

Miami-Dade County School District
No. 06-3046E
Initiated by: Parent
Hearing Officer: Errol H. Powell
Date of Final Order: March 28, 2007

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 06-3046E
)
MIAMI-DADE COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on January 10 through 11, 2007, in Miami, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lilliam Rangel-Diaz
Qualified Representative
Center for Education Advocacy, Inc.
5973 Southwest 42nd Terrace
Miami, Florida 33155

For Respondent: Laura Pincus, Esquire
Miami-Dade County School Board
1450 Northeast 2nd Avenue, Suite 400
Miami, Florida 33132

STATEMENT OF THE ISSUES

The issues for determination are whether the Miami-Dade County School Board (School Board) violated the Individuals with Disabilities Education Act (IDEA) by holding an Individualized Education Plan (IEP) meeting on September 11, 2006, when a due process hearing was pending; whether the IEP team failed to consider ██████'s Independent Educational Evaluation (IEE) during its IEP meeting held on December 15, 2006; whether the IEP drafted on September 11, 2006 provides ██████ with a free appropriate public education (FAPE) in the least restrictive environment (LRE); whether the School Board unilaterally determined that ██████ should no longer continue to pursue a standard high school diploma, including whether the School Board is refusing to afford ██████ the opportunity to meet the requirements of a standard diploma; and whether the School Board failed to address ██████'s transition needs.

PRELIMINARY STATEMENT

On August 21, 2006, the parent of ██████ requested a due process hearing (DPH) from the School Board; the DPH request (Request) consisted of 72 pages. On August 21, 2006, this matter was referred to the Division of Administrative Hearings.

On September 21, 2006, an Order Designating Qualified Representative was issued by the undersigned. On September 26, 2006, a pre-hearing conference was held. During the pre-hearing conference, the parties indicated that a partial resolution had

been reached as to the issue involving the IEE and that the partial resolution was that an IEE would be conducted at public expense. Further, the parties represented that a contract between an independent contractor and the School Board must be entered into before the IEE could be conducted. Also, the parties agreed that the School Board would consider the IEE. Moreover, during the telephone conference, the parties agreed that, based upon the circumstances indicated, the 45-day decision requirement should be extended. By Order dated September 21, 2006, the 45-day decision requirement was extended to begin running on October 26, 2006; a deadline for completing the contract was established, i.e., October 21, 2006; and a deadline for a status report was established, i.e., October 26, 2006. Subsequently, by Amended Order dated October 2, 2006, the final order deadline was extended to up to and including December 10, 2006.

On September 29, 2006, a telephone conference was held, after a status report and a response thereto were filed, regarding the IEE in terms of the reasonableness of the fee for the IEE and the payment of the fee by the School Board. By Order dated October 2, 2006, the fee was found to be reasonable and the School Board was ordered to pay the fee.

Subsequently, on November 7, 2006, another telephone conference was held regarding the status of the IEE. During the

telephone conference, the School Board represented that a contract for the IEE had been entered into, which included a provision for the completion date of the IEE. Further, during the telephone conference, the parties agreed that an IEP meeting would be held to consider the IEE and agreed to extend the 45-day decision requirement and to dates to conduct the DPH. By Order dated November 13, 2006, the 45-day decision requirement was extended, with the running of the time to begin on December 18, 2006; a status report deadline was established, i.e., December 18, 2006; the dates of the DPH were set forth, i.e., January 10 and 11, 2007, with the DPH being scheduled by separate order; and the final order deadline was extended up to and including January 29, 2007.

On December 21, 2006, a telephone conference was held regarding amending ██████'s DPH Request to include the failure of the School Board to consider the IEE. During the telephone conference, the School Board agreed to the amendment, and, further, the parties agreed that, even though ██████'s DPH Request was being amended, the time period for a resolution meeting should not recommence. By Order dated December 22, 2006, ██████ was granted leave to amend the DPH Request to include the failure of the School Board to consider the IEE, and the time period for the 45-day decision requirement was not recommenced with the amending of the DPH Request. On January 3,

2007 [REDACTED]'s Amended DPH Request was filed.

At hearing, the testimony of three witness was presented on behalf of [REDACTED] including [REDACTED] [REDACTED] self, and [REDACTED]'s mother, and 20 exhibits (Petitioner's Exhibits numbered 1 through 20) were entered into evidence. The School Board presented the testimony of nine witnesses and entered seven exhibits (Respondent's Exhibits numbered 1 through 7) into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for 14 days following the filing of the transcript, again extending the 45-day decision requirement. The Transcript, consisting of four volumes, was filed on January 31, 2007. On February 1, 2007, [REDACTED] requested an extension of the date due for post-hearing submissions. Subsequently, the parties agreed that post-hearing submissions would be filed no later than February 20, 2007. By Order dated February 13, 2007, the 45-day decision requirement and the final order deadline were extended to March 22, 2007. The post-hearing submission on behalf of [REDACTED] was filed on February 21, 2007, having been filed on February 20, 2007 after 5:00 p.m.; thereby, being untimely and extending the 45-day decision requirement and final order deadline. On February 23, 2007, [REDACTED] requested leave to enlarge the 40-page limit of post-hearing submissions; by Order dated February 26, 2007, the request was granted. By Order

dated March 12, 2007, the 45-day decision requirement and the final order deadline were extended to March 28, 2007.

