

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

** ,

Petitioner,

vs.

Case No. 18-3555E

PASCO COUNTY SCHOOL BOARD,

Respondent.

_____ /

FINAL ORDER

Based on the parties' agreement to submit this case for decision by the duly-designated Administrative Law Judge, Diane Cleavinger, of the Division of Administrative Hearings (DOAH), on a stipulated record, this Final Order is entered.

APPEARANCES

For Petitioner: [REDACTED], Esquire
DeL'Etoile Law Firm, PA
Suite 200
10150 Highland Manor Drive
Tampa, Florida 33610

For Respondent: [REDACTED], Esquire
McClain, Alfonso and Meeker, P.A.
38416 Fifth Avenue
Zephyrhills, Florida 33542

STATEMENT OF THE ISSUE

The issue in this case is whether the provision of a free appropriate public education (FAPE) to Petitioner requires that the parents of Petitioner be permitted to record individual

education plan (IEP) meetings involving Petitioner, a student enrolled with the Pasco County School Board (District or School Board).

PRELIMINARY STATEMENT

On [REDACTED], Petitioner (Student), through [REDACTED] parents, filed a Request for Due Process Hearing (Complaint) against the School Board. The Complaint generally alleged that FAPE was not provided to the Student because the Student's parents were not permitted to record IEP meetings. The Complaint was forwarded to DOAH on [REDACTED]. That same day a Case Management Order was entered, establishing deadlines for a sufficiency review, as well as for the mandatory resolution session.

On [REDACTED], the School Board notified the court that the parties had been unable to resolve this matter. On [REDACTED], by agreement of the parties, this case was placed in abeyance. Subsequently, On [REDACTED], after conferring with the parties, the hearing was set for [REDACTED].

The hearing was not held as scheduled due to approaching Hurricane Michael. After discussion with the parties, the parties agreed that there was no need for a live hearing and that the case would be decided based on stipulated facts and evidence. On [REDACTED], an Order Canceling the hearing was entered. The Order also established a schedule for filing stipulated facts

and documents, proposed final orders and issuance of this Final Order.

On [REDACTED], the parties filed a Joint Stipulation of Facts. That same day, the parties filed Joint Exhibits numbered 1 through 14.

On [REDACTED], Petitioner timely filed a Proposed Final Order. Likewise, Respondent filed a Proposed Final Order on the same date. To the extent relevant, the filed proposed orders were considered in preparing this Final Order.

Unless otherwise noted, citations to the United States Code, Florida Statutes, Florida Administrative Code, and Code of Federal Regulations are to the current codifications.

For stylistic convenience, the undersigned will use [REDACTED] pronouns in this Final Order when referring to Petitioner. The [REDACTED] pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. The School Board is the constitutional entity authorized to operate, control, and supervise the public schools in Pasco County, Florida, and is a "local educational agency" under the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. § 1401 et. seq. As such, the School Board is responsible for providing the Student with FAPE, Title 20 U.S.C. § 1401(9).

2. The parents of the Student have undertaken primary responsibility for overseeing the Student's educational needs and have been active participants in IEP meetings. At the election of the parents, the Student has not been present at these meetings.

3. The Student is currently [REDACTED] years old, with a date of birth of [REDACTED]. [REDACTED] attends high school at School A, a local school in the District and is enrolled in [REDACTED] grade. As such, the Student is within the time period for development of transition services planning for post-graduation.

4. The Student is an individual with multiple disabilities and is part of the Exceptional Student Education (ESE) program, pursuant to IDEA. [REDACTED] diagnoses include [REDACTED], [REDACTED]

[REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] ([REDACTED]), [REDACTED] and [REDACTED]. [REDACTED] has a variety of [REDACTED] and [REDACTED].

The Student also has [REDACTED], is [REDACTED] and [REDACTED]. [REDACTED] has a very [REDACTED] [REDACTED] through the use of [REDACTED] and [REDACTED]

[REDACTED]. The Student was found eligible under the ESE category of [REDACTED] ([REDACTED]) with [REDACTED]

[REDACTED] and [REDACTED]. The Student also is eligible to receive services for [REDACTED] ([REDACTED]),

██████████ (██████), ██████████ (██████), ██████████
(██████) and ██████████ (██████). ████████ services are
██████████ and are necessary because the Student has a ██████████
██████████ due to ██████████, as well as other
██████████ that ██████████ school.

5. The evidence was clear, and the parents readily admit, that it is not appropriate for the Student to attend IEP or other meeting, although such ██████████. Further, the evidence was clear that the student does not function at a level ██████████ or ██████████.

