing basketball.

3. By all accounts, ■ really enjoys listening to music. Both parents and teachers recognize the importance of music in ■'s life. ■ says her "child"² likes to listen to all sorts of music, including the genres enjoyed by ■'s siblings. Marking

says that ■■■'s choice of music at school is almost exclusively "silly stuff" such as is heard in elementary schools.

4. ■■■ is an advocate not only for ■■■ but for all mentally handicapped students. She has been extremely active and vocal in an effort to promote the very best education for all TMH students.

5. ■■■ sees ■■■ as a person who acts as an adult and who enjoys many adult level activities such as age-appropriate movies, shopping, and interaction with older siblings. At home, ■■■ helps with chores around the house, like emptying the dishwasher, taking out trash, walking the family's new baby in a stroller, keeping the bedroom tidy, etc. Some assistance is required for ■■■'s personal issues, e.g., bathing and dressing. In restaurants, ■■■ will order food after looking at pictures on the menu. ■■■ is also active in the family's church, especially with the church youth group.

6. Sizemore considers ■■■ to operate functionally at a two to three-year-old age level. ■■■ calculates a six to eight-year-old mental age, but says ■■■ functions at a five to seven-year-old level. Despite considerable discussion at the final hearing concerning what kinds of movies ■■■ might enjoy (juvenile versus age-appropriate), the evidence indicates ■■■ has a somewhat restricted ability to understand and process

adult content. ■■■ is comfortable with less challenging movies and music.

7. As evidenced by a number of recent Individualized Education Plans (IEPs) for ■■■, this student has an extremely limited ability to read and write (i.e., at a pre-primary, two to four-year-old level). ■■■ is still learning only a few letters of the alphabet one at a time and is learning how to "read" safety signs by use of pictures indicating what they mean. Although ■■■'s vocabulary is somewhat limited, ■■■ understands much more than the words the student actually articulates.

8. ■■■'s school day starts at approximately 7:00 a.m. each day, Monday through Friday, upon arrival at Durant via school bus. ■■■ is helped off the bus by Marking and goes directly to Sizemore's class. Classroom work includes typical educational activities such as reading, writing, training in life skills, and basic instruction regarding life outside the school setting.

9. ■■■ will age out of the current school setting in two years, thus necessitating a concentration on transition, i.e., making ■■■ more prepared for post-secondary education life.

10. One regular activity for ■■■ (along with fellow classmates from Sizemore's class) is the assignment of helping to clean the school cafeteria after the lunch periods. ■■■ has the job of cleaning tables, which entails getting a bucket and

other supplies from a closet, then wiping tables off with a cloth. ■■■ needs some assistance to stay on task, but has essentially mastered the basic concepts of this job and has developed some degree of independence in this particular task.

11. Once an ESE student turns age 14, he or she must begin receiving a transition IEP in place of the regular IEP. A transition IEP begins to focus on post-secondary life. ■■■ began receiving transition IEPs in 2004.³ Transition activity areas include instruction, daily living skills, community experience, employment skills, post-school adult living, functional vocational assessment, and behavior.

12. Part and parcel to ■■■'s transitional education is practical instruction in the off-campus world. This can occur through programs known as community-based instruction (CBI) or community-based training (CBT). ■■■ has been the recipient of training in both programs. CBI introduces students into a community environment with an opportunity to observe and learn how society operates in those places and to practice skills learned in the classroom. For example, field trips were arranged to such places as Chuck E. Cheese, Beef O'Brady's, and Brandon Mall. At those locales, students were given an opportunity to make purchases, engage in activities, and interact with the public. ■■■ was instrumental in getting Durant to formalize CBI experiences for its students.

13. CBT, on the other hand, places certain students⁴ in a work-like environment to allow for development of skills and to obtain work experience. Working with direct supervision, students are assigned work tasks and are monitored to measure levels of accomplishment. The ultimate purpose of this program is to identify potential jobs for the students once they transition from school into the workplace. CBT has been in existence in the District for over ten years, but it does not appear to have been active every year. ■■■ was instrumental in getting CBT back on track in the District when ■■■ reached the age to have need of the program.

