

Citrus County School District
No. 09-5279E
Initiated By: District and Parent
Hearing Officer: Suzanne Hood
Date Of Final Order: November 24, 2009

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

█,)
)
Petitioner,)
)
vs.) Case No. 09-5279E
)
CITRUS COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

A formal hearing was conducted in this case on November 3, 2009, in Inverness, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: █ (Petitioner's parent)
(Address of record)

For Respondent: Wesley Bradshaw, Esquire
209 Courthouse Square
Inverness, Florida 34450

STATEMENT OF THE ISSUE

The issue is whether Petitioner █ (Petitioner) is eligible for participation in Respondent Citrus County School

Board's (Respondent) Exceptional Student Education (ESE) program pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, et seq.

PRELIMINARY STATEMENT

On September 23, 2009, Petitioner filed a request for a due-process hearing. According to the request, Petitioner's parent seeks placement for Petitioner in the ESE program because Petitioner's parent believes it is unacceptable for Petitioner to continue to pass every year but with remediation.

Respondent referred the hearing request to the Division of Administrative Hearings on September 28, 2009.

On October 5, 2009, Respondent filed a Response and Motion to Dismiss or in the Alternative, Notice of Insufficiency.

On October 6, 2009, the undersigned conducted a telephone conference with the parties. During the conference, the undersigned denied Respondent's pending motion and, among other things, advised that a subsequent notice would schedule the hearing as agreed by the parties.

On October 7, 2009, the undersigned issued a Notice of Hearing and a Pre-hearing Order. The notice scheduled the hearing for November 3, 2009.

On October 7, 2009, the parties participated in a resolution meeting.

On October 26, 2009, Respondent filed the following pleadings: (a) a written statement that the parties had been unable to stipulate to any agreed facts; (b) a written statement that Respondent had no completed evaluation to disclose or present at hearing; (c) Respondent's witness list; and (d) Respondent's list of proposed exhibits, together with copies of those exhibits.

On October 27, 2009, Petitioner filed a written statement. Attached to the statement was a document entitled "Medical Clinic Progress Note."

On October 28, 2009, the undersigned conducted a second telephone conference with the parties. During the conference, the undersigned advised Petitioner's parent that all proposed exhibits had to be disclosed to Respondent by 5:00 p.m. that day in order to comply with the five-day rule. The parties advised that they were ready to proceed to hearing as scheduled.

On October 29, 2009, Petitioner filed a proposed exhibit list. Copies of the proposed exhibits were attached to the list.

On October 30, 2009, Respondent filed a Motion to Strike Petitioner's Witness List and Exhibits as untimely. After the hearing commenced, Respondent withdrew the motion.

During the hearing, Petitioner presented the testimony of two witnesses. Petitioner offered eight exhibits that were

accepted as evidence. Exhibits that had Respondent had never reviewed and that were not in Petitioner's cumulative file were excluded.

Respondent presented the testimony of two witnesses. Respondent offered three exhibits that were accepted as evidence.

The hearing Transcript was filed on November 12, 2009. Respondent filed its proposed Final Order on November 23, 2009. As of the date of this Order, Petitioner has not filed a proposed Final Order.

FINDINGS OF FACT

1. Petitioner enrolled in one of Respondent's elementary schools as a kindergartener for the 2007/2008 school year. Respondent developed an initial Progress Monitoring Plan for Petitioner on October 15, 2007. Petitioner's Response to Intervention (RTL) Progress Report indicates that Petitioner received 30 minutes of daily instruction/intervention in phonics awareness and letter naming fluency. The progress report shows that Petitioner made slow and inconsistent progress on these skills. At the conclusion of the school year, Respondent retained Petitioner.

2. For the 2008/2009 school year, Petitioner repeated kindergarten at the same elementary school. That year, Respondent developed a PMP for Petitioner on September 2, 2008.

As of November 12, 2008, Petitioner's PMP indicates that Petitioner's strength was in phonemic awareness and that Petitioner had difficulty with phonics and fluency.

3. As part of the September 2, 2008, PMP, Respondent taught and monitored Petitioner's progress on the following specific skills: (a) initial sound fluency; (b) nonsense word fluency; and (c) letter-naming fluency. Petitioner made some progress on these skills by the end of school in 2008.

4. The September 2, 2008, PMP plan included a Reading Intervention Action Plan. The reading plan shows that Petitioner made the following progress by June 5, 2009, on specific interventions: (a) good progress after receiving ten minutes of daily individual instruction/intervention in a program entitled Earobics; (b) questionable progress after receiving twenty minutes of small group instruction/intervention, four days a week, in a curriculum entitled Strategic Intervention Harcourt; and (c) good progress after receiving ten minutes of daily individual instruction/intervention in a program entitled Successmaker.

5. Petitioner's September 2, 2008, PMP also included a Math Intervention Action Plan. According to the math plan, Petitioner made good progress in the Successmaker program by June 5, 2009, after receiving ten minutes of daily individual instruction/intervention.

