

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 14-0097E



Respondent.

\_\_\_\_\_ /

FINAL ORDER

Pursuant to notice, a formal administrative hearing was conducted in Miami, Florida, on March 10, 2014, before Administrative Law Judge Edward T. Bauer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary C. Lawson, Esquire  
Miami-Dade County School Board  
1450 Northeast Second Avenue, Suite 430  
Miami, Florida 33132-3108

For Respondent: Respondent, pro se  
(Address of Record)

STATEMENT OF THE ISSUE

Whether Petitioner is authorized to conduct an initial evaluation of Respondent over the objection of the parent.

PRELIMINARY STATEMENT

On January 7, 2014, Petitioner, Miami-Dade County School Board ("School Board"), filed a request for a due process hearing

after Respondent's [REDACTED] objected to the School Board's request to perform a psycho-educational evaluation. The School Board's request was promptly forwarded to the Division of Administrative Hearings and transferred to the undersigned for further proceedings.

As noted above, the final hearing was held on March 10, 2014, during which the School Board presented the testimony of seven witnesses ([REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]) and introduced 15 exhibits, numbered 4 through 17 and 19. Respondent's [REDACTED] testified on [REDACTED] child's behalf and called one other witness, [REDACTED].

The final hearing Transcript was filed on May 6, 2014. The School Board filed a Proposed Final Order that has been considered in the preparation of this Final Order. Respondent did not file a post-hearing submittal of any kind.

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

Unless otherwise noted, all statutory and rule citations are to the versions in effect on the date of the School Board's request to perform an initial evaluation.

FINDINGS OF FACT

1. Respondent is a [REDACTED] who has attended public school in Miami-Dade County since the 2007-2008 academic year. At no time has Respondent received special education services.

2. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

3. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

4. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]:

[REDACTED]  
[REDACTED].

[REDACTED].

5. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

6. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

7. [REDACTED]

[Redacted text block]

8. [Redacted text]

[Redacted text block]

[Redacted text]

9. [Redacted text]

[Redacted text block]

[Redacted text block]

10. [Redacted text]

[Redacted text block]

11. [Redacted text]

[Redacted text block]

[Redacted]

[Redacted].

12. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted].

13. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted].

14. [Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].



## CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 1003.57(1)(b) and 120.57(1), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

16. Congress enacted the Individuals with Disabilities Education Act ("IDEA") to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 523 (2007). Of import to the instant case, the term "children with disabilities" includes, but is not limited to, children suffering from emotional disturbances. 20 U.S.C. § 1401(3)(A); Fla. Admin. Code R. 6A-6.03016.

17. To ensure that students with disabilities receive the services to which they are entitled, the IDEA requires that school districts enact programs to identify, locate, and evaluate children with disabilities in need of special education and related services. 20 U.S.C. § 1412(a)(3)(A). In particular, where it appears that a child may be eligible for special education services, and neither the parent nor child has

requested a determination of eligibility, the school district may request that an initial evaluation be conducted to "determine if the child is a child with a disability." 20 U.S.C.

§ 1414(a)(1)(B); Fla. Admin. Code R. 6A-6.0331(3) ("Each school district must conduct a full and individual initial evaluation before the provision of ESE. Either a parent of a student or a school district may initiate a request for initial evaluation to determine if the student is a student with a disability . . .").

18. In situations where the school district is requesting an initial evaluation, it must first seek consent from the student's parent or guardian. 20 U.S.C. § 1414(a)(1)(D)(i)(I); Fla. Admin. Code R. 6A-6.0331(4)(a) ("[T]he school district proposing to conduct an initial evaluation to determine if a student is a student with a disability . . . must obtain informed consent from the parent . . . before conducting the evaluation.").

19. If parental consent is not granted, the school district may, as it has done here, initiate proceedings before an impartial hearing officer to obtain an order that requires the student to be present for the evaluation, thereby overriding the parent's lack of consent. 20 U.S.C. § 1414(a)(1)(D)(ii)(I); Fla. Admin. Code R. 6A-6.0331(4)(e). In such cases, the school district's burden is twofold: first, it must demonstrate, by a

preponderance of the evidence, a reasonable basis to suspect that the child has a disability and is in need of special education services. Miami-Dade Cnty. Sch. Bd. v. C.S., Case No. 12-1213E, 60 IDELR 86 (Fla. DOAH July 3, 2012). "The threshold for suspicion of a disability is 'relatively low'; the inquiry is not whether the student actually qualifies for special education services, but whether the student should be referred for an evaluation." Orange Unified Sch. Dist. v. C.K., 2012 U.S. Dist. LEXIS 92423, \*18 (C.D. Cal. June 4, 2012).