The parties' post-hearing submissions were considered in the preparation of this Final Order.

FINDINGS OF FACT

1. ██████ is a 17-year-old ██████, high school student at ██████ High School in the School Board's district.
2. No dispute exists that ██████ is an exceptional student, eligible for Exceptional Student Education (ESE), and that ██████ education is governed by the IDEA. ██████ has been found eligible for the ESE program based on the following areas of eligibility: Autism and Language Impaired.
3. ██████'s current IEP was developed on December 17, 2003, hereinafter Current IEP, when ██████ was at the ninth grade level. The Conference Information section of the Current IEP indicates that the type of conference held was an annual review and transition. As to the transition, the IEP included a transition statement and an individual transition plan. Further, the IEP included educational setting adaptations. As to diploma options, the Current IEP indicates a standard diploma. Of note, associated with a standard diploma, in the parent comment section of the IEP, ██████'s mother commented that: "I am concern [sic] about the grading criteria being used

for ██████ which is not in accordance [with] the student progression plan. I am requesting that ██████ ██████'s] grades be review [sic] and

adjusted according to the student progression plan grading criteria."

4. In 2005, ██████'s mother filed a request for a DPH. ██████'s mother and the School Board entered into a mediation agreement regarding the request for DPH.

5. As a provision of the mediation agreement, ██████'s mother consented for the School Board to conduct a psycho-educational re-evaluation of ██████ Further, the parties agreed that ██████ would remain in the standard diploma track.

6. The re-evaluation report, hereinafter Re-Evaluation, indicates that parental consent was obtained on August 11, 2005. Further, the Re-Evaluation indicates that the author of the Re-Evaluation assessed the area of adaptive behavior on November 30, 2005, and the area of psycho-educational on January 27, 2006; and that the person who assessed the two areas aforementioned and the author of the Re-Evaluation was Tamara Palash, MS, the School Board's psychologist for the autism program.¹ The Re-Evaluation Report by Ms. Palash indicates an evaluation date of January 27, 2006.

7. Almost four months after the Re-Evaluation, on or about

May 10, 2006, ██████'s mother received a copy of the Re-Evaluation. ██████ received the copy only after the School Board was notified by the advocate for ██████'s mother and ██████

hereinafter Advocate, that the Re-Evaluation had not been received by ██████'s mother.

8. On or about May 25, 2006, ██████'s mother received notification of an IEP meeting to be conducted on June 27, 2006. The Notification of Meeting form indicated that the purpose of the meeting was to conduct an annual/interim review of the Current IEP or a review of the Current IEP. The form contained no indication that ██████'s transition needs would also be addressed. Also, the Notification of Meeting form listed the persons who were invited to the IEP meeting, and one of those persons was Ms. Palash, the School Board's psychologist who conducted the Re-Evaluation. Additionally, no representative of vocational rehabilitation was invited to attend the IEP meeting. Further, ██████'s mother indicated on the Notification of Meeting form that ██████ would attend the IEP meeting.

9. At the IEP meeting held on June 27, 2006, the Re-Evaluation was reviewed. ██████'s mother disagreed with the Re-Evaluation and requested an IEE at public expense. Among other things, the IEP meeting was not completed and was adjourned to be re-scheduled at a later date. Of note is that the conference

notes section of the IEP states that: "psychologist provided information about the report but parent was in disagreement with part of the information (Vineland) and requested not to proceed [unintelligible]. Psychologist asked to be excused from the meeting before it was completed due to another meeting. . . ." In the parent comments section, ██████'s mother also included comments regarding her disagreement with the Re-Evaluation and the "manner in which it was conducted."

10. The IEP meeting of June 27, 2006 was held almost one year from the time that ██████'s mother consented to the Re-Evaluation; five months after the Re-Evaluation; and approximately one month after ██████'s mother received a copy of the Re-Evaluation.

11. By Notification of Meeting from the School Board dated August 16, 2006, the School Board notified ██████'s mother that an IEP meeting was being scheduled for August 22, 2006. The Notification of Meeting form indicated that it was an IEP meeting and that the purpose of the meeting was to review ██████'s academic progress and/or behavior and to conduct an annual review of the IEP or a review of the IEP. The Notification of Meeting form contained no indication that ██████'s transition needs would also be addressed and did not list a representative of vocational rehabilitation as one of the persons invited to attend. Further, no representative of

vocational rehabilitation was invited to attend the IEP meeting.