6. Since it is not appropriate for the student to attend the IEP meeting and although the Student is ██████████ ██████████ must be discussed at an IEP meeting, the Student, under Florida Administrative Code Rule 6A-6.03028(1)(c)8., is not a member of the IEP team because of the lack of appropriateness of such attendance. In that regard, the School Board must invite the Student to the meeting. However, if a student does not attend an IEP meeting, the School Board's duty is to take other steps to ensure a student's ██████████ ██████████ are considered. Notably, the parents filled that role for the Student.

7. In general, IEP meetings, as well as other formal meetings required under IDEA, are official meetings and are attended by the ██████████, a number of school personnel and other

professionals. All the attendees provide input into the status of the Student's education and plan the course of that education. The School Board does not generally record these meetings, but does have notes taken during these formal meetings to memorialize the discussions and decisions made during those meetings. These notes become part of the educational record of the Student.

8. In fact, the School Board has offered to enhance the conference notes to permit the parents to review the conference notes during their creation with each conference topic and at the end of the meeting. The parents may request revisions to those notes and insert the parents understanding or position, should the parties disagree on the content of the conference notes. A finalized copy of the notes is made available to the parents at the end of the meeting. The parents can also provide an addendum to the notes later. Additionally, personal notes may be taken by the parents or any of the parties to the meetings. Such personal notes can be used by the parents in any discussion they might have with the Student.

9. In order to reasonably ensure that the Student understands [REDACTED] IEP and educational plan, the School Board intends to encourage the Student to attend [REDACTED] IEP meetings and provide staff, [REDACTED] or [REDACTED], to [REDACTED] and [REDACTED], [REDACTED]

██████. Further, the ██████ always have the ability to review the IEP and educational plan with the Student. Similarly, the ██████ always have the ability to obtain input from the Student regarding ██████ education and transition goals, as well as provide such Student input to the IEP team. Indeed, such parent-supplied information on a student is a core function of the parents role, as members of the IEP team.

10. Importantly, formal IEP meetings are confidential, as is the educational record of all students. These meetings are not subject to the government in the Sunshine Laws of the State of Florida. However, the evidence did not demonstrate that these meetings were private meetings (as opposed to confidential) in which the participants had any reasonable expectation of privacy. Indeed, these decisions and discussions during these meetings frequently become the subject of review by both the state and federal government, as well as, the subject of IDEA due process hearings. As such, participants do not have a reasonable expectation of privacy in the discussions and/or decisions, which occur during such formal meetings.

11. On the other hand, the School Board is charged with the responsibility of ensuring the confidentiality of these meetings and a student's educational record, as well as the responsibility to conduct such meetings and establish reasonable rules for such meetings.

12. Towards that end, the School Board's Policy 2461, sets forth the School Board's rule regarding the recording of meetings. The policy states:

Meetings involving student privacy interest, including without limitation, student grade challenges, disciplinary, EP, and IEP meeting, are not open to the public.

The right of access to such meetings, records, and right to record shall be limited as provided by law and otherwise specified by this policy.

* * *

The recording of a non-public meeting involving students (including an EP or IEP meeting) is prohibited unless a parent, authorized representative of a parent, or team member, is unable to understand or meaningfully participate in the process or the planning of the relevant student's education due to a disability, language barrier, or some other impairment.

The policy complies with the requirements of IDEA relative to recording meetings since, under IDEA, there is no general right to record IEP meetings unless such recordation is necessary to permit the parents or the Student to understand and participate in the IEP process. The School Board's policy clearly permits recordation of IEP-required meetings, when necessary, to enable the parents or student to understand or meaningfully participate in the meeting. However, the policy, as interpreted by the agency, does not expand the right to record meetings beyond what is afforded under state and federal law and does not provide or

broaden the scope of when recordation of IEP meetings must be allowed.

13. Around [REDACTED], [REDACTED], one of the Student's parents made a verbal request to [REDACTED], director of Student Support Programs and Services, to record future IEP meetings.

14. On or about [REDACTED], [REDACTED], [REDACTED] provided the Student's [REDACTED] with a letter denying the request to record upcoming IEP meetings. The letter cited policy 2461 as reason for the denial and stated, in pertinent part, as follows:

Your request to record the next and following IEP meetings for the student . . . is being denied. Regulations state that Students are only part of an IEP team, for decision making purposes, when appropriate. [The Student's] present level of performance based on parent input, formal/informal data, most recent evaluations, and progress towards IEP goals do not indicate that it's appropriate for [REDACTED] [REDACTED] in IEP meetings for decision making purposes.

