

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 10-7162E
)
BROWARD COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a final hearing was conducted on December 1 and 2, 2010, at Fort Lauderdale, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: E. N. (Petitioner's father)
(Address of record)

For Respondent: Barbara Myrick, Esquire
Broward County School Board
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

Whether the Broward County School Board (Respondent) denied ██████████ (Petitioner) a free, appropriate public education (FAPE) within the meaning of the Individuals With Disabilities Education Act, (IDEA), 20 U.S.C. § 1400, et. seq. More specifically: 1.) Whether school personnel have been

appropriately trained to address Petitioner's dietary needs?

2.) Whether Petitioner requires one or more full-time aide?

PRELIMINARY STATEMENT

This Final Order is being written in compliance with the standing request of the Florida Department of Education that ALJs write orders involving IDEA in a gender-neutral fashion without identifying school by name.

Petitioner, a complex learner with many needs, has been determined to be eligible for services from Respondent's Exceptional Student Education (ESE) Program under IDEA in the areas of Autism Spectrum Disorder, Language Impaired, and Occupational Therapy. In addition, Petitioner has health issues including colitis, Pica eating disorder (eating non-food items), ulcers, and food allergies.

In the 2009/2010 school year, Petitioner attended School A as a fifth-grade student. The Individualized Education Plan (IEP) at issue in this proceeding provided that Petitioner be transitioned from School A to School B. The targeted placement was a classroom for ESE students that will be described below (the targeted classroom). Both schools are public schools in Broward County, Florida.

On July 28, 2010, Petitioner's mother filed a due process request on behalf of Petitioner. That request was received by Respondent on August 4, 2010. Respondent forwarded the due

process request to DOAH, and this proceeding followed. On August 26, 2010, Respondent filed "Respondent School Board's Motion to Dismiss or in the Alternative, Request for Telephonic Conference with Administrative Law Judge to Clarify Issues of Request for Due Process Hearing". After a hearing on that pleading, the undersigned entered an "Order Defining Issues" on September 7, 2010, that defined the issues in this proceeding. The parties were given a deadline to move to amend the said Order if the party believed that the said Order did not adequately state the issues. Neither party filed a motion to amend.

All witnesses who testified at the final hearing are current or former employees of Respondent. Petitioner presented the testimony of the following witnesses: Lisa Liberman (clinical assistant at School A); Christina Stuttman (school nurse at School A); Felica Bitchatcho (paraprofessional at PTES); Theresa Whitt (paraprofessional at School A), Francine Renguso (principal of School A); Maria Perez (assistant principal at School A); Mindy Mahannah (speech and language therapist at School A); Sandra Higginbotham (former teacher of the targeted classroom at School B); Elana Margolis (classroom teacher at School A); Patricia Josephson (classroom teacher at School A), Kellie Moore (autism coach at School A); Leah Rood (speech pathologist at School A), Janet Greenwalt (assistant

technology program specialist); (Donna Reed (ESE specialist), Latoyna Fondren (behavioral technician); and John Vessey (principal of School B). Petitioner offered no exhibits.

Respondent called as witnesses Gary Grigull (Respondent's curriculum supervisor for autism) and Rhonda Bachman (program specialist for ESE programs). Respondent recalled Mr. Vessey, Ms. Margolis, and Ms. Moore. Respondent offered the following pre-marked exhibits with the Bates stamped number(s) in parentheses: 6 (30-47), 8 (50-69), 10 (74-78), 11 (79-82), 14 (90-92), 15 (93-96), 16 (97), 21 (107-125), 22 (126-131), 24 (136-138), 25 (139-141), 29 (152-156), 32 (160-366), 37 (372), 38 (373-374), 43 (421-423), 45 (427-434), 46 (435-439), 47 (440), 48 (441-447), 49 (448), and 51 (450-452). These exhibits were admitted into evidence.

On a joint motion of the parties, the deadline for submitting proposed orders was January 12, 2011, and the deadline for the filing of this Final Order is February 14, 2011.

The Transcript, consisting of two volumes, was filed December 21, 2010. The parties timely filed Proposed Final Orders, which have been considered in the preparation of this Final Order.

Unless otherwise noted, all references to statutes are to

Florida Statutes (2010). All references to rules are to Florida Administrative Code as of the date of this Final Order.

FINDINGS OF FACT

1. Petitioner was born in [REDACTED] and resides in Broward County, Florida. Petitioner's parents have been very involved in Petitioner's education.

