**Marion County School District**
**No. 08-0096e**
**Initiated By: Parent**
**Hearing Officer: T. Kent Wetherell, II**
**Date Of Final Order: August 6, 2008**

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

| | | |
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| [redacted], | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 08-0096E |
| | ) | |
| MARION COUNTY SCHOOL BOARD, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

FINAL ORDER

A duly-noticed due process hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on July 7 and 8, 2008, in Ocala, Florida.

APPEARANCES

For Petitioner: [redacted]
Address of record

For Respondent: Andrew B. Thomas, Esquire
1625 Lakeside Drive
Deland, Florida 32720-3037

STATEMENT OF THE ISSUES

The issues are (1) whether Petitioner should be placed in a full-time gifted program, and (2) whether Petitioner should be

evaluated and classified under the "other health impairment" disability category.

## PRELIMINARY STATEMENT

On or about January 2, 2008, Petitioner filed a due process hearing request with the Marion County School Board (School Board). On January 7, 2008, the School Board referred the request to the Division of Administrative Hearings (DOAH). The case was initially assigned to Administrative Law Judge Don W. Davis.

A telephonic pre-hearing conference was held on January 14, 2008. The following day, Judge Davis issued a Notice of Hearing scheduling the due process hearing for March 12 and 13, 2008. The Notice of Hearing framed the issues for the hearing as follows: "(A) Should Petitioner be included in the Millennium program, a full-time gifted program, at the elementary school level; and (B) should diagnosis, evaluation and accommodation be afforded to Petitioner for learning disabilities or handicap?"

On March 5, 2008, the final hearing was cancelled by Judge Davis based upon the School Board's motion because Petitioner's mother, [redacted], refused to make herself available for deposition. The Order Granting Continuance entered by Judge Davis gave [redacted] until April 6, 2008, to make herself available

for deposition, and directed the School Board to file a status report on April 15, 2008.

The Status Report filed on April 15, 2008, identified several "mutually-acceptable dates" for the final hearing, including June 4, 2008. The Status Report also quoted an e-mail from [redacted] stating that she did not intend to present any witnesses or evidence on the issues framed by the Notice of Hearing issued by Judge Davis.

On May 5, 2008, the case was transferred to the undersigned due to Judge Davis' impending retirement. The following day, May 6, 2008, the undersigned entered an Order to Show Cause directing Petitioner to "advise the undersigned in writing as to why DOAH's file in this case should not be closed based upon [[redacted]'s] stated intent not to present any evidence on the issues in the due process hearing request over which DOAH has jurisdiction." The Order also directed the parties to reserve June 4, 2008, on their calendars for the hearing.

On May 12, 2008, Petitioner filed a response to the Order to Show Cause. The response expressed a desire to proceed to hearing, but indicated that Petitioner was no longer available for hearing on June 4, 2008. Therefore, on May 13, 2008, the undersigned entered an Order directing the parties to confer as to the length of time needed for the final hearing. The Order

identified several dates that the undersigned was available for the hearing during the periods proposed by Petitioner.

Based upon the parties' responses to the Order, the hearing was scheduled for July 7 and 8, 2008. The Notice of Hearing framed the issues for the hearing as set forth above in the Statement of the Issues. See Order entered May 13, 2008, at page 2.

At the hearing, [redacted] testified on behalf of Petitioner, and the School Board presented the testimony of John McCollum. Exhibits P1 through P24, P29, and P30, and R1 through R3, were received into evidence. Exhibits P25 through P28, P31, and P32 were offered but not received.

[redacted] represented Petitioner at the hearing. She was accompanied and advised throughout the hearing by Linda D. Montalbano, a non-lawyer. [redacted] sought to have Ms. Montalbano represent Petitioner at the hearing, but Ms. Montalbano was not permitted to do so because she refused to comply with Florida Administrative Code Rules 6A-6.03311(11)(e)1.a. and 28-106.106 concerning qualified representatives. Absent compliance with those rules, Ms. Montalbano's representation of Petitioner would have constituted the unauthorized practice of law. See In re Arons, 756 A.2d 867 (Del. 2000), cert. denied, 532 U.S. 1065 (2001); Victoria L. v. District School Bd. of Lee County, 741 F. 2d 369, 373 (11th Cir 1984), disapproved on other grounds, Honig

v. Doe, 484 U.S. 305 (1988). And cf. Federal Register, Vol. 73, No. 93, at 27692-93 (May 13, 2008) (proposing amendments to 34 C.F.R. Section 300.512 to codify the principle that non-lawyer representation at due process hearings is not authorized by IDEA, but rather is governed by state law).