12. On August 21, 2006, the DPH Request was filed with the School Board by the Advocate. The IEP meeting scheduled for August 22, 2006 was not held.

13. Between June 27, 2006 and August 21, 2006, the School Board had not noticed [REDACTED]'s mother regarding its position on her request for an IEE at public expense. Between June 27, 2006 and August 21, 2006, no IEE had been scheduled or conducted.

14. On September 11, 2006, the parties participated in a resolution meeting and a partial resolution was reached. Pertinent hereto, the partial resolution included an agreement that an IEE would be conducted at public expense.

15. Additionally, on September 11, 2006, an IEP meeting was conducted. The Notification of Meeting form, dated September 6, 2006, indicated that the meeting was an IEP meeting and the purpose of the meeting was to review [REDACTED]'s academic progress and/or behavior, to conduct an annual review of the IEP or a review of the IEP, and to conduct a resolution meeting.

16. The Notification of Meeting form also listed the persons who were invited to attend the IEP meeting to be held on September 11, 2006. Of note is that Ms. Palash, who conducted the Re-Evaluation, was not one of the individuals listed as invited to attend the IEP meeting. At hearing the testimony was that Ms. Palash was no longer employed with the School Board,

but the testimony failed to indicate when her employment ceased with the School Board. An inference is drawn and a finding of fact is made that Ms. Palash's employment with the School Board had ceased at the time of the IEP meeting. Also, of note is that a vocational rehabilitation representative and the transition district staffing specialist were listed as being invited to attend the IEP meeting.

17. On September 11, 2006, an IEP was developed, hereinafter Proposed IEP. The grade level indicated for [REDACTED] was ninth grade. As to diploma options, the IEP indicated a special diploma. An Informed Notice of Proposal or Refusal to Change Evaluation, Identification, Educational Placement, or Free Appropriate Public Education (FAPE) form was prepared and indicated, in pertinent part, the following:

I. DESCRIPTION OF THE ACTION PROPOSED BY
MIAMI-DADE COUNTY PUBLIC SCHOOLS (M-DCPS):
change of diploma option to special diploma

* * *

Explanation of why this action is being proposed: Student's academic performance in the classroom had demonstrated that [REDACTED] has difficulty mastering the objectives of the Sunshine State Standards required by the regular diploma track.

DESCRIPTION OF ANY ACTION BEING REFUSED BY
M-DCPS: delivery of services through the
general/standard diploma option.

Explanation of why the action is being refused: Student's performance in the

classes (i.e. Math & English)

* * *

EVALUATION PROCEDURES, TESTS, RECORDS, OR REPORTS USED AS A BASIS FOR THE PROPOSED OR REFUSED ACTIONS: Stanford, FCAT

OTHER FACTORS REVELANT TO THE ABOVE PROPOSAL OR REFUSAL: Student's performance in the general curriculum classes such as Math & English. Student's difficulty with abstract concepts and application.

Further, as to educational placement, the Proposed IEP indicated the placement to be "Separate Class," which indicates that the percentage of time that [REDACTED] would be with non-disabled students is zero percent to forty percent.

18. [REDACTED]'s mother disagreed with changing the diploma track from standard to special and with changing the placement. She and the Advocate left the meeting before it was completed. In the parent comments section of the Proposed IEP, [REDACTED]'s mother comments included the following:

I disagree with the change in diploma option and changing placement. I am leaving the IEP Meeting after Section IX diploma option and I am requesting that this IEP Meeting stops since I have filed a request for due process hearing . . . The school district agreed to conduct an IEE and we should wait for this.

The comments by [REDACTED]'s mother are clear that [REDACTED] disagreed with the diploma change and the change in placement and that [REDACTED] wanted the IEP meeting to cease and the process to cease

until an IEE was conducted and the report on the IEE was received.

19. The School Board chose not to suspend the IEP meeting until completion of the IEE. The remainder of the Proposed IEP was completed without the presence of [REDACTED]'s mother and Advocate. The remaining areas of the Proposed IEP included Measurable Annual Goals and Benchmarks; Individual Transition Plan; and Accommodations/Modifications in the Educational Setting.

20. Subsequently, a contract between the independent evaluator, Ketty Patiño González, Ph.D., and the School Board was entered into for the IEE at public expense. However, when the School Board received notice of Dr. González's fee, the School Board considered the fee out-of-line with the fees previously charged by her and, therefore, the School Board determined that an order from the undersigned was needed to pay the fee. (Dr. González had been used by the School Board for evaluations and by parents for IEEs in other situations.) The School Board filed the appropriate pleadings and a telephone conference was held. By Order dated October 2, 2006, the fee to be charged by Dr. González for the IEE was found to be reasonable and the School Board was ordered to pay the fee.