2. At times relevant to this proceeding, Petitioner was a student receiving ESE services at School A. At the end of the 2009/2010 school year, Petitioner's targeted placement for the 2010/2011 school year was at School B in a classroom taught by Ms. Higginbotham. Petitioner did not enroll in School B for the 2010/2011 school year.

3. Respondent is the constitutional entity authorized to operate, control, and supervise the public schools in Broward County, Florida.

2008/2009 SCHOOL YEAR

4. Petitioner enrolled in School a in December 2008. An Interim IEP meeting was held on December 4, 2008, and an IEP was developed for Petitioner. There were no issues or difficulties in implementing Petitioner's December 4, 2008, IEP.

5. A Positive Behavior Intervention Plan (PBIP) dated December 4, 2008, was reviewed and implemented for Petitioner. Among Petitioner's behaviors addressed by the Functional Behavioral Assessment (FBA) and the PBIP were the following:

attempts to eat non-food items, attempts to eat food to which Petitioner was allergic, attempts to elope, and toileting incidents. In addition, Petitioner is non-verbal and must rely on communication devices to communicate Petitioner's needs. Petitioner at times becomes frustrated and acts out when Petitioner cannot communicate Petitioner's needs.

6. Petitioner was assigned to a cluster classroom taught by Ms. Margolis. In addition, the classroom had adult paraprofessionals.

7. Petitioner's classroom at School A had been specially designed and arranged for ESE students.

8. Petitioner's classroom at School A had a student/adult ratio of two or three students to one adult. At all times, there was an adult in close proximity to Petitioner. For ease of reference, this arrangement will be referred to as a close-proximity class.

9. There are distinctions between having a one-on-one aide and being in a close-proximity class. A student who has a one-on-one aide is with the aide throughout the school day, and the adult's focus is only on the individual student. The adults in a close-proximity class are not dedicated to a particular student, but serve the needs and safety of all the students in the classroom.

10. A student receiving a one-on-one aide may become dependent on the aide and lose his or her independence and ability to generalize. Having a one-on-one aide is a more restrictive placement than being in a close-proximity class.

11. An Interim IEP meeting was held on March 9, 2009, at which an Interim IEP was developed and subsequently implemented at School A. Ms. Margolis observed that Petitioner had not attempted to elope at School A, but elopement continued to be a reported problem at home.

12. The PBIP dated December 4, 2008, was revised on March 9, 2009. The Interim IEP and revised PBIP were implemented at School A. Petitioner completed the 2008/2009 school year at School a. Petitioner's needs were met by Petitioner's placement in the close-proximity class pursuant to Petitioner's IEPs in effect during that school year.

13. There was insufficient evidence to establish that Petitioner required a one-on-one aide during the 2008/2009 school year.

2009/2010 SCHOOL YEAR

14. Petitioner repeated the fifth grade at School A during the 2009/2010 school year and was again assigned to the close-proximity class with Ms. Margolis as the teacher. Ms. Bitchatcho and Ms. Witt were the paraprofessionals who served in the class. All three were very familiar with

Petitioner and were trained to meet Petitioner's needs. This was sufficient supervision for Petitioner and the other students in the class.

15. A parent-teacher conference was held on August 20, 2009. Petitioner's parents liked to have a conference prior to the start of the school year to make sure everyone was on the "same page."

16. Appropriate school personnel, including Ms. Margolis and Ms. Moore, continued to monitor Petitioner's behavior and the sufficiency of Petitioner's PBIP. Petitioner's behaviors included those addressed by Petitioner's PBIP dated December 4, 2009. Petitioner continued to require placement in a close-proximity classroom. Petitioner did not require a one-on-one aide.

17. An adult would accompany a student who needed to go outside Ms. Margolis' classroom for any reason.

18. During the 2009/2010 school year Petitioner visited the school clinic on a daily basis to take medication and, periodically, for other reasons. The other reasons included needing attention to sores that resulted from Petitioner's behavior of picking at Petitioner's skin. While staff did not observe Petitioner picking skin at school, the sores required attention from the clinic staff and were frequently observed

when Petitioner arrived at school in the morning. The staff treated the sores with polysporin and a gauze dressing.

19. A paraprofessional accompanied Petitioner whenever Petitioner needed to go to the clinic. Petitioner was never a behavior problem while at the clinic.