14. The District employs transition specialists to advise schools, teachers, and parents about potential CBT resources available in the community. These specialists also attend IEP meetings.

15. ■■■ has been involved with community-based training in at least four venues: Sweet Bay Grocery, South Baptist Hospital, Pleasant Grove Assembly of God Church, and Goodwill Industries. ■■■ had various levels of success at these sites, but seemed to function most effectively at the hospital.

16. At the CBT job sites, ■■■ and other ESE students performed a number of different kinds of work. ■■■, specifically, engaged in wiping display cases, returning items to the shelf, wiping tables, sweeping, vacuuming, shredding

paper, using a price gun, etc. At each site, a job was found that was commensurate with ■■■'s abilities and skills. In the words of witness Friedman-Chavez, each student would hopefully find a "customized work experience" as part of their CBT or off-campus work involvement. The District strived to meet that goal for ■■■

17. At the hospital location, ■■■ was again assigned the job of wiping tables in a cafeteria. This job entailed retrieving a bucket from the closet, getting a hair net on, having an apron tied on, and proceeding to a designated number of tables to perform the work task. In order to accomplish the task, ■■■ would have to move condiments out of the way, wipe the table and then return the condiments to their position. After about two weeks, ■■■ was able to accomplish this task fairly well, with some gentle reminders and assistance from the one-on-one aide. The aide would have to assist with the apron each time and would sometimes have to remind ■■■ to stay on task, but generally tried to allow ■■■ to work as independently as possible. ■■■ was also allowed to shred documents at the hospital at times. This job was moderately successful, with ■■■ often losing concentration and trying to force too much paper through the shredder. But ■■■ liked the shredding job and was generally able to accomplish the task. (It is a potential job to work on in the upcoming school year.)

18. While at the hospital site, a secondary "job" was discovered for █. Due to █'s outgoing personality and willingness to help others, the aide seized upon the idea of allowing █ to visit with elderly patients on the fourth floor. This was accomplished by having the aide escort █ to a patient room, showing █ how to knock and be allowed entry, then allowing █ to speak directly to (or listen to) the patient. Because █'s speech is not very clear, patients were not generally able to understand what █ said. This did not in any way minimize the impact of █'s visit. Patients seemed to be genuinely cheered by their contact with █.

19. The patient visiting job was not without difficulties. █ would often push buttons on the hospital walls on the way upstairs to patient rooms. Also, █ would frequently attempt to run away from the aide, try to use the elevators inappropriately, and run through the hospital corridors. The aide would then get █ back on task to complete the assignments and finish the patient visits.

20. There seems to be some agreement between the parties that █'s experience in CBT has been helpful. █ has developed some minimal ability to perform certain tasks after receiving instruction and assistance. █ has demonstrated the ability to operate in a work environment, albeit with some direct supervision and support from the one-on-one aide.

However, ■■■ feels that her "child's" experience has not been broad enough or suitably tailored to ■■■'s skills.

21. ■■■ cannot write clearly, but is working on such things as writing initials on job sign-in sheets. Though somewhat limited in physical prowess, ■■■ has the dexterity necessary to perform such tasks as shredding paper, wiping tables, and placing items back on store shelves. ■■■ is learning to distinguish safety signs and indicators on doors so that functioning alone in public places is more possible.

22. CBT or some similar program is critically important to ■■■ so that development of a marketable skill becomes possible. Once ■■■ transitions from high school, some sort of skill will be required in order to find employment. To that end, ■■■ is being exposed to different job sites and experiences by the District. However, it appears that the CBT site for the upcoming school year will be the same one as during the most recent school year. This is not a certainty though, because the school has not yet finalized its survey and interview of possible CBT sites.

23. When ■■■ goes to CBT sites, an aide always goes along for one-on-one assistance. The aide's job is to assist ■■■ in learning and completing assigned tasks. The aide travels to job sites on the school bus (or other school vehicle) along with ■■■ and fellow students.⁵ ■■■'s teacher travels to community-based

training sites as well. It is the policy of the District that a one-on-one aide cannot accompany students into the community without a teacher being present.