21. On November 17, 22, and 30, 2006, the IEE (a psycho-educational evaluation) was conducted by Dr. González and a

doctoral student in clinical psychology, Nicole Zahka.

Ms. Zahka administered some of the tests that were used to evaluate ██████ by Dr. González. The undersigned finds that Ms. Zahka was qualified to administer the tests and that,

therefore, none of the tests administered by Ms. Zahka and the results of the tests are invalid.

22. The written report of the IEE was prepared by Dr. González on December 8, 2006. Dr. González references in her report the testing of ██████ performed in January 2006 (the same time as the Re-Evaluation), and included the tests administered and the results of those tests administered in January 2006. The undersigned draws an inference and makes a finding of fact that Dr. González considered the Re-Evaluation in the IEE. Dr. González testified at hearing. The undersigned finds the IEE persuasive and Dr. González's testimony credible.²

23. No dispute exists that the IEE meets the School Board's criteria for an evaluation.

24. Pertinent to resolving the issues in the instant case, the IEE states and Dr. González testified that ██████ suffers from dyslexia, a reading disability. Dyslexia was not indicated or referenced in the Re-Evaluation or the Proposed IEP. Additionally, Dr. González states in the IEE that strong evidence points to ██████ having Attention Deficit/Hyperactivity

Disorder (ADHD) - Primarily Inattentive Type; again, not indicated or referenced in the Re-Evaluation or the Proposed IEP. Furthermore, Dr. González states in the IEE that the "sequelae of dyslexia (e.g., deficits in rapid language retrieval) and ADHD (i.e., deficit in working memory) have also affected [REDACTED]'s] ability to learn mathematical calculations. According to these results, [REDACTED] also meets criteria for Mathematics Disorder . . ."

25. Dr. González made several recommendations in the IEE. Pertinent to resolving the issues in the instant case are the following recommendations:

2. It is strongly recommended that the family consider whether medication would help improve [REDACTED]'s] working memory. For students with working memory dysfunction, only part of their cognitive abilities are available for learning, so use of medication will hopefully help [REDACTED] better utilize all [REDACTED] cognitive resources to learn. Consultation with a psychiatrist is thus urged.

3. It is recommended that [REDACTED] attend school for the four additional years of help to which [REDACTED] is entitled. However, these four years will need to be dedicated to specifically helping [REDACTED] attain reading and math proficiency at a more adaptive level. Unless [REDACTED] receives the right help, these years will go by and [REDACTED] will still be reading and mathematically illiterate. [REDACTED] is referred to Miami-Dade County Public Schools for appropriate help.

4. The following suggestions are based on

research regarding appropriate treatment for [REDACTED]'s] dyslexia. Regarding word decoding:

A. Gear the intervention to the level of [REDACTED] reading skills rather than phonological processing per se (e.g., use word attack, knowledge of phonics rules, and fluency rather than work segmentation and sound blending), as it is too late to learn phonemic awareness. As word attack skills (understanding of phonics rules) do not seem to exist, [REDACTED] will benefit most from a systematic, sequential, intensive phonics-based program.

B. Intense remediation will be needed, as the treatment of dyslexia has to be "early, intense, of high quality, and of long duration" . . . It is too late for "early," but not for the other three elements. . .

5. Regarding fluency, once [REDACTED] is able to read a number of words, reading fluency training needs to start. . . Therefore, guided repeated oral reading is suggested. . .

6. Regarding reading comprehension, please refer to the report of the National Reading Panel: Teaching Children to Read at . . . to learn more about reading comprehension. Suggestions based on that publication follow. . .

7. Regarding remediation of [REDACTED] math deficits, have a math specialist examine [F. C.'s] mathematical knowledge and start remediation from where the breakdown started to occur. Mathematics should be taught in a step-by-step, sequential approach and [REDACTED] visual abilities should be incorporated in [REDACTED] education plan, as they are [REDACTED] area of relative strength. . .

* * *

10. If [REDACTED] working memory improves, it

would be helpful to provide [REDACTED] with [REDACTED] books on tape. . .

11. Again, if [REDACTED] working memory improves, provide [REDACTED] with a computer screen reader for when [REDACTED] has to read large amounts of material in the computer. .

12. According to [REDACTED] mother, [REDACTED] has been very happy in [REDACTED] mainstream classes. This is corroborated by how much [REDACTED] likes to go to school. It is suggested that [REDACTED] continue attending mainstream classes with accommodations and the intense remediations [sic] recommended above.