6. Respondent passed Petitioner to first grade with remediation for the 2009/2010 school year.

7. Petitioner's parent was experiencing behavioral problems with Petitioner at home beginning on October 8, 2009. Petitioner's parent also was concerned that Petitioner had passed to kindergarten with remediation for the 2008/2009 school year. Therefore, Petitioner's parent had Petitioner evaluated at The Centers in Lecanto, Florida.

8. On or about July 14, 2007, staff at The Centers developed a Master Treatment Plan for Petitioner. The plan indicates that Petitioner suffers from attention deficit hyperactivity disorder, bipolar disorder (not otherwise specified), oppositional defiant disorder, and problems in the school setting and at home. The plan sets forth specific long-term and short-term goals, together with the interventions to resolve Petitioner's targeted behavioral problems.

9. Petitioner's Master Treatment Plan is not evidence that Petitioner is eligible to receive ESE services under IDEA. It does not constitute a complete individual educational evaluation (IEE).

10. As a ■■■ student in the 2009/2010 school year, Petitioner is receiving Response to Intervention (RTI) at Tier 3, the most intensive level. Petitioner is enrolled in a regular education class for instruction in the core curriculum.

Petitioner also is pulled out for one hour daily for additional reading intervention. During that time, Petitioner receives specific instruction and or interventions pursuant to [REDACTED] PMP.

11. Petitioner's current PMP is not included in the record. Nevertheless, persuasive testimony indicates that Petitioner is making slow steady progress on [REDACTED] reading goal, which is to read 60 words per minute by the end of the school year. Petitioner is also making progress in sub-skills such as phonetic awareness. During the RTL, Tier 3, reading period, Petitioner is well behaved, compliant, engaged, pleasant, and polite.

12. Petitioner's 2009/2010 first-quarter progress report reflects the following: (a) successful academic performance in language, science, health and safety, and social studies; (b) inconsistent academic performance in reading, writing, and mathematics; and (c) specific areas needing development in each of the academic subjects.

13. In non-academic areas, Petitioner is performing as follows: (a) needs improvement in art; and (b) satisfactory performance in music, physical education, conduct, and work habits.

14. On September 23, 2009, the same day that Petitioner requested a due-process hearing, Petitioner' parent signed a request for an IEE and a consent for the evaluation. The

greater weight of the evidence indicates that this was the first time Petitioner's parent requested an IEE and placement in the ESE program.

15. Prior to September 23, 2009, Respondent had no reason to request consent to perform an IEE because Petitioner is making progress in RTI, Tier 3, instruction. However, Respondent has begun the evaluation process by gathering pre-referral data and data on Petitioner's RTI performance.

16. Respondent's school psychologist will perform a series of evaluations to determine Petitioner's cognitive ability and to compare it to Petitioner's academic achievement. Under IDEA, Respondent has 60 school days to complete the evaluation. The evaluation must be completed by January 7, 2010, unless Petitioner is absent from school during the 60-day period.

17. When the IEE is complete, the parties will meet to discuss the results. Petitioner's eligibility for ESE services will be determined at that time.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 1003.57(1)(e), Florida Statutes (2009), and Florida Administrative Code Rule 6A-6.03311.

19. Petitioner has the burden of proving by a preponderance of the evidence that Petitioner is eligible to

receive ESE services under IDEA. See Balina v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Petitioner has not met this burden.

20. Pursuant to Section 1003.57(1)(e), Florida Statutes, a "student may not be given special instruction or services as an exceptional student until after he or she has been properly evaluated, classified, and placed in the manner prescribed by rules of the State Board of Education."

21. The Florida Administrative Code Chapter 6A-6 sets forth ESE eligibility requirements. The rules cover eligibility criteria for numerous disabilities and or impairments, including but not limited to the following: (a) eligibility for students with intellectual disabilities; (b) eligibility for students who are physically impaired with other health impairment; and (c) eligibility for students with emotional or behavioral disabilities. See Fla. Admin. Code R. 6A-6.03011, 6A-6.03015, 6A-6.030152, and 6A-6.03016, respectively.

22. For example, Florida Administrative Code Rule 6A-6.03011 provides as follows in relevant part:

(1) Definition. Students with intellectual disabilities. An intellectual disability is defined as significantly below average general intellectual and adaptive functioning manifested during the developmental period, with significant delays in academic skills. Developmental period refers to birth to eighteen (18) years of age.

(2) General education interventions and activities. Prior to referral for evaluation the requirements in subsection 6A-6.0331, F.A.C. must be met.

(3) Evaluation. In addition to the procedures identified in subsection 6A-6.0331(5), F.A.C., the minimum evaluation for determining eligibility shall include all of the following:

(a) A standardized individual test of intellectual functioning individually administered by a professional person qualified in accordance with Rule 6A-4.0311, F.A.C., or licensed under Chapter 490, F.S.;

(b) A standardized assessment of adaptive behavior to include parental or guardian input;

(c) An individually administered standardized test of academic or pre-academic achievement. A standardized developmental scale shall be used when a student's level of functioning cannot be measured by an academic or pre-academic test; and

(d) A social-developmental history which has been compiled directly from the parent, guardian, or primary caregiver.