24. It is the mother's position that [REDACTED] would be best served by an individualized work experience separate and apart from CBT. The testimony at final hearing was not clear as to whether such an arrangement would be possible from a practical or financial perspective for the District. [REDACTED] has not made any demand that the District locate a job for [REDACTED], only that training be provided so that once [REDACTED] graduates, finding a job will be more reasonably expected.

25. The IEP for [REDACTED] for school year 2008-2009 is at issue. That IEP was developed over two days of meetings held on March 24 and March 31, 2008. In attendance at the March 24 meeting were the following: [REDACTED], Patricia Miller, Anne Wissner, Deborah Davis, Rob Carlton, Jackie Sizemore, Karen Wilkinson, Amy Wagner, Barbara Marking, Karen Pekerol, Jennifer Shin, Diane Justice, Lisa Friedman-Chavez, and Mary Wells. At the March 31 meeting, the following persons attended: [REDACTED], Miller, Wissner, Sizemore, Marking, Wells, Kathleen Moore, Suzette Sample, Wilkinson, Justice, Davis, and [REDACTED] (who did not actively participate, but listened to music on an iPod the entire meeting).

26. ■ inquired about the possibility of tape recording the March 24 meeting, but since no response was received prior to the commencement of the meeting, she did not attempt to record it. That meeting was fairly brief, with discussions on-going only until the team reached Goal 2. At that time, there was disagreement as to verbiage to be used to describe off-campus work experiences. ■ wanted the term "customized vocational experience" to be used because that term was developed and discussed during a process called "Discovery" (which will be discussed more fully below). The remainder of the IEP team felt that the community-based training program in effect was adequate. ■ asked for a Notice of Refusal to be issued and the meeting was closed. The parties then agreed to meet again on March 31, 2008, to continue the discussions.

27. ■ asked for the second day of the meeting (March 31, 2008) to be tape-recorded as well, but that request was denied. The request was based upon three stated reasons: First, that ■'s mother was not able to take notes, and it did not appear anyone from the District took notes on day one of the meeting; second, that ■'s husband could not attend due to ■ work schedule; and third, that the tape could be used to go over the meeting content with ■ later at a slower pace.

28. The District provided ■ a copy of the District policy prohibiting IEP meetings from being taped except under

extraordinary circumstances. She was further assured that notes would be taken and that ■■■'s teacher would review the entire meeting with ■■■ so that any questions could be addressed. As for the ■■■'s inability to attend, the District offered to allow ■■■ to attend via telephone or to reschedule the meeting to a date and time ■■■ would be available. It does not appear that any alternative dates were provided to the IEP team. ■■■ requested a Prior Written Notice stating the District's denial of her request. The meeting was not tape recorded.

29. Sizemore, ■■■'s teacher, was the case manager for the March IEP meetings. She utilizes the IEP as a tool to direct her work in the classroom. She helped draft the language found in the IEP which was discussed at the meeting.⁶

30. The March meetings were conducted in substantively the same form as prior years' meetings. However, ■■■ felt there was a recognizable shift in attitude at the March meetings, as exemplified by the comments of Debra Davis, the District's supervisor of transition services.

31. ■■■ says that Davis "was running the meeting" and refused to incorporate the vocational profile from the Discovery process into the current IEP. Davis, who was not a regular attendee at ■■■'s IEP meetings, was there for a specific purpose, to wit: A question had arisen prior to the meeting as to whether ■■■'s one-on-one aide could become ■■■'s job coach or

employment specialist so that she could accompany [REDACTED] into the community for non-CBT work experiences. No one on the IEP team was comfortable addressing that issue, so Davis was called in to do so.

32. At the IEP meeting, the actual discussion was not about changing the aide's job title or description. Rather, the discussion became one of whether [REDACTED]'s work experience could be individualized, done outside the CBT program, and done with the presence of the one-on-one aide. The discussion, therefore, necessarily involved conversation about Goal 2 of the IEP and its propriety or completeness. Included in those discussions were comments about the Discovery process (to be discussed more fully below) and what strengths and preferences for [REDACTED] had been identified during that process.

