

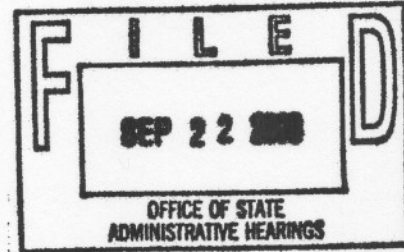
03-0332935

OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

~~XXXXXX~~,  
Petitioner,  
v.  
COBB COUNTY SCHOOL DISTRICT,  
Respondent.

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DOCKET NUMBER:  
OSAH-DOE-SE-0332935-33-SWT



FINAL DECISION

I. Introduction

Pursuant to a request for a hearing filed by Petitioner, a hearing began on August 12, 2003, and concluded on August 13, 2003, with the time for issuance of a Final Decision being extended to September 22, 2003 in light of parties needs to review transcripts and the hearing officer's need to review the entire record including party submissions of proposed findings of fact and conclusions of law that were submitted subsequent to the parties' review of the transcripts. Glenn A. Delk, Esq. represented Petitioner's ~~XXXX~~'s parent on behalf of Petitioner, a minor student. Sylvia Eaves, Esq. represented the Cobb County School District. Petitioner. The issue presented is whether or not the school system has provided a free appropriate public education (FAPE) in accordance with the Individualized Education Plan (IEP) for school year 2003-2004.<sup>1</sup>

For reasons indicated, it is determined that the current IEP fails to provide FAPE and that it is necessary to conduct an independent psychological evaluation and to provide greater counseling for the transition from ~~XXXX~~'s current private placement back into the Cobb County School system and to determine whether or not ~~XXXX~~ continues to be appropriately designated a special needs child.

II. Findings of Fact

1.

~~XXXX~~ is a ~~XX~~ year old male child who resides with his mother, ~~XXXX~~'s parent, within the Cobb County School District. (Transcript, page 243, line 20; page 244, line 23).

<sup>1</sup> Respondent's motion in limine that prohibited, excluded, limited and suppressed any evidence, proffers, tenders, comments, statements, testimony, colloquy, or any other utterance between the parties regarding any and all educational services provided to ~~XXXX~~ during the 2000-2001 and 2001-2002 school years was GRANTED.

2.

██████ is eligible for special education services pursuant to the Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1400, *et. seq.* under the category of Severe Emotional and Behavior disorders (SEBD). (Respondent's Exhibit 5).

3.

██████'s current status as a child eligible for special education services is challenged by testimony given by Dr. Leroy Ervin, one of Petitioner's witnesses, with testimony regarding the over-representation of African-American males in special education programs that would infer the possibility that ██████ might be a member of such a category and might inappropriately be identified as a child eligible for special education services. (Transcript, pages 220-1, lines 22 through 25 on page 220 and lines 1 through 4 on page 221, pages 224-5, lines 18 through 25 on page 224 and lines 1 through 5 on page 225).

4.

Prior to being removed by his parent from the District in the fall of the 2002-2003 school year, ██████ received special education services through ██████ Academy, the ██████ center for the District. He had completed the fifth grade in their program. (Transcript, page 158, lines 3-6).

5.

██████'s parent disagreed with the Individualized Education Plan (IEP) for the 2002-2003 school year recommended by an IEP committee and on August 13, 2002, filed for a due process hearing. (Respondent's Exhibit 1).

6.

To resolve the due process hearing and without an admission of wrongdoing, the District entered a settlement agreement on October 8, 2002, with ██████'s parent. According to its terms, the agreement resolved all claims against the District arising out of ██████'s parent's due process hearing request. The agreement also stated that ██████'s parent released and forever discharged the District from any and all claims or causes of action which she or ██████ may have, known or unknown, arising from or out of any educational services or programming provided to ██████ through and including the 2002-2003 school year. (Respondent's Exhibit 1).

7.

Beginning in September of the 2002-2003 school year, ██████ attended ██████ Academy, a private Christian school, in Atlanta, Georgia. Even though ██████ was promoted to the sixth grade in the District, he was in the fifth grade class at ██████'s because that was then

the highest grade in the school. There were six fifth-graders in his class. The fifth-grade class shared a large room with a combined third and fourth-grade class of twelve students. The two groups each had a teacher. [REDACTED] also participated in a music class of eighteen students that included all third-, fourth-, and fifth-graders. (Respondent's Exhibit 1; Transcript, page 147, lines 8-111, 19-23; page 148; lines 3-5; page 157, lines 24-25; page 158, lines 1-2; page 153, line 12; page 155, lines 1-5).

8.

[REDACTED] Academy provides no special education services or related services to students who attend this school, including [REDACTED]. (Transcript, page 157, lines 14-23).

9.

