St. Johns County School District
No. 06-2535E
Initiated by: Parent
Hearing Officer: P. Michael Ruff
Date of Final Order: January 19, 2007

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted]	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-2535E
	)	
ST. JOHNS COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to notice this cause came on for formal proceeding and hearing on September 14, 2006, before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The appearances were as follows:

APPEARANCES

For Petitioner: John E. Owens, CLI
Rebekah A. Gleason, Esquire
Family and Child Advocacy Clinic
8787 Baypine Road
Jacksonville, Florida 32256

For Respondent: Sidney M. Nowell, Esquire
Nowell & Associates, P.A.
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Post Office Box 819
Bunnell, Florida 32110

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding involve whether the Respondent provided the Petitioner a Free Appropriate Public Education (FAPE). Embodied within that general issue is whether the proposed Individualized Educational Plan (IEP) adequately addresses [redacted] reading deficits, specifically in the areas of phonemic knowledge, graphemic knowledge and phonemic awareness; whether [redacted] needs a "systematic, multi-sensory approach to reading, due to [redacted] learning disabilities" and whether a behavior intervention plan (BIP) should be continued in the April 2006 IEP.

PRELIMINARY STATEMENT

This cause arose when [redacted] the mother of [redacted] filed a request for a due-process hearing on July 14, 2006. The reasons for the due-process hearing request were alleged failures by the St. Johns County School District (District) to include appropriate goals to address [redacted] deficits in phonemic and graphemic knowledge and awareness in the April 2006 IEP; that [redacted] had not been provided with a systematic, multi-sensory approach to reading; that the District should have used more than a single measure or assessment in determining the appropriate education program for [redacted] and that the District should have included a BIP in the April 2006 IEP.

The request for due process hearing was filed July 14, 2006. Immediately thereafter a pre-hearing conference was scheduled with the Administrative Law Judge and the parties

discussed the hearing dates and schedule, the need for a resolution conference and/or mediation and an agreed-upon hearing date. The hearing was then set for August 15, 2006. Thereafter, however, the parties were not able to prepare for hearing for that early a hearing date and agreed to a continuance. Thereafter the hearing was set for September 14th and 15th for St. Augustine, Florida. Soon thereafter the Petitioner filed a "waiver of 45-day time limit for resolution." This was filed on August 3, 2006, whereby the Petitioner extended the 45-day time limit for resolution of the due process proceeding for a reasonable period of time after the hearing could be conducted, a transcript thereof could be received by the parties and proposed final orders filed.

The cause came on for hearing as noticed. At the hearing the Petitioner presented four witnesses and Exhibits one through seven, which were admitted. The Respondent presented six witnesses and Exhibits A, B, and C, which were admitted. Upon concluding the proceeding the parties requested a transcript thereof and availed themselves of the right to submit proposed final orders. After an unopposed request for extension of time was granted, the Proposed Final Orders were timely filed on or before November 19, 2006.

FINDINGS OF FACT

1. The Petitioner [redacted] is an 18-year-old student who attends the 12th grade in the 2006-2007 school year at [redacted] High School in [redacted], Florida.

2. An IEP was enacted by the Respondent's IEP team on August 4, 2005. That IEP identified the Petitioner's exceptionality as "specific learning disabled." It identified "instruction" as the educational service activity area for which goals and objectives were to be developed and implemented. The priority educational need was described therein as to "increase reading fluency."

3. The IEP also included a description of the assessment procedures related to achieving the annual goals. Those assessment tools included informal testing as well as Diagnostic Assessment of Reading (DAR) and Specialized Reading Instruction (SRI). The assessment method also followed by the Respondent in meeting the goals of the IEP included observation by Ms. [redacted], the school reading coach, as well as the reading teacher, Ms. [redacted]. The assessments conducted by Ms. [redacted] for reading fluency and comprehension, while not direct, discrete testing of phonemic knowledge and graphemic awareness, subsume and reflect the level of such phonemic knowledge and graphemic awareness in their results.

4. The August 4, 2005, IEP additionally determined that the Petitioner's priority educational need was also to improve note-taking and organizational skills.

5. As a part of that IEP review and enactment process, a BIP was developed through the efforts of the IEP team and the Respondent's behavioral specialist, [redacted]. His recommendations were followed and the BIP was put into place in the August 4, 2005, IEP. The parent participated fully in this IEP process and agreed to its goals and content.