33. [REDACTED] maintains that the 08-09 transition IEP developed at the March meetings fails to provide an adequate transition plan that would allow [REDACTED] to develop skills necessary to obtain employment (whether paid or unpaid) after leaving Durant High School. [REDACTED] says that failure is exemplified in Goal 2 of the 08-09 IEP which states:

Goal 2: With guidance and support and with 1:1 adult assistance, [REDACTED] will display employability and community-based instruction skills needed for transition into the community and in a variety of settings over a 9 week period.

A. [] will initiate getting off the bus at the CBT site with 2 or less prompts, 7/10 observations.

B. Given a community or school job, [] will transition into that job by following directions and staying on task until the job is completed with 2 or less prompts to remain on task, 4/5 opportunities.

C. Given a community site, [] will locate requested items or areas with minimal assistance 4/5 observations.

D. [] will recognize informational signs at the community site and follow the directions conveyed on the sign. Ex. Stop, Do Not Open, Not an Exit, etc. 4/5 opportunities.

34. A similar goal has appeared in prior years' IEPs with slightly different language. For example, in the 07-08 IEP, Goal 3 stated:

Goal 3: With guidance and support and with 1:1 adult assistance, [] will display employability and community-based instruction skills needed for transition into the community and in a variety of settings, over a 9 week period.

A. Given manipulatives and a model to follow, [] will match up the correct amount of coins or dollars, up to 5 coins/dollars, 7/10 observations.

B. Given a community or school job and moderate assistance, [] will transition into that job by following directions and staying on task until the job is completed, with short breaks as needed to be successful 7/10 observations.

C. Given a community activity, like grocery shopping, [] will stay with the group

with no more than 2 redirections in order to be successful, 3/5 observations.

D. Given a community site, [REDACTED] will locate requested items or areas with minimal assistance, 4/5 observations.

35. It is not uncommon for goals to be similar in succeeding years' IEPs, especially when--as in the present situation--the student requires fairly constant retraining on assigned tasks. When goals in an IEP are not met after one year, they may well be restated and attempted again in a successive year.

36. [REDACTED] does not feel like the goals and objectives in the IEP are measurable. Her primary concern seems to be that the goals are too generic and do not identify specific jobs, specific tasks within those jobs, and specifically how [REDACTED]'s progress will be measured. However, a review of Goal 2 in the 08-09 IEP does indicate that specific goals exist. [REDACTED] is expected to learn, for example, how to identify the CBT job site and get off the bus at the appropriate time (a skill which may be very important after graduation), how to follow directions and stay on task, and how to recognize safety signs. All of those skills are measurable and quantitative, if not significantly personal or individualized.

37. After the 07-08 IEP went into effect, [REDACTED] began searching for an alternative means of helping [REDACTED] transition

into the post-secondary education world. One such alternative was a program put together by Partners in Transition. One aspect of that program was a process known as "Discovery." Discovery is generally referred to as an assessment tool or reference tool which can be utilized to assist with placing TMH students into job training situations.⁷

38. The Discovery process contains input from a variety of people who are willing to spend some time monitoring and observing the student. These persons employ a device known as HOWIE, or Hanging Out With Intent. The person accompanies the student to some venue outside the home or school and observes how well the student interacts. For example, a HOWIE might be a visit to the grocery store, a trip to the gym, attending a ball game, or any other activity. The purpose is to evaluate the student's skills and abilities as he or she deals with the environment around them.

39. In the Discovery process, after the HOWIE assessments are completed a profile of the student is drafted. The profile should include the student's strengths, likes and dislikes, successes and accomplishments. It is a "can-do" document, not a list of problems or inabilities. Once the profile is complete, it can be used to help establish an Employment Plan for the student.

40. The Employment Plan should identify various jobs the student could possibly master based on strengths and likes identified in the profile. The Employment Plan has distinct parts: Ideal working conditions, Preferences (passions or special interests of the student), Contributions (the kinds of attributes the student has which could be beneficial in a particular work environment), Types of Job Tasks, and a list of Specific Employers.