The parties agreed to the following deadlines at the conclusion of the due process hearing: transmittal of the Transcript to the parties by the court reporter by July 18, 2008; filing of Proposed Final Orders (PFOs) no later than July 28, 2008; and issuance of the Final Order on or before August 6, 2008.

The two-volume Transcript of the due process hearing was filed with DOAH on July 21, 2008. The School Board filed a PFO on July 29, 2008, and Petitioner filed a "Legal Brief" on that same date. The parties' post-hearing filings have been given due consideration.[1/]

## FINDINGS OF FACT

1. Petitioner is almost [redacted] years old and will be in the seventh grade in the upcoming 2008-09 school year.

2. Petitioner had fever-induced seizures on two prior occasions. The first occurred when Petitioner was nine months old, and the second, and most recent, occurred more than five years ago, when Petitioner was seven years old. Neither of the seizures occurred in a school environment.

3. Petitioner presented no credible evidence that children who have experienced fever-induced seizures typically require special accommodations in school. Indeed, although hearsay, one of the documents from the Internet presented by Petitioner discussing febrile illness states that "[c]hildren who experience febrile seizures have no related difficulties with their performance at school . . . ."

4. Petitioner has been in the public school system in Marion County since at least the first grade.

5. Petitioner's mother, [redacted], did not have any issues with how the school system treated Petitioner until the Petitioner was in the fourth grade at [redacted] Elementary School.

6. Petitioner's fourth grade teacher kept the temperature in the classroom elevated and refused to allow the students to drink water during class, which, according to [redacted], put Petitioner at risk of having a fever-induced seizure.

7. After [redacted] complained to the school principal about the situation, the teacher adjusted the classroom temperature to a cooler setting and allowed the students to get water from the fountain in her classroom and from water bottles that the students brought to class.

8. Petitioner did not have any seizures during fourth grade, but according to [redacted], Petitioner suffered headaches,

emotional injuries, and cognitive decline as a result of the teaching style of the fourth grade teacher.

9. No credible evidence was presented to support [redacted]'s claim that Petitioner was adversely affected by experiences in fourth grade.[2/]

10. Petitioner performed well academically in the fourth grade, scoring at the highest level -- a five -- on the reading and math portions of the Florida Comprehensive Assessment Test (FCAT) and receiving A's in Language Arts, Math, Science, and Social Studies and a B in Reading.

11. Petitioner was accused of cheating during fifth grade.[3/] The elementary school principal summarized the incident as follows in Petitioner's student record:

> [Petitioner] wrote the process for how to solve a problem on an [exam] and passed it to another student. [Petitioner] did not receive answers to put on the test for [Petitioner]. I feel [Petitioner] has learned from this unfortunate incident and will be extremely surprised if this will ever occur again. This is a fine [student] that has not had a history of prior referrals.

12. Cheating is considered a "Level 2 disciplinary referral" under the school system's student conduct code.

13. Petitioner was given a one-day in-school suspension for the incident, and the note quoted above was put into the Petitioner's student record. Also, according to [redacted], Petitioner

was not allowed to go on the fifth grade field trip and did not receive academic and attendance awards that year that had been earned.

14. Petitioner performed well academically in the fifth grade, scoring a five on the math portion of the FCAT and a four on the reading portion, and receiving A's in all core academic courses.

15. Petitioner applied for admission into the "magnet program" at [redacted] Middle School ([redacted]) for sixth grade. One of the requirements for admission into the program was that the student has had "no previous level 2 or 3 disciplinary referrals."

16. Petitioner's application for the [redacted] program was denied based, at least in part, on the disciplinary referral from cheating incident in fifth grade.

17. Petitioner attended [redacted] Middle School ([redacted]) starting in sixth grade. [redacted] is the middle school that Petitioner is zoned to attend.

18. Petitioner was in the gifted program in elementary school and was placed in the gifted program at [redacted].

19. It is undisputed that Petitioner meets the eligibility criteria for the gifted program.

20. A Gifted Education Plan (GEP) was prepared for Petitioner in October 2007 to cover Petitioner's middle school years. The GEP is valid through October 2010.

21. [redacted] was fully involved in the preparation of the GEP, notwithstanding her claims that she has been "blacklisted" by the school district.[4/] She and Petitioner both signed the GEP.

22. The GEP requires Petitioner to be placed in regular education classes "which may or may not be advanced level classes," and also requires Petitioner to receive specialized instruction in a gifted classroom on a daily basis.

23. [redacted] does not have a "full-time" gifted program. The school offers a number of advanced and honors courses, but the only gifted class offered is Language Arts.