26. At hearing, Dr. González reiterated her report and recommendations. As indicated previously, the undersigned finds her testimony credible. Dr. González testified that there was no question that [REDACTED] was dyslexic. Moreover, Dr. González testified that the recommendations that she made, regarding research-based accommodations and intense remediation for [REDACTED]'s dyslexia and learning, were related to [REDACTED]'s learning, as a child with dyslexia and at [REDACTED]'s age, grade level, level of learning, and potential and capabilities of learning, and were to be used across the board for all classes taken by [REDACTED]. Furthermore, Dr. González testified that she was in no way telling the School Board what classes [REDACTED] should take or should not take. As to mainstreaming, Dr. González testified that [REDACTED] should remain in mainstream classes for the majority of [REDACTED] classes but, again, [REDACTED] should receive intense

research-based accommodations and intense remediation, but not in special education classes because [REDACTED] would "remain illiterate if that happens."

27. No evidence was presented by the School Board to contradict the evidence that [REDACTED] suffers from dyslexia.

28. The School Board did not present the testimony of an expert in opposition to the testimony presented by Dr. González.

29. A finding of fact is made that [REDACTED] suffers from dyslexia. Further, a finding of fact is made that the IEE is appropriate.

30. By Notification of Meeting dated November 13, 2006, [REDACTED]'s mother was notified of an IEP meeting to be held on December 15, 2006, for the purpose of reviewing [REDACTED]'s academic progress and/or behavior; to revise the current IEP/EP because of the evaluation results; and to review the results of and consider the IEE. Of note is that a psychologist from the School Board, a vocational rehabilitation representative, and a transition district staffing specialist were listed as individuals who were among those invited to attend the IEP meeting.

31. At the IEP meeting held on December 15, 2006, the Proposed IEP (developed on September 11, 2006) was presented as the proposed IEP for this IEP meeting. At hearing, the School Board's witnesses testified that the purpose of this IEP meeting, as considered by them, was to review the IEE. As to the IEE, at the IEP meeting, those present had a copy of the IEE and the School Board's psychologist, Sue L. Buslinger-Clifford, Ed.D.,³ read the IEE. No questions were posed by any of the representatives from the School Board regarding the finding of

dyslexia and the recommendations associated therewith. [REDACTED]'s mother insisted on discussing the sections of the IEE on dyslexia but to no avail. Added to the Proposed IEP at the section of Additional Conference Notes was the following: "12-15-06 Team met to review the outside psychological re-evaluation." No changes were made to the Proposed IEP.

32. At hearing, [REDACTED]'s intense reading teacher testified that she had no questions at the IEP meeting held on December 15, 2006, in that she did not agree with the IEE as to [REDACTED]'s decoding ability because she did not believe that [REDACTED] had any decoding problems; she believed that [REDACTED] could decode phonetically. The intense reading class has 25 students in it -- 3 ESE students and, the remainder, general education students.

33. At hearing, [REDACTED]'s geometry teacher testified that [REDACTED] has problems with geometry. She further testified that she did not believe that [REDACTED] could pass geometry because the way that geometry is taught, a student must apply algebra and [REDACTED] could not apply algebra.

34. At hearing, the School Board presented evidence of accommodations and remediation being provided to [REDACTED]. No evidence was presented that the accommodations and remediation provided by the School Board were provided to assist [REDACTED] with [REDACTED] dyslexia, as well as autism and language impairment.

Further, the evidence presented failed to demonstrate that the accommodations and remediation being provided by the School Board were the same as or equivalent to the accommodations and remediation recommended in the IEE to address ██████'s dyslexia and learning inabilities.

35. The first time that dyslexia was presented as a factor in ██████'s learning was in the IEE, and it was presented as a major factor in ██████ learning. No discussion regarding dyslexia occurred at the IEP meeting held on December 15, 2006. At hearing, no testimony was presented to demonstrate that those present at the IEP meeting held on December 15, 2006 had any experience with dyslexia to enable them to make a determination that ██████ was not suffering from dyslexia; or had any experience with the accommodations and remediation recommended in the IEE in order to make a determination as to whether the accommodations and remediation recommended would not be effective in ██████'s situation or assist ██████. Discussing a suggested new and significant factor in ██████'s learning ability, which was suggested by an expert, and having someone at the IEP meeting with expertise in dyslexia to provide input on the accommodations and remediation recommended by the IEE would demonstrate that the IEE was considered at the IEP meeting.

36. The evidence presented demonstrates that the IEE was not considered at the IEP meeting held on December 15, 2006.

37. With the IEE not being considered at the IEP meeting held on December 15, 2006, the evidence demonstrates that the Proposed IEP was not properly developed. The areas such as Diploma Options, Measurable Annual Goals and Benchmarks, Individual Transition Plan, and Accommodations/Modifications in the Educational Setting were developed without any consideration of ██████'s dyslexia and the IEE.