15. As justification for the demand that the parents be allowed to record IEP meetings involving the Student, the parents claim that they need an accurate record of the meetings to review the meetings for the Student's benefit. The evidence demonstrated that the Student [REDACTED]

[REDACTED].
The evidence also showed that the [REDACTED] would not play the recordings to the Student, but use the recordings similar to

written notes to refresh their memory of the meeting and then verbally discuss the Student's educational plan with [REDACTED].

16. However, the evidence did not show that the parents were [REDACTED]. The parents clearly understand what is being said at IEP meetings. Further, the parents are able to take notes at IEP meetings. The evidence did not demonstrate that the parents have memory problems that would prevent the parents from meaningful participation in the IEP process or in communicating what occurred in the meeting to the Student. Indeed, there was no credible evidence that such electronic recordation of meetings was necessary for accuracy, participatory or informational purposes.

17. In this case, the evidence showed that the parents provided meaningful input during the Student's past IEP meetings and were able to develop an appropriate IEP for the Student at those meetings. More importantly, the parent participation or opportunity to participate was meaningful irrespective of whether such meetings were recorded or not and irrespective of whether the Student was present or not. There was no convincing or credible evidence that electronically recording meetings, with school personnel or administrative staff, was necessary to either the [REDACTED] or the Student's participation in or understanding of such meetings. Additionally, there was no convincing or credible evidence that electronically recording these meetings

was necessary to inform the Student about [REDACTED] IEP or [REDACTED] education. Further, the better evidence demonstrated that the parent meaningfully participated in meetings and were fully capable of and did communicate any necessary information to the Student, without recording such meetings.

18. As indicated, there is no general right to record IEP meetings under IDEA. Further, there is no need to record such meetings demonstrated by the evidence in this case. As such, the Petitioner's Complaint should be dismissed.

CONCLUSIONS OF LAW

19. The Division has jurisdiction over the parties to and the claims under IDEA in this proceeding. § 1003.57(1)(b), Fla. Stat. (2010); Fla. Admin. Code R. 6A-6.03311(9).

20. This case arises under the IDEA, Title 20 U.S.C. § 1400 (2004), and corresponding Florida Statutes and Florida Administrative Code rules.

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

22. The IDEA provides the opportunity for parent participation in the process of identifying, evaluating and

programming for students with disabilities. See C.F.R. §§ 300.501(b), 300.344(a)(1), and 300.517.

23. Like its federal counterpart, the State of Florida has adopted procedural safeguards consistent with 34 C.F.R. §§ 300.500-300.529, providing eligible students and their [REDACTED] with certain procedural safeguards, including due process protections. 34 C.F.R. §§ 300.121 and 300.129; OSEP Letter to William L. Librera, Ed.D., (December 20, 2004); Fla. Admin. Code R. 6A-6.03311. Like the federal IDEA provisions, Florida's procedural safeguards do not include a parental right to require recording of student IEP meetings or other meetings involving a student.

24. Rule 6A-6.03028 is the state regulation governing participation at IEP meetings. That section states, in pertinent part, as follows:

(3) IEP requirements. An IEP must be developed, reviewed, and revised for each eligible student or child with a disability served by a school district, or other state agency that provides special education and related services either directly, by contract, or through other arrangements, in accordance with this rule [REDACTED] are partners with schools and school district personnel in developing, reviewing, and revising the IEP for their student. . . .

(a) Role of [REDACTED]. The role of [REDACTED] in developing IEPs includes:

1. Providing critical information regarding

the strengths of their student;

2. Expressing their concerns for enhancing the education of their student so that their student can receive FAPE;

3. Participating in discussions about the student's need for special education and related services;

4. Participating in the determination of how the student will be involved and progress in the general curriculum, including participation in the statewide assessment program and in district-wide assessments;

5. Participating in the determination of what services the school district will provide to the student and in what setting; and,

6. Participating in the determination of which course of study leading towards a standard diploma the student will pursue, consistent with section 1003.4282, F.S., to include a course of study leading to a Scholar or Merit designation in accordance with section 1003.4285, F.S.

(b) Parent participation in meetings. Each school district shall establish procedures that provide the opportunity for one or both of the student's [REDACTED] to participate in meetings and decisions concerning the IEP for the student. [REDACTED] of each student with a disability must be members of any group that makes decisions on the educational placement of their student. Procedures to ensure participation in meetings shall include the following:

* * *

4. No later than the first IEP to be in effect when the student turns fourteen (14), or younger if determined appropriate by the IEP Team, the notice must also indicate that

a purpose of the meeting will be identifying transition services needs of the student and that the district will invite the student.