20. Throughout the 2009/2010 school year, Petitioner continued to exhibit toileting incidents at School A. Some of these incidents resulted from Petitioner not getting to the bathroom in time, standing before finishing, and not completely emptying the bladder. Petitioner's failure to get to the bathroom on time was the result of Petitioner holding the urge to go until it was too late. Lack of proximity to a bathroom was not a cause of Petitioner's toileting incidents. In the spring of 2010, Petitioner exhibited a behavior of urinating while still dressed without trying to get to a bathroom. That behavior was appropriately addressed by the PBIP. There was insufficient evidence to establish that the toileting incidents described above would have been prevented by a one-on-one aide.

21. Throughout the 2009/2010 school year, Petitioner suffered from Pica eating disorder and was a risk to attempt to eat non-food items. The PBIP in place adequately addressed that risk and that risk was appropriately managed in the close proximity class. Petitioner did not establish that the Pica

risk that resulted from the Pica eating disorder required a one-on-one aide.

22. Throughout the 2009/2010 school year, Petitioner was a risk to attempt to take food items from others. The PBIP in place adequately addressed that risk and that risk was appropriately managed in the close proximity class. Petitioner did not establish that the risk required a one-on-one aide.¹

23. During the 2009/2010 school year, Petitioner was not a risk to attempt to elope.

24. During the 2009/2010, Petitioner was able to communicate Petitioner's needs to staff using a wallet of pictures, making verbal sounds, using a visual schedule, and using a communicative device called an MT4. An MT4 is a dynamic-display, voice-activated output system that assists a student reach the student's benchmark standards. Petitioner also used a typing program on a computer.

25. Ms. Mahannah provided direct programming of Petitioner's communication devices, including software for the MT4. Ms. Margolis and staff in her classroom were trained in using MT4. Petitioner's mother had also received training in the use of the MT4.

26. Petitioner made academic progress during the 2009/2010 school year.

27. There was insufficient evidence to establish that Petitioner required a one-on-one aide during the 2009/2010 school year.

THE PLANNED TRANSITION TO WGMS

28. Petitioner's transition from School A (an elementary school) to School B (a middle school) was to occur at the beginning of the 2010/2011 school year. Petitioner's targeted placement was Ms. Higginbotham's class, which was a close proximity class very similar to Ms. Margolis' class at School A.

29. Ms. Higginbotham and her staff had been trained to use the communication devices Petitioner needed.

30. Ms. Higginbotham and her staff were trained to manage students such as Petitioner with special dietary needs.

31. There was no evidence that Petitioner's condition had changed so that Petitioner needed a one-on-one aide for the 2010/2011 school year.

32. Ms. Higginbotham had read Petitioner's IEP and had prepared for Petitioner's arrival as a student in her classroom. Ms. Higginbotham testified, credibly, that Petitioner's IEP could have been easily implemented in her classroom.

33. Petitioner never enrolled in Ms. Higginbotham's classroom.

CONCLUSIONS OF LAW

34. DOAH has jurisdiction over the subject matter and parties to this case pursuant to sections 120.569, 120.57(1), and 1003.57(5), Florida Statutes. See also Fla. Admin. Code R. 6A-6.03311(11).

35. Petitioner has the burden of proving by a preponderance of the evidence that the School B staff was inadequately trained and that Petitioner's needs could not be met without a one-on-one aide. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005), and L.E. v. Ramsey Bd. of Educ., 435 F. 3d 384 (3d Cir. 2006).

36. In determining the appropriateness of an IEP, it must be determined whether the placement allows the student to receive his or her educational benefits in the least restrictive environment. See Florida Statutes 20 U.S.C. section 1412(5)(A).

37. The evidence in this proceeding established that School B was adequately trained to manage Petitioner's dietary restrictions and to fully implement Petitioner's IEP.

38. The evidence further established that Petitioner's needs were appropriately met in the close-proximity class. Petitioner failed to establish that Petitioner requires the services of a one-on-one aide, which is a more restrictive placement than a close-proximity class.

39. Petitioner's burden of proof has not been satisfied in this proceeding.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's claims asserted in this due process proceeding are denied and dismissed.

DONE AND ORDERED this 1st day of February, 2011, in Tallahassee, Leon County, Florida.

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CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of February, 2011.

ENDNOTE

¹ Petitioner did not eat in the school cafeteria because of the noise in the cafeteria, not because of the risk of taking food from others. Petitioner was always accompanied by a paraprofessional and was usually accompanied by another student.

COPIES FURNISHED:

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E. N.
(Address of record)

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 (2009), 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), and Florida Administrative Code Rule 6A-6.03311(9)(w).