41. A fairly extensive profile for [REDACTED] was completed as part of the Discovery process. That profile addresses a broad spectrum of [REDACTED]'s skills, e.g., domestic, community functioning, recreational, academic, sensory, motor/mobility, communication and vocational. The profile also sets out [REDACTED]'s preferences for work. Mopping and shredding paper were [REDACTED]'s own stated job preferences in the profile. The profile itself is an obviously valuable tool for anyone considering [REDACTED]'s needs.

42. In the case of [REDACTED], the last portion of the Employment Plan had not been completed as of the date of the final hearing. That is, no specific employers had been identified and set forth in the Employment Plan.

43. Discovery was introduced to Hillsborough County in calendar year 2006. Debra Davis invited [REDACTED] to participate in this new program in an effort to help with [REDACTED]'s transition to post-secondary education life. A number of people associated

with the present case received some degree of training in the process. There were six or seven instructional sessions held in the area to educate and train appropriate individuals about the system.

44. To date, three students in the District have taken part in the Discovery program. One of them has since dropped out, but ■■■ and one other student remain. The program requires considerable involvement on the part of the student's parents, and ■■■'s parents have been willing to do their part. Debra Davis, whose responsibilities for the District include transition services, has approved the pilot project for Discovery, but is withholding her opinion on its success until the current students have completed the program.

45. ■■■ is a strong proponent of the Discovery tool. Debra Davis recognized that ■■■ might benefit from the plan, partly due to ■■■'s strong advocacy for her child and for other similarly situated students. ■■■ believes Discovery best identifies her child's strengths and should be fully incorporated into ■■■'s most recent IEP. Other members of the IEP team maintain that the profile was incorporated into the current IEP, if not verbatim, at least in spirit and content.

46. At the March IEP meetings, ■■■, after being denied the right to tape-record day two, presented two large poster boards to the IEP team. One of the posters contained an excerpt from

the IDEA legislation discussing transition services. The other board set out some of the issues and findings from the Discovery process that ■■■ felt important enough to include in the IEP. ■■■ ■■■ says the issues were presented as an option for inclusion in the IEP; the District believes the issues were presented by ■■■ as an absolute requirement for inclusion in the IEP.

47. A review of the Conference Summary⁸ from the March 24 and 31 IEP meetings indicates ■■■ was proposing elimination of the CBT program for ■■■ in exchange for "customized employment or experiences" as had been discussed in ■■■'s Discovery profile. While acknowledging that CBT had been a positive experience and had done some good, ■■■ maintained that a change was required to give ■■■ more personalized training. Lisa Friedman-Chavez, a specialist hired to work with ■■■, affirmed the desirability of such a change.

48. The IEP team addressed ■■■'s concerns, but found that CBT was already providing individualized training. The District attempted to show ■■■ how the goals of ■■■'s IEP were being addressed by the CBT experience. For example, ■■■ was being given jobs commensurate with the student's established skills and talents, was being provided an opportunity to interact with non-ESE employees, and was receiving one-on-one supervision to assure understanding and completion of tasks. Further, the jobs were somewhat flexible to allow for changes when necessary. ■■■

might wipe tables one day, shred papers the next, and visit patients the next, all in one CBT location. There was no evidence presented that a particular job or work site was available for ■■■ that would be more beneficial than what the existing CBT program provides.

49. The CBT program was not without its faults. Off-campus job sites were only utilized one semester per year. Some of the job sites provided jobs that were not the best match for all of the students involved. Transportation issues existed that curtailed consideration of some possible job sites. And even though Durant High School intended to alternate CBT sites frequently, that goal did not always work in practice. The hospital job site utilized in the 2007-2008 school year was also being strongly considered for the 2008-2009 school year. It is sometimes difficult to obtain and maintain job sites. Sites have been lost because unruly parents of TMH students show up and have words with employers, for example. And sometimes the students themselves will engage in activities that create liabilities for the work site.