6. On an ongoing basis the Respondent worked diligently through its staff and through its behavioral specialist, Mr. [redacted], to respond to the parents' concerns regarding implementation of the BIP. In the period of time immediately before implementation of the August 4, 2005, IEP, Ms. Turrentine-Jenkins, a school psychologist, conducted an evaluation of the Petitioner. That evaluation in June of 2005, did not include a social and emotional component because the Petitioner's parent refused to allow the Respondent to conduct such an assessment.

7. The Petitioner maintains that student [redacted] has exhibited suicidal ideation. At the August 20, 2005, IEP meeting however, no mention was made by the Petitioner of any suicidal ideation issues regarding [redacted] Several months later, Dr. [redacted]'s evaluation noted possible suicidal ideation. That

evaluation was made available to the Respondent, whereupon various school district personnel reviewed the existing crisis intervention plan that had already been enacted for the Petitioner.

8. During the subsequent IEP meeting the school psychologist sought to discuss Dr. [redacted]'s concerns regarding the Petitioner's mental state. The parent objected to any such discussion however, on grounds of confidentiality. Dr. [redacted] had specifically denied that the Petitioner was a suicide risk.

9. Ms. Garman, the assistant principal, became aware of a letter that the Petitioner [redacted] had written in [redacted] freshman year in high school, which although not in evidence, by inference from the testimony had some elements of concern regarding suicidal ideation. She discussed the matter at length with [redacted] and [redacted] assured [redacted] that [redacted] had no such feelings, but rather was upset when [redacted] had written the letter because of the loss of a friend or a friendship. Ms. Garman proceeded to discuss her concerns about the Petitioner's potential for self-harm with [redacted]'s mother. [redacted] mother assured her that the matter was being taken care of through counseling which [redacted] was undergoing at the time. Consequently, Ms. Garman, believed that the matter was being adequately addressed.

10. Ms. Garman also established that she had assisted in the development and implementation of the crisis intervention plan created for the Petitioner. The Petitioner's parent was made aware of that plan and had never expressed any concerns over its contents or implementation.

11. The Petitioner's recent educational assessments showed that [redacted] skills in basic phonemic awareness are adequate. When assessing reading capability, phonemic awareness is one of the first elements evaluated. The Petitioner's evaluation showed that [redacted] particular difficulty is with phonetics or specific sounds. Despite the difficulty with phonetics, [redacted] evaluation showed [redacted] comprehension to be well within the average range and commensurate with [redacted] intellectual ability.

12. The Respondent has addressed the Petitioner's identified reading deficiencies through the use of specific instructional and remediation tools such as the "great leaps program." [redacted]. has demonstrated significant progress since [redacted] has entered high school, and in the past academic year, in both reading fluency and reading comprehension. In fact, [redacted] interim grade reports issued just prior to the hearing show that [redacted] has a C in "math topics" and has an A in English and an A in "learning strategies." This is in consideration of the fact that [redacted] has already been absent for seven days in the first part of this school year.

13. Generally, however, [redacted] grades have improved markedly since [redacted] began high school. At the end of [redacted] ninth grade year [redacted] had a 2.0 average, at the end of [redacted] tenth grade year which includes the 9th grade average [redacted] had a 2.4 average and at the end of [redacted] junior year [redacted] had a 2.42 as a tenth grader and a 2.41 as an eleventh grader. Ms. Turrentine-Jenkins also finds that [redacted] is exhibiting more confidence and seems to be taking charge of [redacted] academic career and to be more self-motivated. [redacted] is showing definite leadership capabilities in [redacted] school life and in [redacted] part-time working situation. [redacted] appears to have less and less occasion to consult with the guidance counselor Ms. Turrentine-Jenkins. Ms. Turrentine-Jenkins's only specific concern about [redacted] academics is [redacted] absences. She finds that [redacted] is perfectly capable of graduating and [redacted] will graduate with a standard diploma at the end of the 2006-2007 academic year.