38. Regarding the Proposed IEP changing the diploma track from standard to special, the School Board presented evidence that the special diploma track would allow ██████ to attend general education courses in which ██████ has success and in the courses that ██████ had problems, such as Math, to receive special assistance. However, the evidence demonstrates that ██████'s dyslexia and the accommodations and remediation recommended by the IEE were not taken into consideration in making the change. The School Board should have considered ██████'s dyslexia and the accommodations and remediation recommended by the IEE in determining whether to change the diploma track.

39. In addition, regarding the Proposed IEP changing the diploma track from standard to special, evidence was presented at hearing that 24 credit hours are required for ██████ to graduate and receive a standard diploma. ██████ has earned 11 credits; however, the evidence demonstrates that ██████ has not

earned any standard English or Math credits and has failed some courses more than once. The School Board's position, as to credits, is that [REDACTED] is unable to earn the required credits to receive a standard diploma, and, as a result, the diploma track should be changed from standard to special. As previously found, the School Board should have considered [REDACTED]'s dyslexia and the accommodations and remediation recommended by the IEE in determining whether to change the diploma track, but the School Board failed to do so.

40. As to transition, vocational rehabilitation is involved in the consideration of [REDACTED]'s transition. The evidence demonstrates that a representative of vocational rehabilitation was listed as being invited to attend the IEP meetings held on September 11, 2006 and December 15, 2006, but the representative failed to attend. The School Board presented evidence to demonstrate that it could not force a representative of vocational rehabilitation to attend an IEP meeting. The evidence demonstrates that the transitional specialist from the School Board was present at both the September 11, 2006 and December 15, 2006 IEP meetings; that an Individual Transition Plan was developed for F. C. at the IEP meeting held on September 11, 2006; and that the same Plan, without any changes, was used for the December 15, 2006 IEP meeting.

41. Further, the evidence demonstrates that, after the

Current IEP and before the IEP meeting on September 11, 2006, transition had not been addressed at any IEP meeting and no vocational rehabilitation representative had been invited to attend any IEP meeting. Only at the IEP meeting held on September 11, 2006, were a transition representative and vocational rehabilitation invited to attend an IEP meeting.

42. Moreover, the evidence demonstrates that neither the IEE nor ██████'s dyslexia were considered in the development of ██████'s transition plan at the IEP meeting held on September 11, 2006, when the Proposed IEP was developed, or at the IEP meeting held on December 15, 2006.

43. Additionally, the evidence presented demonstrates a level of frustration by both ██████'s mother and the School Board, which has demonstrated a lack of mutual cooperation in developing an IEP for the benefit of ██████. Both parties agree that ██████ needs and requires assistance, but what that assistance should be is a point of disagreement. The evidence demonstrates that the frustration has led to distrust and accusatory remarks by both parties. The parties should put their ill-feelings aside and work toward developing an IEP that will benefit ██████.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction of these proceedings and the parties thereto

pursuant to Sections 1001.42(4)(1) and 1003.57(1), Florida Statutes (2006).

45. The parent of [REDACTED] has the burden of proof in these proceedings. Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). The standard of proof is a preponderance of the evidence. DeVine v. Indian River County School Board, 249 F.3d 1289, 1292 (11th Cir. 2001).

46. Section 1001.42(4)(1) provides, among other things, that the School Board shall "Provide for an appropriate program of special instruction, facilities, and services for exceptional students"

47. States must comply with the IDEA in order to receive federal funding for the education of handicapped children. The IDEA requires states to establish policy which assures that children with disabilities will receive a FAPE. Through an IEP, the educational program accounts for the needs of each disabled child.

48. Definitions applicable to the IDEA are set forth at 20 U.S.C.S. Section 1401. FAPE is defined as follows:

- (9) . . . The term 'free appropriate public education' means special education and related services that—
 - (A) have been provided at public expense, under public supervision and direction, and without charge;
 - (B) meet the standards of the State

- educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program

IEP is defined as follows:

- (14) . . . The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised

Special education is defined as follows:

- (29) . . . The term 'special education' means specially 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.

49. The Code of Federal Regulations (C.F.R.) implements the federal statutes. The C.F.R. applicable to the pertinent sections of the IDEA is 34 C.F.R. Section 300 (2006).⁴ FAPE is found at 34 C.F.R. Section 300.17 and is defined as follows:

- Free appropriate public education or FAPE means special education related services that—
- (a) Are provided at public expense, under public supervision and direction, and without charge;
 - (b) Meet the standards of the SEA [State educational agency], including the requirements of this part;
 - (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
 - (d) Are provided in conformity with an

individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

IEP is found at 34 C.F.R. Section 300.22 and is defined as follows:

Individualized education program or IEP means a written statement that is developed, reviewed and revised in accordance with §§ 300.320 through 300.324.