20. Further, and as mandated by the plain language of Florida Administrative Code Rule 6A-6.0331(1) and (3), the school district must demonstrate that general education intervention procedures have been implemented and indicate that the student should be considered for eligibility for ESE services; or, alternatively, that general education intervention procedures are inappropriate to address the student's immediate needs:

(1) General education intervention procedures for kindergarten through grade twelve (12) students suspected of having a disability. It is the local school district's responsibility to develop and implement coordinated general education intervention procedures for students who need additional academic and behavioral support to succeed in the general education environment. In implementing such procedures, a school district may carry out activities that include the provision of educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction and professional

development for teachers and other school staff to enable them to deliver scientifically based academic and behavioral interventions and, where appropriate, instruction on the use of adaptive and instructional software. . . . The general education interventions requirements set forth in paragraphs (a), (b), and (e) of this subsection may not be required for students suspected of having a disability if a team that comprises qualified professionals and the parent determines that these general education interventions are not appropriate for a student who demonstrates . . . severe social/behavioral deficits that require immediate intervention to prevent harm to the student or others, or for students who are not enrolled in a public school.

\* \* \*

(3) Initial evaluation. Each school district must conduct a full and individual initial evaluation before the initial provision of ESE. Either a parent of a student or a school district may initiate a request for initial evaluation to determine if the student is a student with a disability . . . .

(a) Prior to school district request for initial evaluation, school personnel must make one (1) of the following determinations and include appropriate documentation in the student's record to the effect that:

1. For a student suspected of being a student with a disability, the general education intervention procedures have been implemented as required under this rule and indicate that the student should be considered for eligibility for ESE; or
2. The nature or severity of the student's areas of concern make the general education intervention procedures inappropriate in

addressing the immediate needs of the student.

(emphasis added).

21. The foregoing requirements are echoed and reinforced in rule 6A-6.03016, which specifies the eligibility criteria for the disability category known as EBD. Subsection (2) of this rule provides that, "[p]rior to referral for evaluation, the [general education intervention] requirements in subsection 6A-6.0331(1), F.A.C., must be met." Paragraph (3)(b) of this rule mandates that the evaluation for determining eligibility on the basis of EBD "must include documentation of the student's response to general education interventions implemented to target the function of the behavior as identified in the" functional behavioral assessment.

22. However, and similar to rule 6A-6.0331(3)(a)2., rule 6A-6.03016(4)(e) provides limited authority to make an immediate referral for an initial evaluation in "extraordinary circumstances . . . when immediate intervention is required to address an acute onset of an internal emotional/behavioral characteristic . . . ." Such characteristics include, inter alia, erratic behavior, difficulty maintaining normal thought processes, and mood swings. See Fla. Admin. Code R. 6A-6.03016(4)(a)1. & (4)(a)3.

23. Turning to the merits, the School Board asseverates, and the undersigned agrees, that Respondent's behavior of October 29, 2013, provides a reasonable basis to suspect that [REDACTED] is a child with a disability who requires special education services.<sup>1/</sup> It is further concluded that the acute and serious nature of Respondent's conduct—i.e., [REDACTED] [REDACTED]—warrants immediate attention and, therefore, general education interventions should be waived. Accordingly, the School Board is entitled to conduct a psycho-educational evaluation of Respondent over the parent's objection. Respondent's parent may, however, unequivocally decline all special education services under the IDEA, in which case the School Board shall not be permitted to proceed with the evaluation. See Shelby S v. Conroe Indep. Sch. Dist., 454 F.3d 450, 454-55 (5th Cir. 2006) ("Shelby is free to decline special education under the IDEA rather than submit to [the school district's] . . . evaluation"); G.J. v. Muscogee Cnty. Sch. Dist., 704 F. Supp. 2d 1299, 1310 (M.D. Ga. 2010) ("Plaintiffs are, of course, free to decline services under IDEA for G.J. rather than submit him to the reevaluation"); Durkee v. Livonia Cent. Sch. Dist., 487 F. Supp. 2d 313, 317-318 (W.D.N.Y. 2007) (holding that the IDEA does not permit a school district to compel the evaluation of a student for determination of that student's eligibility for special education services where the

parent has objected to such an evaluation and has refused to accept services); Oxnard Elementary Sch. Dist., 107 LRP 6594 (Cal. State Educ. Ag. Jan. 26, 2007) (concluding that school district was entitled to conduct an initial evaluation unless the child's parents waived all IDEA services).

CONCLUSION

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

ORDERED that, in the absence of an express and unequivocal waiver of all IDEA services, the School Board is entitled to conduct a psycho-educational evaluation of Respondent. The evaluation shall be performed no later than 30 days from the date of this Order.

DONE AND ORDERED this 19th day of May, 2014, in Tallahassee, Leon County, Florida.

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EDWARD T. BAUER  
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 May, 2014.

ENDNOTE

<sup>1/</sup> The fact that Respondent has earned satisfactory grades at all relevant times does not militate against this conclusion. See Bd. of Educ. of the Massapequa Union Free Sch. Dist., 49 IDELR 89 (N.Y. State Educ. Ag. 2007) (concluding that, although student received all A's in [REDACTED] homebound placement, [REDACTED] fears of bullying qualified [REDACTED] as a child with an emotional disturbance); see also Mr. I. v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1, 12 (1st Cir. 2007) ("Indeed, 'there is nothing in IDEA or its legislative history that supports the conclusion that . . . educational performance is limited only to performance that is graded'") (quoting Robert A. Garda, Jr., Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act, 69 Mo. L. Rev. 441, 471 (2003)).

COPIES FURNISHED:

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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)(b), Florida Statutes (2011), 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).