14. During the period 2004-2005, the Petitioner was continuously and regularly assessed with regard to [redacted] academic process, including in the areas involved in reading progress. To some extent, at times, [redacted] achievement on these assessment evaluations was impaired by [redacted] visually acuity problem. [redacted] has a problem with visual acuity which requires [redacted] to wear corrective glasses. [redacted] refuses, however, to wear [redacted] corrective lenses and did not wear them during [redacted]

reading assessments, which retarded the efficacy of [redacted] scores. Nevertheless, [redacted] assessments showed that [redacted] was making process in academics and in reading fluency and comprehension. The assessment data eventually indicated that [redacted] did not demonstrate a need for further phonemic or graphemic training. That is why it was not incorporated into the most recent IEP, that of April 2006. The IEP's reading goals and objectives contained in the Petitioner's last two IEP's, dated November 2005 and April 2006 were based on data derived from ongoing assessments conducted by the Respondent. They were not based in the case of the April 2006 IEP at issue, upon the Florida Comprehensive Assessment Test (FCAT) reading test nor with any belief that any [redacted] had passed the FCAT reading test. In fact, knowledge of [redacted]'s passage of the FCAT reading test was not obtained by the Respondent until May 2006 approximately one month after the IEP at issue had been completed. Rather, the reason that further phonemic or graphemic training was not included in the new IEP of April 2006 was that the Respondent's own assessment data indicated that the Petitioner did not demonstrate any need for such further training based upon [redacted] classroom performance and the results of the various formal and informal assessment evaluations.

15. The Respondent has uniformly provided the Petitioner with notice of the variety of meetings held related to [redacted]

educational progress and status, including the formal written notice required by the Individuals With Disabilities Education Act (IDEA).

16. Indeed, the Petitioner was provided with written notification on March 30, 2005, that discussion of the necessity of continuing the BIP in the upcoming IEP would be on the agenda for the April 5, 2006, IEP meeting. Additionally, the Petitioner was provided a draft IEP at the March 30, 2005, meeting so she would have that to review, with her attorney, prior to the re-convening of the IEP meeting and effort on April 5, 2006. The Petitioner fully participated in the discussion of the BIP and its inclusion or non-inclusion in the new IEP, at the March 30, 2005, IEP meeting. She expressed objection to removal of the BIP from the Petitioner's IEP at that time.

17. After implementation of the new IEP, [redacted] parent filed a due process hearing request at issue. That due process hearing request and the Petitioner's position in this case basically asserts that the Respondent should include appropriate goals in the IEP that address deficits in phonemic and graphemic knowledge and phonemic awareness; should provide a systematic, multi-sensory approach to reading in order to address the alleged effects of [redacted]'s learning disabilities; that the Respondent should use more than a single measure or assessment

in determining the appropriate educational program; and that the BIP should be included in the April 2006 IEP for [redacted]

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. § 1003.57(5), Fla. Stat. (2005); 20 U.S.C. § 1400, et seq.

19. The IDEA requires the school district to provide FAPE to a student with exceptionalities or who is in need of special education services. See 20 U.S.C. Section 1400(d)(1)(A). A school district generally must develop an IEP for each student identified as eligible for special education services and must follow certain procedures in the process in arriving at an IEP. See 20 U.S.C. Section 1414.

20. The United States Supreme Court set the bedrock legal standard for determining whether an educational agency (state or local) has provided FAPE or has violated IDEA. In Board of Education v. Rowley, 458 U.S. 176 (1982) the court held:

> [A] court's inquiry . . . is twofold. First, has the state complied with the procedures set forth in the Act? And second, is the individualized education program developed through the act's procedures reasonable calculated to enable the child to receive educational benefits?

Rowley, 458 U.S. at 206-207. See also School Board of Collier County Florida v. K.C., 285 F.3d 977 (11th Cir. 2002).

21. The nature and extent of educational benefits required to be provided by Florida School Districts was discussed in School Board Martin County v. A.S., 727 So. 2d 1071 (Fla. 4th DCA 1999), wherein the court held, regarding the standard of educational benefits which should be provided to exceptional students:

> Federal cases have clarified what 'reasonably calculated to enable the child to receive educational benefits' means. Education benefits under IDEA must more than trivial or de minimis. J.S.K. v. Hendry County School District, 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Department of Education, 915 F.2d 651 (11th Cir. 1990). Although they must be 'meaningful' there is no requirement to maximize each child's potential. Rowley (citation omitted).