Special education is found at 34 C.F.R. Section 300.39 and is defined as follows:

- (a) General. (1) Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—
 - (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
 - (ii) Instruction in physical education.
- (2) Special education includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section—
 - (i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;
 - (ii) Travel training; and
 - (iii) Vocational education.

* * *

- (3) Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—
 - (i) To address the unique needs of the child that result from the child's disability; and
 - (ii) To ensure access of the child to the

general curriculum, so that the child can meet the educational standards with the jurisdiction of the public agency that apply to all children.

* * *

(5) Vocational education means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

50. In general, a FAPE must be available to all children residing in a state between the ages of 3 and 21, inclusive.
34 C.F.R. § 300.101(a).

51. A state meets the IDEA's requirement of a FAPE when it provides personalized instruction with sufficient support services to permit the disabled child to benefit educationally from that instruction. The instruction and services must be provided at public expense, meet the state's educational standards, approximate grade levels used in the state's regular education, and correspond to the disabled child's IEP. Board of Education of Hendrick Hudson Central School District v. Rowley, 102 S. Ct. 3034 (1982).

52. Inquiry in cases involving compliance with the IDEA, which is a de novo inquiry, is twofold: (1) whether there has been compliance with the procedural requirements of the IDEA, including the creation of the IEP, and (2) whether the IEP

developed is reasonably calculated to enable the child to receive educational benefits. Rowley, at 3051.

53. A state is not required to maximize the potential of a disabled child commensurate with the opportunity provided to a non-disabled child. Rather, the IEP developed for a disabled child must be reasonably calculated to enable the child to receive some educational benefit. Rowley, at 3048-3049. The disabled child must be making measurable and adequate gains in the classroom, but more than de minimus gains. J.S.K. v. Hendry County School Board, 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Department of Education, 915 F.2d 651 (11th Cir. 1990). The unique educational needs of the particular child in question must be met by the IEP. Todd D. v. Andrews, 933 F.2d 1576 (11th Cir. 1991) "The importance of the development of the IEP to meet the individualized needs of the handicapped child cannot be underestimated." Greer v. Rome City School District, 950 F.2d 668, 695 (11th Cir. 1991).

54. In examining an IEP, great deference is given to the educators who develop the IEP. Todd, at 1581.

55. The disabled child's education must be provided in the LRE available. A determination of such environment requires consideration of whether there has been compliance with the procedural requirements of the IDEA and whether the IEP is

reasonably calculated to enable the child to receive educational benefits. DeVries v. Fairfax County School Board, 882 F.2d 876 (4th Cir. 1989).

56. Furthermore, regarding the LRE in the placement of the child, generally, to the maximum extent appropriate, children with disabilities are to be educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment are to occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C.S. § 1412(a)(5); 34 C.F.R. § 300.114(a). Further, in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services he or she needs. 34 C.F.R. § 300.116(d). An IEP must be examined as to whether it provides a meaningful education in the LRE. Pachl v. School Board of Anoka-Hennepin Independent School District No. 11, 453 F.3d 1064, 1068 (8th Cir. 2006).

57. As a procedural safeguard, the parent of a child with a disability is provided the opportunity to obtain an IEE of his or her child. 20 U.S.C.S. § 1415(b)(1). If an IEE is obtained at public expense, the "results" of the IEE "must be considered" by a school district "in any decision made with respect to the

provision of FAPE to the child." 34 C.F.R. § 300.502(c)(1).

58. The undersigned's decision, as to whether the Proposed IEP provides F. C. with a FAPE, must be based on "substantive grounds." 20 U.S.C.S. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(1). However, in matters regarding a procedural violation, pertinent hereto, the undersigned may find that F. C. did not receive a FAPE "only if the procedural inadequacies impeded" F. C.'s "right to a FAPE" or "caused a deprivation of educational benefit." 20 U.S.C.S. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2)(i) and (iii).

59. The evidence demonstrates that the School Board failed to consider the IEE obtained at public expense at the IEP meeting held on December 15, 2006. The results of the IEE importantly and significantly indicated that [REDACTED] was suffering from dyslexia and included recommended accommodations and remediation to address [REDACTED]'s dyslexia. The evidence demonstrates that [REDACTED]'s dyslexia significantly affected [REDACTED] ability to learn and comprehend. The Proposed IEP was developed at the IEP meeting held on September 11, 2006, prior to the IEE, and was, therefore, developed by the School Board without considering the results of the IEE. Furthermore, at the IEP meeting held on December 15, 2006, whose purpose was to consider the IEE, the School Board had an opportunity to consider the IEE but failed to do so and no changes were made to the Proposed IEP

developed by the School Board on September 11, 2006.

Consequently, the evidence demonstrates that the School Board's failure to consider the IEE in developing the Proposed IEP impeded ██████'s right to a FAPE. Hence, the Proposed IEP failed to provide ██████ with a FAPE.