During [REDACTED]'s fifth-grade year in the District, he was administered the Fifth Grade Criterion-Referenced Competency Tests (CRCT). The CRCT is a test mandated by the State of Georgia and measures how well a student has learned the Georgia Quality Core Curriculum in the areas of reading, math, and English/language arts. A student can score between 150 and 450 in each of the three categories. A student who scores 300 to 349 meets standards for a fifth-grader in Georgia. A student who scores below 300 does not meet standards. A student scoring 350 and above exceeds standards. [REDACTED] was very close that year to meeting standards at the 300 mark on the CRCT. (Transcript, page 80, lines 13-18; page 84, lines 19-23; page 101, lines 21-24).

10.

[REDACTED] was administered the Sixth Grade CRCT in the spring of 2003 at [REDACTED] Academy as required by the settlement agreement. He scored 318 in math, 314 in reading, and 286 in English/language arts. Therefore, he met expectations for a sixth-grader in math and reading and did not meet expectation in English/language arts. The English/language arts score was lower than the fifth-grade scores in the spring of 2002, in the District. (Transcript, page 84, lines 8-11; page 101 lines 5-14).

11.

[REDACTED] was also administered the math grade placement, word recognition, and reading comprehension portions of the Brigance Diagnostic Comprehensive Inventory of Basic Skills on April 29, 2003, as required by the settlement agreement. On the Brigance, he correctly read 67 words on the work recognition sub-test, placing him at the sixth-grade level. On the math sub-test, he scored at the fourth-grade level; and in reading comprehension he scored at the ninth-grade level.

The Brigance is a skills inventory test, which measures skills that students should learn in sequence. Test items are limited for each grade level. For example, there are only four (4) math problems per grade level. A student's grade level on the Brigance is determined by the last grade



sequence of skills of which the student answers the majority correctly. It is a planning tool used by teachers to not only progress but to plan for instruction. The test allows teachers to assess skill levels of individual students to determine where instruction for the student should begin. Teachers look at not only the scores but also the actual work the student did on the test to determine instruction needs. The Brigance has been used approximately five years by ██████████ Academy to track progress of students in reading and math. It is no longer used, as there are more accurate assessments to measure student academic gains. It has been replaced by the CRCT as the measurement of student progress. (Respondent's Exhibit 1; Petitioner's Exhibit 3; Transcript, page 65, lines 16-17; page 67, lines 15, 18-25; page 68, lines 6-19; page 71, lines 23-25; page 74, line 9; page 79, lines 19-25; page 80, lines 1-4; page 83, lines 23-25; page 84, line 1).

12.

In the preceding two school years, ██████████'s Brigance scores in math and reading comprehension were below the grade level in which ██████████ was enrolled at the time. However, the scores for 2001 are not accurate, as the examiner noted that ██████████ did not attempt to answer the test items. In addition, scores for the 2002 Brigance for math and reading comprehension are also questionable and appear to be the result of lack of motivation and oppositional behaviors rather than an accurate estimate of his skills. (Petitioner's Exhibit 3; Transcript, page 73, lines 18-22; page 339, lines 19-21).

13.

██████████ was also administered the Walker-McConnell Scale of Social Competence and School Adjustment in December 2002, and after the completion of the 2002-2003 school year. The Walker-McConnell measures teachers' perception of students' ability to interact appropriately with peers and adults and to operate successfully in a school setting. The four areas on the scale are empathy, which is the student's ability to relate to other people or show sympathy; peer relationships, which is the student's ability to interact with their peers in their social context; self-control, which is the student's ability to control his or her emotions and accept constructive criticism; and school adjustment, which is the student's ability to attend to a task, follow instructions from the teacher, stay organized, and work independently. The purpose of the measurement is to determine students who may have some deficits in the area of social competency and to give prescriptive guidelines as to what areas are deficit so that additional training and resources can be addressed. It is predictive of student behavior across different kinds of settings. On both administrations, ██████████ scored in all areas of the normative range. That is, he was performing like most general education students. The July test scores show some regression in the area of school adjustment; however, he was still within the normative range. A special education student in a restrictive setting with these test scores would be considered for mainstreaming in regular education classes. (Respondent's Exhibit 8; Transcript, pages 111-114, 123,125).

14.

At the time [REDACTED] left the District, he was demonstrating appropriate behaviors, such as following directives, getting along with his peers, and completing his class work; although the behaviors were not consistent. (Transcript, page 191, lines 13-25).

15.

Two District employees observed [REDACTED] at [REDACTED] Academy during the 2002-2003 school year. Ms. Judy Harvey observed him over a three-day period in October. She observed that he complied with all rules and routines of the class including when he participated in a music class of eighteen students. Ms. Mary Ann Eads observed [REDACTED] twice during April and did not see any behavioral problems. (Transcript, page 146, lines 17-20; page 149, lines 21-23; page 155, lines 3-5; page 156, lines 6-15; page 165, lines 1-4; page 94, lines 3-5; page 105, lines 17-21).