24. [redacted] does not have a "full-time" gifted program either, as [redacted] seems to believe.[5/] Indeed, the more persuasive evidence presented at the due process hearing establishes that the only material difference in the gifted programs at [redacted] and [redacted] is that the gifted class offered at [redacted] is Social Studies, rather than Language Arts.

25. As required by the GEP, Petitioner was placed in the gifted Language Arts class in sixth grade, and the [redacted] principal credibly testified that Petitioner will be placed in the gifted Language Arts class in seventh grade. The remainder of Petitioner's seventh grade schedule consists of an honors class (high school level Algebra I), advanced classes (Social Studies and Science), and two electives.

26. Petitioner performed well academically at [redacted] in sixth grade, and received A's in every course, except for Language Arts in which Petitioner received a B, and scored a five on both the math and reading portions of the FCAT.

27. Petitioner presented no persuasive evidence of any deficiencies in the GEP or Petitioner's current placement at [redacted].

28. The disciplinary referral resulting from the cheating incident in fifth grade will not affect Petitioner's future educational opportunities and placements, as [redacted] seems to believe.

29. Petitioner has been allowed to participate in all extracurricular activities at [redacted] despite the disciplinary referral. Moreover, the [redacted] principal credibly testified that he does not normally look at a student's disciplinary history at previous schools and that he would not have even known about the cheating incident if [redacted] had not told him about it.

30. Petitioner has had very few absences over the past several school years, and a history of fever-induced seizures has not prevented Petitioner from running track and cross-country at [redacted] or playing in the school's marching band.

31. Petitioner is clearly making meaningful educational progress in the current educational placement. Not only is Petitioner advancing from grade to grade, but is doing so with

A's and B's in gifted and advanced-level classes and is scoring well above grade level on the FCAT.

32. There is no reason to suspect that Petitioner has any disability or condition adversely affecting Petitioner's educational performance. Indeed, although hearsay, the May 2008 report from Shands Children's Hospital states that the "available data shows [Petitioner's] performance in fine motor area to be above average," which would suggest that Petitioner does not have a handwriting disorder such as dysgraphia as [redacted] contends. See also Endnote 2.

33. Petitioner does not need any special interventions, accommodations, or services to make meaningful educational progress.

34. The School Board, through counsel, agreed at the due process hearing to convene a meeting prior to the upcoming 2008-09 school year between [redacted] and the teachers and staff at [redacted] who will have contact with Petitioner to discuss [redacted]'s concerns about Petitioner's fever-induced seizure condition. For this meeting to be productive, and to be sure that the school knows precisely what to do for Petitioner, [redacted] should bring a current diagnosis from Petitioner's doctor explaining what specific precautions and treatments he recommends based upon Petitioner's fever-induced seizure condition.

## CONCLUSIONS OF LAW

### A. Jurisdiction and Burden of Proof

35. DOAH has jurisdiction over the parties to and subject matter of this proceeding as described below.

36. DOAH has jurisdiction to consider claims concerning the "identification, evaluation, and placement, or lack thereof," of exceptional students, as well as related claims arising under the Individuals with Disabilities Education Act (IDEA). See § 1003.57(1)(e), Fla. Stat. [6/]; Fla. Admin. Code R. 6A-6.03311(11), 6A-6.03313(7); 34 C.F.R. §§ 300.503(a)(1) and (2), 300.507(a), 300.511.

37. DOAH also has jurisdiction to consider claims concerning the discipline of students with disabilities. See Fla. Admin. Code R. 6A-6.03312(1)(k). However, the discipline imposed on Petitioner for the cheating incident in fifth grade does not implicate this jurisdiction because the one-day in-school suspension did not result in a "change of placement" as a matter of law. See Fla. Admin. Code R. 6A-6.03312(1)(a)1., (1)(l), (3) (manifestation determination is only required if the student is being removed from his current educational placement for more than 10 days); 34 C.F.R. § 300.530(b), (c), (e) (same). Moreover, at the time of the cheating incident, Petitioner was only classified as a gifted student, not a "student with a disability" or "child with a disability," which are the terms

used in the rules giving DOAH jurisdiction over discipline claims. See Fla. Admin. Code R. 6A-6.03312; 34 C.F.R. § 300.530.

38. DOAH does not have jurisdiction to consider claims arising under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, 42 U.S.C. Section 1983, or the Family Education Records and Privacy Act. Petitioner's claims under those laws were expressly not considered in this proceeding. See Orders entered May 6 and May 9, 2008; Notice of Hearing dated May 28, 2008.