60. The evidence demonstrates that the parent of ██████ agreed to attend the IEP meeting on September 11, 2006. A school district and a parent are not prohibited from agreeing to meet to develop an IEP during the pendency of a DPH request. See 34 C.F.R. § 300.518(a). As a result, the School Board did not violate the IDEA by holding an IEP meeting on September 11, 2006.

61. A further question arises, as to whether the School Board continuing with, instead of suspending, the IEP meeting held on September 11, 2006, after ██████'s mother and Advocate left, violated the IDEA. The evidence demonstrates that, prior to the IEP meeting held on September 11, 2006, the parties had agreed to ██████'s mother's obtaining an IEE at public expense. Further, the evidence demonstrates that, when the parties reached the section on the Proposed IEP regarding the diploma option, ██████'s mother requested that the IEP meeting be suspended until the results of the IEE were obtained but that the School Board declined ██████ request and that is when ██████'s mother and the Advocate left the IEP meeting. Since the parties

had agreed, prior to the IEP meeting, that ██████'s mother would obtain an IEE at public expense and since the School Board must consider an IEE at public expense in developing an IEP, the IEP meeting on September 11, 2006 should never have taken place. However, since both parties agreed to an IEP meeting in the absence of the IEE and both parties participated to a certain point, the evidence demonstrates that a violation of the IDEA by the School Board did not occur by the School Board holding the IEP meeting on September 11, 2006.

62. The failure of the School Board to consider the IEE also negatively affected the LRE in the Proposed IEP. The evidence demonstrates that, in determining placement, the School Board failed to consider ██████'s dyslexia before making the decision on the LRE. The Proposed IEP failed to provide ██████ a meaningful education in the LRE. Hence, the Proposed IEP failed to provide ██████ a FAPE in the LRE. As a result, the LRE must also be readdressed in developing an IEP for ██████

63. Regarding the diploma track for ██████ again, the evidence demonstrates that the IEE at public expense and ██████'s dyslexia were not considered in developing the Proposed IEP, which included changing the diploma track from standard to special. Failure to consider the IEE violated the IDEA and denied ██████ a FAPE. Therefore, failure to consider the IEE resulted in the School Board unilaterally changing the diploma

track from standard to special. Further, by the School Board's failure to consider the IEE and to address ██████'s dyslexia in changing the diploma track, the School Board did not afford ██████ the opportunity to meet the requirements of a standard diploma. The decision regarding a standard diploma versus a special diploma track must be readdressed taking into consideration the IEE and ██████'s dyslexia.

64. As to ██████'s transition needs, the evidence demonstrates that the School Board failed to address ██████ transition needs until the Proposed IEP. Again, the evidence demonstrates that the IEE at public expense and ██████'s dyslexia were not considered in developing the Proposed IEP and, therefore, they were not considered in addressing ██████'s transition needs. Hence, ██████'s transition needs have not been addressed, but they need to be addressed.

65. In developing an IEP in the LRE for ██████ including ██████ diploma option and transition needs, the IEE and ██████ dyslexia must be addressed, which has not occurred.

66. As to compensatory educational services, ██████ was first diagnosed with dyslexia at the time of the IEE, with the written report being prepared on December 8, 2006. No evidence was presented that anyone suspected that ██████ was suffering from dyslexia prior to the IEE or that anyone had requested that ██████ be examined for dyslexia. The undersigned is not

persuaded that a basis for compensatory education services has been presented. Furthermore, the IEE recommends accommodations and remediation which can be included in an IEP with the LRE when it is developed.

67. The parties should re-convene an IEP meeting and develop an IEP for ██████ in the LRE, considering the IEE and addressing ██████'s dyslexia. The parties must focus on the educational benefits for ██████ within the parameters of the IDEA.

CONCLUSION

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

ORDERED that:

1. The Proposed IEP developed on September 11, 2006 fails to provide ██████ with a free appropriate public education in the least restrictive environment.

2. The School Board and ██████'s mother are to re-convene an IEP meeting and develop an IEP for ██████ that provides ██████ with a free appropriate public education in the least restrictive environment consistent with this Final Order.

DONE AND ORDERED this 28th day of March, 2007, in
Tallahassee, Leon County, Florida.

S

ERROL H. POWELL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of March, 2007.

ENDNOTES

^{1/} The date that the written report was prepared was not indicated.

^{2/} At hearing, Dr. González was tendered and accepted as an expert on autism, learning disabilities and assessments.

^{3/} Dr. Buslinger-Clifford's professional vitae indicates that [REDACTED] is the School Board's Instructional Supervisor of Psychological Services.

^{4/} Unless indicated otherwise, 34 C.F.R. Section 300 refers to the 2006 Code of Federal Regulations.

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.