(4) Criteria for eligibility. A student with an intellectual disability is eligible for exceptional student education if all of the following criteria are met:

(a) The measured level of intellectual functioning is more than two (2) standard deviations below the mean on an individually measured, standardized test of intellectual functioning;

(b) The level of adaptive functioning is more than two (2) standard deviations below the mean on the adaptive behavior composite or on two (2) out of three (3) domains on a standardized test of adaptive behavior. The adaptive behavior measure shall include parental or guardian input;

(c) The level of academic or pre-academic performance on a standardized test is consistent with the performance expected

of a student of comparable intellectual functioning;

(d) The social/developmental history identifies the developmental, familial, medical/health, and environmental factors impacting student functioning and documents the student's functional skills outside of the school environment; and

(e) The student needs special education as defined in Rules 6A-6.0331(6)(a), F.A.C.

23. Additionally, Florida Administrative Code Rule 6A-6.030152 states as following in relevant part:

(1) Definition. Other health impairment means 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 is due to chronic or acute health problems. This includes, but is not limited to, asthma, attention deficit disorder or attention deficit hyperactivity disorder, Tourette syndrome, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and acquired brain injury.

(2) Activities prior to referral. Prior to referral for evaluation, the requirements in subsections 6A-6.0331(1)-(3), F.A.C., must be met.

(3) Evaluation. In addition to the provisions in subsection 6A-6.0331(4), F.A.C., the evaluation for a student must also include the procedures identified in the district's Policies and Procedures for the Provision of Specially Designed Instruction and Related Services as required by Rule 6A-6.03411, F.A.C.

(4) Criteria for eligibility. A student with another [sic] health impairment is eligible for exceptional student education if the following criteria are met:

(a) Evidence of another health impairment that results in reduced efficiency in schoolwork and adversely affects the student's performance in the educational environment, and

(b) The student needs special education as defined in paragraph 6A-6.03411(1)(c), F.A.C.

24. Florida Administrative Code Rule 6A-6.0331 describes in detail the requirement for general education intervention and the identification, evaluation, reevaluation and the initial provision of ESE services as follows in pertinent part:

(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 evaluation, 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 a speech disorder or severe cognitive, physical or sensory disorders, or severe social/behavioral deficits that require immediate intervention to prevent harm to the student or others. .

. .

(a) Parent involvement in general education intervention procedures. Opportunities for parents to be involved in the process to address the student's areas of concern must be made available. In addition, there must be discussion with parent of the student's responses to interventions, supporting data and potential adjustment to the interventions and of anticipated future action to address the student's learning and/or behavioral areas of concern. Documentation of parental involvement and communication must be maintained.

(b) Observations of the student must be conducted in the educational environment and, as appropriate, other settings to document the student's learning or behavioral areas of concern. At least one observation must include an observation of the student's performance in the general classroom.

(c) Review of existing data, including anecdotal, social, psychological, medical, and achievement (including classroom, district and state assessments) shall be conducted. Attendance data shall be reviewed and used as one indicator of a student's access to instruction.

(d) Vision and hearing screenings shall be conducted for the purpose of ruling out sensory deficits that may interfere with the student's academic and behavioral progress, and additional screenings or assessments to assist in determining interventions may be conducted as appropriate.

* * *

(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 or is gifted.

* * *

(b) If the parent of the child receiving general education interventions requests, prior to the completions of these [general education] interventions, that the school conduct an evaluation to determine the student's eligibility for specially designed instruction and related services as a student with disability, the school district:

(1) Must obtain consent for and conduct the evaluation; and

(2) Complete the activities described in subsection (1) of this rule concurrently with the evaluation but prior to the determination of the student's eligibility for specially designed instruction; or

(3) Must provide the parent with written notice of its refusal to conduct the evaluation that meets the requirements of Rule 6A-6.03311.

25. The above-referenced rules are consistent with the requirements of IDEA. See 34 C.F.R. §§ 300.15, 300.8, and 300.304 through 300.311.

26. In this case, Petitioner did not present competent evidence of Petitioner's eligibility for ESE services pursuant to the statutes and rules listed above. Petitioner's eligibility cannot be determined until Respondent completes the

individual education evaluation. In the meantime, Respondent must continue to provide Petitioner with general education interventions.

ORDER

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

ORDERED:

Petitioner's request for placement in the ESE program prior to completion of an individual educational evaluation is denied.

DONE AND ORDERED this 24th day of November, 2009, in Tallahassee, Leon County, Florida.

S

SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of November, 2009.

COPIES FURNISHED:

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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)(A) 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)(A) of the IDEA and Section 1003.57(1)(b), Florida Statutes; or
- c) only if the student is identified as "gifted", files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(b) and 120.68, Florida Statutes.