39. Petitioner, as the party seeking relief in this proceeding, has the burden of proof. See Schaffer v. Weast, 546 U.S. 49, 62 (2005); M. M. v. School Board of Miami-Dade County, 437 F. 3d 1085, 1097 n.8 (11th Cir. 2006).

B. Eligibility for a Gifted Program

40. Section 1003.01(3)(a), Florida Statutes, defines "exceptional student" to include "students who are gifted."

41. There is no corresponding inclusion of gifted students in the IDEA and, therefore, the determination as to whether Petitioner is eligible for special education services as a gifted student is determined by Florida law, not the IDEA.

42. A "gifted" student is one who has superior intellectual development and is capable of high performance. See Fla. Admin. Code R. 6A-6.03019(1), (2)(a).

43. It is undisputed that Petitioner meets the criteria for classification as a gifted student.

44. The school district is required to develop and implement a GEP for each gifted student. See Fla. Admin. Code R. 6A-6.030191.

45. Petitioner has a GEP. Petitioner and [redacted] participated in the development of the GEP, and no credible evidence was presented concerning any deficiencies in the GEP.

46. The GEP was properly implemented by [redacted] during Petitioner's sixth grade year, and the [redacted] principal credibly testified that the GEP will be implemented in accordance with its terms in the upcoming seventh grade school year.

C. Evaluation for an Other Health Impairment

47. Petitioner contends that the School Board violated "child find" by not evaluating Petitioner for a disability, and that Petitioner should be classified as a child with a disability under "other health impairment" category based upon Petitioner's history of fever-induced seizures and/or handwriting problems.

48. "Child find" does not require school districts to evaluate every child for a disability; it only requires evaluation of children who are suspected having a disability that requires special education services. See 20 U.S.C.

§ 1412(a)(3); 34 C.F.R. § 300.311; Fla. Admin. Code R. 6A-6.0331.

49. If there is no reason to suspect that a student is a "child with a disability" under the IDEA or an "exceptional student" under Florida law, there is no need for the school district to evaluate the child. See, e.g., Hoffman v. East Troy Community School District, 38 F. Supp. 2d 750, 766 (E.D. Wisc. 1999) (citing cases); McMullen County Independent School District, 49 IDELR 118 (Texas SEA 2007) ("The IDEA requires a two-prong analysis for determining whether a child should be identified and referred for special education services. First, the student must have a specific physical or mental impairment identified through an appropriate evaluation. Identifying an impairment does not alone satisfy the eligibility test under Part B of the IDEA. Second, the district must have reason to suspect the student is in need of special education services. This is usually determined by the student's inability to progress in a regular education program."); Fla. Admin. Code R. 6A-6.0331(2) (requiring school district to attempt to address any areas of concern in the general educational environment before evaluating the student for a disability).

50. Section 300.8 of the IDEA regulations define "child with a disability" to mean a child manifesting one or more

specifically listed impairments who, by reason of the impairment, needs special education and related services.

51. One of the impairments listed in Section 300.8 of the IDEA regulations is "other health impairment," which is defined to mean:

> having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that
>
> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poising, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourrette syndrome; and
>
> (ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.8(c)(9) (emphasis supplied).

52. Florida law includes a similar definition of "other health impaired":

> Other health imparied means having limited strength, vitality or alertness due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes that adversely affect a child's educational performance.

Fla. Admin. Code R. 6A-6.03015(3) (empahasis supplied).

53. In Ashli v. Hawaii, 2007 U.S. Dist. LEXIS 4927, at

** 24-25 (D. Hawaii 2007), the court explained that

> whether a student's disability 'adversely affects' his 'educational performance' refers to the student's ability to perform in a regular classroom designed for non-handicapped students. If a student is able to learn and perform in the regular classroom taking into account his particular learning style without specially designed instruction, the fact that his health impairment may have a minimal adverse effect does not render him eligible for special education services.

54. Similarly, in Katherine S. v. Umbach, 2002 U.S. Dist. LEXIS 2523, at *38 (M.D. Ala. 2002), the court explained that "the IDEA generally requires a showing of 'actual impact of the disabling condition on any area of education as expected to be provided within a public school context.' The law does not permit a finding of entitlement to special education and related services when the student has not demonstrated an inability to learn in the public school context."

55. These decisions are consistent with the general principles announced in Board of Education v. Rowley, 458 U.S. 176 (1985), that the purpose of the IDEA is to provide a "basic floor of opportunity," not "potential-maximizing education"; that "meaningful educational benefit" must be provided to the child; and that the child's ability to advance from grade to grade in the regular curriculum is "an important factor in determining educational benefit." Accord School Board of Martin

County v. A.S., 727 So. 2d 1071,1074 (Fla. 4th DCA 1999).