22. The burden of proof to establish that the IEP does not comport with the IDEA and does not provide for FAPE resides with the Petitioner. See Schaffer v. Weast, 546 U.S. 49 (2005).

23. In terms of the provision of procedural safeguards, the Petitioner alleges the following error: That the Respondent failed to provide notice of its intention to discuss the necessity of continuing or discontinuing the formal, behavioral, intervention plan at the IEP meeting of April 5, 2006. The IDEA at Title 20 U.S.C. Section 1415(f)(E), provides, concerning the legal effect of procedural violations, as follows:

(E) Decision of hearing officer.

(i) In general. Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies --

(I) impeded the child's right to a free appropriate public education.

(II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

24. 20 U.S.C. Section 1415 further reads in pertinent part as follows:

(b) Types of procedures. The procedures required by this section shall include the following:

* * *

(3) Written prior notice to the parents of the child, in accordance with Subsection (c)(1), whenever the local educational agency -

(A) proposes to initiate a change, or

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of

a free appropriate public education to the child.

* * *

(c) Notification requirements:

(1) Content of prior written notice. The notice required by subsection (b)(3) shall include --

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part (citation omitted) and, if this notice is not an initial referral for evaluation, the means by which a copy of the description of the procedural safeguards can be obtained;

* * *

(d) Procedural safeguards notice --

(l) In General.

(A) Copy to parents. --A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parent.

(i) upon initial referral or parental request for evaluation;

(ii) upon first occurrence of the filing of a complaint under subsection (b)(6); and

(ii) upon request by the parent.

* * *

(j) Maintenance of current educational placement. Except as provided in (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the state or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child . . . .

25. State regulations also require the District to provide parents with prior written notice a reasonable time before any proposals to change the placement or program of a child. See Fla. Admin. Code R. 6A-6.03311(1). Written notice to the parents must indicate, among other things, the purpose of the meeting and who, by title and position, will be attending the meeting. Fla. Admin. Code R. 6A-6.03028(7)(b).

26. The preponderant, persuasive evidence establishes that the Respondent did not commit procedural violations which in any way impeded [redacted] right to a FAPE; significantly impeded the parents' opportunity to participate in the decision-making process regarding FAPE or caused any deprivation of educational benefits for purposes of the above-quoted statute. In fact, the Respondent gave the parents sufficient prior written notice of the intent of the IEP team to discuss the status of the BIP at the April 5, 2006, meeting. A draft copy of the IEP was provided to the parents and to the parents' counsel on March 30,

2006, to allow them to prepare for the discussion which would take place on April 5, 2006, and which did take place.

27. Therefore, the Respondent has substantially complied with the first part of the Rowley test in its development of the IEP for the Petitioner. It must also be determined whether there was compliance with the second portion of the Rowley test.

28. In this regard, an appropriate education does not mean a "potentional-maximizing education." Rowley, at 198, n. 21. The issue in reviewing an IEP is whether the student has received "the basic floor of opportunity" to receive an educational benefit. J.S.K. v. Hendry County School Board, 941 F.2d 1563, 1572-1573 (11th Cir. 1991); Todd D. v. Andrews, 933 F.2d 1576, 1580 (11th Cir. 1991). FAPE does, however, require "more than a trivial educational benefit." See Ridgewood Board of Education v. N.E., 172 F.2d 238, 247 (3rd Cir. 1999). An IEP must provide "significant learning" and "meaningful benefit" when considered in light of a student's potential and individual abilities. Ridgewood Board of Education v. N.E., supra at 248.

29. The IEPs developed in 2004-2005 and culminating in the April 2006 IEP, developed by the Respondent succeeded in their mission to improve the Petitioner's academic skills and success, and particularity the Petitioner's reading skills. This is shown by the preponderant, persuasive testimony and evidence of record and it must be concluded that a "basic floor of

opportunity" has been provided such that meaningful educational benefit has been accorded [redacted] by the Respondent, the IEP's enacted and their implementation. FAPE has been provided to [redacted] including by the IEP of April 5, 2006.

30. The Petitioner also claims entitlement to "compensatory education" as an alleged consequence of the procedural violations it alleges the Respondent committed, by not including the Petitioner's desired reading program features and BIP in the most recent IEP at issue. This claim by the Petitioner is not supported by the preponderant, persuasive evidence and testimony of record. There is no evidence in the record which can support a conclusion that the alleged procedural violations have caused any delay in the educational progress of the Petitioner or had any deleterious effect on the provision of FAPE to the Petitioner.