5. Not later than the first IEP to be in effect when the student turns sixteen (16), or younger if determined appropriate by the IEP Team, the notice must also indicate that a purpose of the meeting will be consideration of the postsecondary and career goals and transition services for the student, that the district will invite the student

* * *

8. The district shall take whatever action is necessary to ensure that the [REDACTED] and the student, beginning at age fourteen (14), understand the proceedings at a meeting,

* * *

(c) IEP Team participants. The IEP Team, with a reasonable number of participants, shall include:

1. The [REDACTED] of the student;

2. Not less than one (1) regular education teacher of the student, if the student is or may be participating in the regular education environment. The regular education teacher of a student with a disability, as a member of the IEP Team, must to the extent appropriate, participate in the development, review, and revision of the student's IEP, including assisting in the determination of:

a. Appropriate positive behavioral interventions and supports and other strategies for the student; and,

b. Supplementary aids and services, classroom accommodations, modifications or supports for school personnel that will be provided for the student consistent with this

rule.

3. Not less than one (1) special education teacher of the student, or where appropriate, not less than one special education provider of the student;

4. At least one (1) teacher of the gifted, if the team is developing an IEP for a student who is also identified as gifted in accordance with rule 6A-6.03019, F.A.C.

5. A representative of the school district who is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of students with disabilities, is knowledgeable about the general curriculum, and is knowledgeable about the availability of resources of the school district. At the discretion of the school district, the student's special education teacher may be designated to also serve as the representative of the school district if the teacher meets the requirements described in this paragraph;

6. An individual who can interpret the instructional implications of evaluation results who may be a member of the IEP Team as described in subparagraph (3)(c)3., 4., or 5. of this rule;

7. At the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate. The determination of the knowledge or special expertise of any such individual shall be made by the party who invited the individual to be a member of the IEP Team; and,

8. The student, if appropriate, and in all cases where a purpose of the meeting will be the identification of the student's transition services needs or consideration of

postsecondary goals for the student and the transition services needed to assist the student in reaching those goals. If the student does not attend the IEP meeting to identify transition services needs or consider postsecondary and career goals and transition services, the school district shall take other steps to ensure that the student's preferences and interests are considered.

* * *

(h) Contents of the IEP. The IEP for each student with a disability must include:

* * *

8. Before attaining the age of fourteen (14), in order to ensure quality transition planning and services, IEP Teams shall begin the process of identifying transition services needs of students with disabilities, to include the following:

* * *

c. Consideration of the student's need for instruction or the provision of information in the area of self-determination and self-advocacy to assist the student to be able to actively and effectively participate in IEP meetings and self-advocate, so that needed postsecondary and career goals may be identified and in place by age sixteen (16).

9. Beginning not later than the first IEP to be in effect when the student turns sixteen (16), or younger, if determined appropriate by the IEP Team and updated annually, the IEP must include the following:

* * *

b. A statement of the outcomes and the additional benefits expected by the parent and the IEP team at the time of the student's graduation;

c. A statement of appropriate measurable postsecondary and career goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills and the transition services (including courses of study) needed to assist the student in reaching those goals; and,

Accord 34 C.F.R § 300.321.

25. Notably, under the above-cited regulations the Student is only a required team member in an IEP meeting if it is appropriate for the Student to participate in the meeting. Further, an invitation to the Student and the Student's input is required only when discussions regarding transition to post-graduation life become mandatory once the Student achieves the age of 14. In fact, an IEP team can proceed to consider transition services at a meeting not attended by the student, provided the student was invited and the student's interests and preferences are provided by other means. See also 34 C.F.R. § 300.320.

26. The Office of Special Education's (OSEP) statements regarding the right of a School Board and a parent to record IEP meetings is not binding on this tribunal but are highly persuasive. Since 1991, OSEP has taken the position that neither a school board nor a parent has a right to record. OSEP Memorandum 91-24 (July 18, 1991). In its 1991 memorandum, OSEP stated that a school district has the option to require,

prohibit, limit, or otherwise regulate the use of tape recorders at IEP meetings. OSEP Memorandum 91-24 (July 18, 1991).

Subsequently, in a Letter to Anonymous, the OSEP confirmed that the IDEA "does not address the use of audio or video recording devices at IEP meetings, and no other federal statute authorizes or prohibits the recording of an IEP meeting by either a parent or a school official" and that "[t]herefore, an SEA or public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings." OSEP Letter to Anon., 40 IDELR 70 (June 4, 2003). See also Letter to Savit, 67 IDELR 216 (OSEP 2016).