56. No credible evidence was presented to show that Petitioner has a health impairment that adversely affects Petitioner's educational performance. There is no credible evidence that Petitioner has a handwriting disorder such as dysgraphia, and to the extent that the history of fever-induced seizures is a qualifying medical condition under the "other health impaired" category, there is no evidence whatsoever that the condition adversely affects Petitioner's educational performance. To the contrary, the more persuasive evidence presented at the hearing establishes that Petitioner is performing exceptionally well in school.

57. In sum, there was no reason to suspect that Petitioner is a child with a disability (under the IDEA) or an exceptional student (under Florida law) by virtue of an "other health impairment," and there is no reason for the School Board to evaluate Petitioner for classification under that disability category.

## ORDER

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

ORDERED that:

1. Petitioner shall continue to be classified as gifted and receive the services reflected in the current Gifted Education Plan at [redacted] Middle School.

2. Respondent shall convene a meeting between [redacted] and the appropriate teachers and staff at [redacted] Middle School prior to the upcoming 2008-09 school year as it agreed to do at the due process hearing (See Finding of Fact ¶34).

3. All other relief sought in the due process hearing request -- including the evaluation and classification of Petitioner as "other health impaired" -- is denied.

DONE AND ORDERED this 6th day of August, 2008, in Tallahassee, Leon County, Florida.

S

T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of August, 2008.

[1/] Petitioner's "Legal Brief" includes information that was not presented as evidence at the due process hearing. None of that information has been considered because the undersigned's

decision must be based "solely on information presented during the hearing." See Fla. Admin. Code R. 6A-6.03311(11)(i)10.

[2/] Although the medical reports presented by Petitioner were hearsay that cannot support a finding of fact, it is noteworthy that the reports contradict [redacted]'s claims. For example, the May 2006 report from Shands HealthCare (Exhibit P11) noted that a CAT scan of Petitioner done in late 2005 was normal and the report recommended no further investigation or treatment of Petitioner; a March 2008 report (Exhibit P12) stated that no significant abnormalities were identified in an MRI scan of Petitioner; and the May 2008 report from Shands Children's Hospital (Exhibit P13) states that no significant decline in Petitioner's cognitive abilities were shown in the current testing and that Petitioner did not need any more medical investigation.

[3/] [redacted] contends that Petitioner was falsely accused and unfairly disciplined for the incident even though, according to a subsequent review of the incident, Petitioner admitted to the misconduct and [redacted] was given the opportunity to draft a "rebuttal" to be included with the disciplinary referral in Petitioner's student record. See Exhibit P7, at 5. The justification for, and reasonableness of the discipline imposed on Petitioner are beyond the scope of this proceeding. See Conclusion of Law ¶37. The incident is discussed in this Final Order simply to provide context for other claims raised by Petitioner.

[4/] [redacted] presented significant testimony at the hearing regarding the procedures that the school district requires her to follow in communicating with school officials, which according to [redacted], make it difficult for her to participate in her children's education. The September 2007 letter from the Superintendent outlining the procedures –- which [redacted] refers to as the "blacklisting letter" –- states in part:

> I regret that these measures are necessary; however occasionally we have to utilize such procedures when a person's interaction with the school system presents a significant interruption to personnel, students and parents. . . . .
>
> During the past, we have made a sincere effort to address your concerns, but to no avail. Your increasingly frequent visits to

> School Board offices and schools, with the resulting interruption of personnel, gives us no choice. These provisions are in effect until further notice. I will review the issue periodically to determine if the procedures should be modified based upon your interim behavior. . . . . .

Exhibit P18, at 3. The justification for, and reasonableness of the procedures imposed on [redacted] by the school district is beyond the scope of the undersigned's jurisdiction.

[5/] See, e.g., Petitioner's "Legal Brief," at 14-15. It is also interesting to note that although [redacted] apparently wants Petitioner to have a choice of attending [redacted], she never gave a straight answer when she was asked at the due process hearing whether she wants Petitioner to be placed in the gifted program at [redacted] rather than [redacted]. See Transcript, at 129-37.

[6/] All statutory references are to the 2007 version of the Florida Statutes, unless otherwise indicated.

COPIES FURNISHED:

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[redacted]
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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 90 days in the appropriate federal district court pursuant to Section 1415(i)(2) 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 90 days in the appropriate state circuit court pursuant to Section 1415(i)(2) 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 120.68 and 1003.57(1)(e), Florida Statutes.