16.

[REDACTED] participated on a community football team. He behaved appropriately at practices and games that were attended by large numbers of people. (Transcript, page 234, lines 8-11; page 235, lines 1-6).

17.

An IEP committee meeting was held on May 14, 2003, to develop [REDACTED]'s IEP for the 2003-2004 school year. The committee members included Judy Harvey and Mary Ann Eads, District staff who were certified by the Georgia Professional Standards Commission in the field of Behavior Disorders and who had observed [REDACTED] at [REDACTED]'s. Ms. Eads had also known [REDACTED] from his prior placement at [REDACTED] Academy, as did Ms. Marianne Weidnere, the Assistant Director of [REDACTED] Academy who also participated in the IEP meeting. The committee developed a goal and short-term objectives for [REDACTED] to maintain his current ability to follow directions, stay in the assigned area, follow school rules and routine, and complete school work. The committee discussed a continuum of placement options, including regular education class placement with no support, regular education classes with supports, and special education classes. [REDACTED]'s parent presented [REDACTED] Academy as a placement option. The committee recommended placement of [REDACTED] in a regular education seventh-grade setting at [REDACTED] Middle School with special education supports. The special education support includes 45 minutes of consultative services per week provided by a special education certified teacher to include 30 minutes with [REDACTED]'s teachers and 15 minutes with [REDACTED]'s parent. (Respondent's Exhibit 5; Transcript, page 64, lines 1-16; page 145, lines 14-15; page 146, lines 8-13; page 181, lines 17-19; page 159, lines 23-25; page 160, lines 1-10).





22.

Prior to transfer from the District school to ██████████, ██████████'s problematic behavior included his habit of leaving school; a practice that resulted in one or two dangerous situations. While at the District school he was substantially depressed and many of his problems were caused by his school environment or by medications prescribed incident to medial diagnosis supporting his special education status. After transferring to ██████████, he no longer takes any of the medications and has emotionally prospered. A year after transfer, he is a totally different child. (Transcript, page 17, lines 8-11; page 176, lines 4-6; pages 225-226, page 228, lines 4-10, page 252, page 260, lines 17-20, page 60, lines 21-22; page 299, lines 5-9).

23.

Prior to transfer from the District school to ██████████, ██████████'s mother received notice of ██████████'s ongoing behavioral issues probably more than 100 times in a school year. She was often interrupted by telephone calls at work. ██████████'s parent is convinced that he emotionally needs another year in his current placement at ██████████ prior to a transfer back into the District school. (Testimony of ██████████'s parent). She has another child who has successfully attended District schools without incident and ██████████'s parent does not generalize ██████████'s educational needs with that of any of her children. (Transcript, page 247, lines 23-25, page 248, lines 5-9)

24.

Dr. ██████████ a psychologist who has worked with ██████████ previously, believes that the transition from ██████████ to a regular setting in Cobb County should be more gradual than that proposed by Respondent. (Transcript, page 313-314).

25.

The proposed IEP does not include a sufficient current psychological analysis of ██████████ in light of his prior behavioral problems. There exists a reasonable propensity for recurrence of these problems if not properly assessed prior to transfer. (Record as a whole).

### III. Conclusions of Law

1.

The pertinent laws and regulations governing this matter include the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*; 34 C.F.R. § 300 *et seq.* and *Ga. Comp. R. & Regs.* at Chapter 160-4-7(DOE Rules). It is required that a free and appropriate education (FAPE) be provided to any student who is identified as having a disability as defined by the Act, 20 U.S.C. § 1412(l); 34 C.F.R. § 300.4 in the least restrictive environment. Georgia regulations

require that a due process hearing must relate to issues of identification, evaluation, placement or the provision of a free appropriate public education (FAPE). DOE Rule 160-4-7-.02(7)(b)(1). As asserted by Respondent, IDEA does not require a school district to pay for the cost of education, including special education and related services, of a child with a disability at a private school if the school district made FAPE available to the student and the parent unilaterally elected to place the student at the private school. 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.403(c).

FAPE is satisfied when Respondent provides “personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction.” **Hendrik Hudson Central School District v. Rowley**, 458 U.S. 176 (1982).

“Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate grade levels used in the State’s regular education, and must comport with the child’s IEP, as formulated in accordance with the Act’s requirements. If the child is being educated in regular classrooms, as here, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.*

A two-pronged test was established to determine whether a local school district is providing a disabled student with an appropriate IEP, the first prong being a determination whether the school district has complied with the administrative procedures set forth in the act and the second prong being a determination whether or not the IEP is reasonably calculated to allow the child to achieve educational benefit. *Id.* An appropriate public education does not mean absolutely the best or “potential maximizing” education for the individual child, but rather the states are obliged to provide a “basic floor of opportunity” through a program individually designed to provide educational benefit to the handicapped child. *Id.* There is no universal measure of “some educational benefit” and each case must be reviewed upon its merits rather than attempting to articulate any particular formula for determining the adequacy of educational benefits conferred by any given IEP. **JSK by and through JK v. Hendry County School Bd.**, 941 F.2d 1563 (11 Circuit 1991).

2.

The initial burden of persuasion in these matters to show that the Individualized Education Program (IEP) is appropriate and that it provides free appropriate public education (FAPE) in the least restrictive environment. This burden is placed on the school district. Only after such a burden is met, does it shift the burden to the other party challenging the terms of the IEP. **Devine v. Indian River County School Board**, 249 F.2d 1289 (11<sup>th</sup> Cir. 2001).

As applied in this case, this burden does not shift; inasmuch as it is determined that Respondent has not met its burden of establishing FAPE.



The FAPE required is "tailored to the unique needs of the handicapped child by means of an "individualized educational program" (IEP) which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child parents or guardian , and where appropriate, the child." Id.

The IEP includes "(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved."


While the IEP for the 2003-2004 year meets IEP criteria enunciated in (A), (B), and (C), weaknesses are apparent in (D) and (E) in light of [redacted]'s emotional and psychological history. Only a short time in an alternative environment has transpired during which time [redacted] has show great improvement both academically and emotionally, sufficient to prompt Respondent to recommend transfer back to the District school in a far-less restricted environment than [redacted] previously experienced there. Given [redacted]'s history, the short-lapse of time between emotionally and/or psychologically troubled time incident to his prior placement, and expert testimony confirming the need for delay in transition, the parent's request for another year of placement in the current facility is reasonable and appears too easily dismissed in Respondent's desire to transfer [redacted] into the District school system and avoid payment of private school tuition. Within the factual context, Respondent essentially seeks to transfer [redacted] from a less restrictive environment to a more restrictive environment since he would be moving from a general education setting with no special education components to a basically general education setting with some special education components. That FAPE is currently being met by the private school is implicit in the fact that Respondent entered a consent agreement that provided FAPE for 2002-2003. Although Respondent may enter into a consent agreement where it admits no liability and obtains waiver of suit for allegations made, it cannot waive its responsibility to provide FAPE.

#### IV. Decision

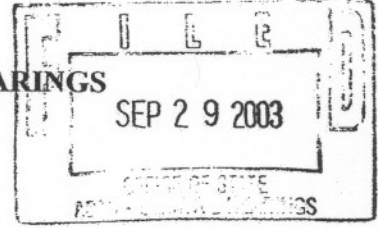
The IEP for 2003-4 is not reasonably calculated to allow [redacted] to achieve educational benefit and free and appropriate education (FAPE) in the least restrictive environment; inasmuch, as it fails to adequately identify the emotional and psychological needs of TJW incident to a transfer from the current private placement established by a Consent Agreement for the 2002-3 school year back into the District school. Respondent is directed to obtain psychological services for [redacted] sufficient to develop an IEP that will provide sufficient expert psychological advice based on new psychological evaluations of [redacted] to provide reasonable transition from the current placement back into the District school. In the interim, Respondent will continue to provide payment for private school tuition at the current placement. While Respondent is free to select a

psychologist, it is suggested that Dr. [REDACTED]'s services would probably prove to be the least costly to Respondent in light of the patient-therapist relationship with [REDACTED] that has already been established. Whether or not [REDACTED] remains at [REDACTED] for the remainder of the 2003-4 school year is a function of an IEP to be developed with sufficient input of [REDACTED]'s psychological needs which is not adequately developed in the current IEP as proposed.

**SO ORDERED**, this 22<sup>nd</sup> day of September 2003.

  
**STEVEN W. PEATE**  
**Administrative Law Judge**

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**CLARIFICATION AND/OR AMENDMENT OF FINAL DECISION**

In light of some apparent confusion over the Respondent's obligation to reimburse Petitioner for private school tuition incident to the Final Decision issued in this matter on September 22, 2003, the ALJ clearly contemplated that the Respondent would pay ~~DOE~~'s private school tuition for tuition accruing in 2003, prior to and during the hearing as well as such tuition subsequent to the Final Decision until such time as a new IEP is developed that provides FAPE for reasons enunciated in the order.

To the extent necessary, the Final Decision is amended to reflect this clarification.

SO ORDERED, this 30th day of September 2003.

  
STEVEN W. TEATE  
Administrative Law Judge