50. Nonetheless, the work experiences provided to students through CBT were consistent with the goal of helping all students, including ■■■, develop skills for post-secondary education life. The job sites may not always have provided the

optimum work experience, but they were at least adequate for their intended purposes.

51. Despite not being able to yet identify a specific CBT site for the upcoming year, the IEP team put together goals for ■■■ that could be pursued once the site was selected. The goals, which could not be more specific because it was not certain where the work would be performed, were nonetheless directed at developing transition skills.

52. ■■■ would prefer the District to identify a particular job fitting ■■■'s skills (although the Discovery process had not been able to do that to-date). Then ■■■ would like the school to transfer ■■■ to the selected job, provide ■■■ a one-on-one aide (or job coach), and allow ■■■ to work separate and apart from other ESE students and faculty. It is not clear from the record whether such an arrangement would benefit ■■■ any more than the CBT program, inasmuch as no particular job, task, or work site has been identified.

CONCLUSIONS OF LAW

53. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Subsections 1003.57(5), Florida Statutes⁹; Florida Administrative Code Rule 6A-6.03311; and 20 U.S.C. Section 1402, et seq. (the Individuals with Disabilities Education Act, or IDEA).

54. Petitioner, as the party seeking relief under the IDEA, has the burden of proof. Schaffer v. Weast, 546 U.S. 49, 51 (2005); Devine v. Indian River County School Brd., 249 F.3d 1289 (11th Cir. 2001).

55. Under the IDEA, the District is required to provide ■ a free appropriate public education (FAPE) by developing an IEP that is "reasonably calculated to enable the child to receive educational benefits." School Board of Martin County v. A.S., 727 So. 2d 1071, 1073-4 (Fla. 4th DCA 1999) (citing Board of Educ. of Hendrick, Hudson Sch. Dist. v. Rowley, 458 U.S. 176, 206-7 (1982)); Doe v. Alabama State Dept. of Education, 915, F.2d 651, 665 (11th Cir. 1990).

56. FAPE is defined as "[s]pecial education and related services that have been provided at public expense, . . . [that] meet the standards of the State educational agency, . . . [and that] are provided in conformity with the individualized education program required under section [1414(d) of the Act]."

20 U.S.C. Section 1401(9). Special education is defined as "[s]pecially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education." 20 U.S.C. § 1401(29).

57. The term "related services," as used in the IDEA, is defined as:

[T]ransportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26)(A).

58. To meet its obligation under Section 1003.57, Florida Statutes, to provide FAPE to each of its exceptional students, a district school board must provide "personalized instruction with 'sufficient supportive services to permit the child to

benefit from the instruction.'" Hendry County School Board v. Kujawski, 498 So. 2d 566, 568 (Fla. 2d DCA 1986), quoting from, Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 188 (1982). It is clear from the record that [REDACTED] receives personalized instruction with sufficient support services from the District. [REDACTED] is receiving educational benefits from the classroom instruction and from CBT (and to some extent, from CBI, as well).

59. As the Fourth District Court of Appeal stated in its opinion in School Board of Martin County, 727 So. 2d at 1074:

Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits provided 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, 102 S. Ct. 3034. The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer." Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997)(citing Board of Educ. of Community Consol. Sch. Dist. 21 v. Illinois State Bd. Of Educ., 938 F.2d 712 at 715, and Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988)). Thus, if a student progresses in a school district's

program, the courts should not examine whether another method might produce additional or maximum benefits. See Rowley, 458 U.S. at 207-208, 102 S. Ct. 3034; O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, No. 97-3125, 144 F.3d 692, 709 (10th Cir. 1998); Evans v. District No. 17, 841 F.2d 824, 831 (8th Cir. 1988).

60. See also M. H. v. Nassau County School Board, 918 So. 2d 316, 318, n. 1 (Fla. 1st DCA 2005), which held, "[a] free appropriate public education 'provided under the Act does not require the states to satisfy all the particular needs of each handicapped child,' but must be designed to afford the child a meaningful opportunity to learn." (citation omitted); C.P. v. Leon County School Board, 483 F.3d 1151, 1153 (11th Cir. 2007).