27. Notably, IDEA was revised in 2004, 13 years after OSEP first stated its position on audio recording in 1991, but Congress chose not to include a right of either the parent or a school board to record meetings. IDEA of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004), effective July 1, 2005.

28. OSEP's position has been supported by the relatively small amount of case law available on this issue. In Horen v. Bd. of Educ. of City of Toledo Pub. Sch. Dist., 655 F. Supp. 2d 794 (N.D. Ohio 2009), aff'd, 113 LRP 45715 (6th Cir. 03/11/11, unpublished), [REDACTED] of a disabled student claimed they were entitled to record their daughter's IEP sessions. The court affirmed the hearing officer's determination that the [REDACTED] had no such right, holding that "recording shall not

occur without the consent of [school district] personnel participating in the session.” Id. at 804. See also Jackson Cnty. Sch. Bd., 61 IDELR 120 (SEA Fla. 2013)(parent did not have a right to record IEP meetings where alternative methods such as taking notes were adequate).

29. Cases which have allowed parental recording are factually distinguishable. E.H. v. Tirozzi, 735 F. Supp. 53 (D. Conn. 1990); V.W. v. Favolise, 131 F.R.D. 654, 654 (D. Conn. 1990). In E.H. v. Tirozzi, a parent needed to record meetings because [REDACTED] was a native Danish speaker, and had trouble understanding and following written and spoken English. 735 F. Supp. 53, 57 (D. Conn. 1990). In V.W. v. Favolise, a parent sought to tape IEP meetings because a disabling injury to [REDACTED] hand made note-taking difficult. 131 F.R.D. 654, 658 (D. Conn. 1990). See also Dallas Indep. Sch. Dist., 110 LRP 36304 (SEA Tex. 2010). However, a district can deny a request to record an IEP meeting where it provides other accommodations allowing the parent or student to participate. See Belvidere Cmty. Unit Sch. Dist. No. 100, 112 LRP 12955 (SEA Ill. 2012).

30. Notably, the issue in this case is not whether the Student is a required member of the IEP team, which [REDACTED] is not, but whether recordation of IEP meetings is necessary for the [REDACTED] or the Student’s participation or [REDACTED] of such meetings. In that regard, the [REDACTED] failed to produce any

evidence which would qualify [REDACTED] for any of the established exceptions permitting recordation of IEP meetings.

31. The evidence demonstrated that the parents advocate for the Student and are capable of taking notes at IEP meetings, which can be used to [REDACTED]. Accordingly, the parents do not have a right to record the Student's IEP meetings or other meetings.

32. Further, the evidence demonstrated that the School Board has taken adequate steps to ensure parents participation, as well as Student input and understanding at the Student's IEP meetings, absent recording. Given these steps, it was not necessary that the Student's IEP meetings be recorded in order for the Student and the parents to meaningfully participate in the IEP process and otherwise exercise their rights under IDEA. Jackson Cnty. Sch. Bd, supra, OSEP Letter to Anon., 40 IDELR 70 (June 4, 2003). Therefore, the School Board's refusal to allow the recording of the Student's IEP meetings has not denied the Student FAPE and has not impeded or otherwise affected the Student's or the parents' ability or right to meaningful participation in the Student's IEP meetings or otherwise exercise their rights under IDEA.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Complaint is DISMISSED.

DONE AND ORDERED this 26th day of November, 2018, in Tallahassee, Leon County, Florida.

S

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

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of November, 2018.

COPIES FURNISHED:

██████████, Esquire
McClain, Alfonso and Meeker, P.A.
38416 Fifth Avenue
Zephyrhills, Florida 33542

██████████. ██████████, Esquire
McClain, Alfonso, Nathe & DiCamplia, P.A.
38416 Fifth Avenue
Zephyrhills, Florida 33542
(eServed)

████████████████████, Esquire
DeL'Etoile Law Firm, PA
Suite 200
10150 Highland Manor Drive
Tampa, Florida 33610

██████████, Esquire
McClain, Alfonso and Meeker, P.A.
38416 Fifth Avenue
Zephyrhills, Florida 33542
(eServed)

██████████
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399
(eServed)

██████████, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

██████████. ██████████, Superintendent
Pasco County School Board
7227 Land O'Lakes Boulevard
Land O'Lakes, Florida 34638-2826

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

- a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).