31. Even if there were evidence that a formal behavioral "plan" was not in place at the time when its presence and implementation might have been beneficial, there remains substantial evidence that behavioral management, in an appropriate manner and by appropriate methods, was on-going during the Petitioner's entire academic experience, even if a formal plan was not in place for that entire time.

32. Moreover, in the absence of a formal behavioral plan it still does not follow that compensatory education is

appropriate. Compensatory education is simply a compensatory remedy designed to cure the deprivation of a child's right to FAPE. Lester H. v. Gilhool, Secretary of Education, Commonwealth of Pennsylvania and The Chester Upland School District, 916 F.2d 865 (3rd Cir. 1990). The only compensatory education claimed by the Petitioner is additional reading instruction programs over and above that determined appropriate in the IEP at issue. This remedy would only be appropriate if there were record evidence proving that the alleged procedural violation caused a deprivation of the Petitioner's right to a FAPE that could be remedied by the addition of more reading programs or reading program features.

33. If the claim for compensatory education is based upon the fact that certain reading programs or reading program features were not included in the most recent IEP in the Petitioner's view, there is no showing that their lack of inclusion has caused a deprivation of [redacted] right to FAPE, given the preponderant, persuasive evidence of [redacted] significant progress in reading, reading fluency, and reading comprehension skills, including phonemic and graphemic skills or progress. The same is true with regard to [redacted] academic progress in English, math, and other areas.

34. Moreover, if the Petitioner's claim for compensatory education is grounded on the removal of the BIP from the IEP

provisions and requirements, the preponderant, persuasive evidence shows that the BIP is no longer needed for [redacted] given [redacted] progress in leadership skills and emotional health in addition to [redacted] academic progress. The testimony of Ms. Terrintino-Jenkins in this regard is accepted. There has been no persuasive showing that inclusion of the formal BIP in [redacted] latest IEP is necessary for reasonable and meaningful educational benefit and progress and thus its removal from the IEP does not constitute a denial of FAPE. Moreover, the removal of the formal BIP, has not been demonstrated by preponderant, persuasive evidence to be an occurrence or condition in the Petitioner's educational program, based upon the most recent IEP, which could be compensated for by the addition of further reading programs. The BIP is more related to the students emotional health and well-being and does not, and is not, designed to address deficits in the areas of reading.

35. In this case there is no persuasive evidence of a causal connection between the alleged procedural violation, the absence of the BIP and additional reading program benefits or features. There is no competent, persuasive evidence that additional programs or features as proposed by the Petitioner would be appropriate for this student nor that the lack of them versus what is being provided by the Respondent through the IEP

of April 5, 2006, constitutes a denial of FAPE, in whole or in part.

36. In summary, and in consideration of the above findings of fact and conclusions of law and the preponderant, persuasive evidence of record, it has not been established that the absence of a BIP in the most recent IEP of April 5, 2006, constitutes a deprivation of the Petitioner's right to FAPE. Moreover, a violation of any of the IDEA procedures is not per se a violation of the act. Weiss v. School Board of Hillsborough County, 141 F.3d 990, 996 (11th Cir. 1998). Even it be assumed that a procedural defect occurred regarding notice, one must look to the facts to determine whether that possible procedural defect resulted in the Petitioner's inability to participate appropriately and effectively in the IEP meeting at issue. The preponderant evidence establishes that such a frailty on the Petitioner's ability to adequately participate did not arise or occur. In fact, the Petitioner's mother participated in the meeting of March 30, 2006, and the meeting of April 5, 2006, to any extent she desired. The persuasive evidence shows that participation. The evidence is clear that the Petitioner's mother, the parent in question, did receive adequately notice of the April 5, 2006, meeting. The testimony to that affect was not refuted.

ORDER

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is ordered that the Petitioner's claim be denied.

DONE AND ORDERED this 19th day of January, 2007, in Tallahassee, Leon County, Florida.

S

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of January, 2007.

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 230.23(4)(m)5, Florida Statutes; or
c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 230.23(4)(m)5 and 120.68, Florida Statutes.