61. It is clear from the facts that [REDACTED] has been provided a meaningful opportunity to learn during the community-based training provided by the District. [REDACTED] has benefited from the training. [REDACTED] acknowledged that fact, and the value of the CBT program in general has not been challenged. Petitioner's desire, however, for a special degree of training separate and apart from CBT is not a requirement of the IDEA.

62. As stated in M. M. v. School Board of Miami-Dade County, 437 F.3d 1085, 1102 (11th Cir. 2006), "under the IDEA there is no entitlement to the 'best' program." In Doe v. Board of Education, 9 F.3d 455, 459-460 (6th Cir. 1993), the court said,

The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA.

Likewise, in the instant case, [REDACTED] has been provided off-campus work opportunities (with assistance from a one-to-one aide) in a variety of settings. Although the parents would prefer an arrangement whereby [REDACTED] would be assigned a job site independent of all other students and outside the CBT program, there is simply no requirement in law that the District accommodate that desire.

63. The IEP at issue contains objectives and goals which focus on [REDACTED]'s transition needs. The IEP does not identify a specific job site or job task, but inasmuch as no site/task has been decided upon, inclusion is impossible. The IEP goals are no less specific than prior years and are adequately measurable.

64. While the Chevrolet/Cadillac analogy in Doe lacks sensitivity, it nonetheless describes well the dichotomy at issue in the present proceeding. The fledgling CBT program is

providing ■ an opportunity to learn skills necessary for post-secondary life. Using information gleaned from the Discovery process, ■'s parents would like the District to formulate a separate and more finely honed job for ■, one that might further ■ skills development. Unfortunately, the law does not require the District to do that.

65. ■ has not met the burden of proof required to show that FAPE is not being provided under the facts presented.

ORDER

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

ORDERED that Petitioner's due process claim fails, and the relief sought in the due process complaint is denied.

DONE AND ORDERED this 12th day of August, 2008, in Tallahassee, Leon County, Florida.

S

R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of August, 2008.

ENDNOTES

- 1/ ■ did not begin walking until age 7.
- 2/ ■ is not, by chronological age, a child. However, in an attempt to keep this Final Order gender neutral (and with the acquiescence of ■'s mother) ■ will be referred to as ■'s "child" at times.
- 3/ None of the prior years' transition IEPs are at issue in this proceeding; they were addressed for comparison purposes only.
- 4/ Only students with a potential for either supported or competitive employment are allowed into the CBT program.
- 5/ There was no testimony at final hearing as to whether other students had a one-on-one aide or whether ■ was alone in that regard.
- 6/ It is common for attendees at an IEP meeting to be given a draft IEP for discussion. That draft is then either adopted, amended, or rejected. In the instant case, the IEP was adopted almost verbatim by the IEP team, although ■ was not fully in agreement with it in its entirety.
- 7/ Petitioner's expert witness opined that Discovery is not an assessment tool, but is more of a process, but her distinction seemed to be more of semantics than substance.
- 8/ A Conference Summary is a written summation of the IEP meeting, usually prepared by the case manager (in this case, Jackie Sizemore).
- 9/ Unless otherwise specifically stated, all versions of the Florida Statutes shall be to the 2007 version.

COPIES FURNISHED:

MaryEllen Elia, Superintendent
Hillsborough County School Board
Post Office Box 3408
Tampa, Florida 33601-3408

Deborah K. Kearney, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Dr. Kim C. Komisar, Dispute Resolution
Program Administrator
Bureau of Exceptional Education
and Student Services
Department of Education
Turlington Building, Suite 614
325 West Gaines Street
Tallahassee, Florida 32399-0400

Mark S. Kamleiter, Esquire
Kamleiter & Kirk
2509 First Avenue South
St. Petersburg, Florida 33712

Gregory A. Hearing, Esquire
Caren R. Skversky, Esquire
Thompson, Sizemore, Gonzalez & Hearing, P.A.
201 North Franklin Street, Suite 1600
Tampa, Florida 33602

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.