

Miami-Dade County School District
No. 06-1895E
Initiated by: Parent
Hearing Officer: J. D. Parrish
Date of Final Order: July 27, 2006

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 06-1895E
)
MIAMI-DADE COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice a formal hearing was held in this case on June 23, 2006, by video teleconference with the parties appearing from Miami, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lilliam Rangel-Diaz, CLA/CP
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For Respondent: Melinda L. McNichols, Esquire
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STATEMENT OF THE ISSUE

The central issue in this case is whether the Respondent, Miami-Dade County School Board (Respondent, School Board or School District), provided the Petitioner, [REDACTED] with a free appropriate public education (FAPE). If the School District did not meet its obligations in this regard, additional issues are whether the student is entitled to compensatory educational services; and whether the student's parents should be reimbursed for expenses incurred and, if so, in what amount.

PRELIMINARY STATEMENT

The Petitioner is a student enrolled in the Miami-Dade County Public Schools. At all times material to this case the Respondent was responsible for providing the student with a FAPE. On May 19, 2006, the Petitioner filed a Request for an Exceptional Student Education Due Process Hearing. That request alleged that the Respondent had failed to accept the Petitioner's eligibility for Exceptional Student Education (ESE) services and had failed in the educational efforts for the student such that the Petitioner has been denied a FAPE.

Thereafter, the parties attended a resolution conference that resulted in the School Board accepting the eligibility of the student for ESE services. At the hearing on June 23, 2006, the Petitioner presented evidence regarding the alleged denial of a FAPE and the parents' requests for reimbursement of expenses they have incurred.

At the hearing the Petitioner presented testimony from the

student's mother. Exhibits admitted on behalf of the Petitioner are denoted in the transcript of the proceeding and have been appended to that document. The School Board presented testimony from Tonya Walton, a fourth-grade teacher; Stacey Goldman, an ESE teacher; Katrina Wilson-Davis, a principal; and Pilar Celaya, a staffing specialist. The Respondent's exhibits admitted into evidence are also appended to the transcript. The transcript of the proceedings was filed on July 14, 2006.

At the conclusion of the hearing, the parties stipulated that they would file Proposed Final Orders not later than July 21, 2006. This date for filing was selected by the parties as both parties have demanding schedules and other commitments. The parties agreed that filing the Proposed Final Orders as agreed would best serve the parties' interests. The parties further stipulated that the Final Order would be entered not later than July 28, 2006. This Final Order is entered in compliance with that agreement.

FINDINGS OF FACT

1. The Petitioner is a ten-year-old [REDACTED] student enrolled in the Miami-Dade County Public Schools. [REDACTED] attends the [REDACTED] and has been so enrolled since entering the public school system at kindergarten.

2. [REDACTED] has experienced academic difficulties since the second grade, and [REDACTED] has struggled to perform class assignments. [REDACTED] required small group instruction and extra

help with mathematics, reading, and writing.

3. In 2004, suspecting [REDACTED] needed additional help, the parents decided to have the Petitioner tested and found that [REDACTED] has a significant hearing loss that requires the use of a hearing aid.

4. In August of 2004, the school site was provided information regarding [REDACTED]'s hearing loss, need for a hearing aid, and the recommendation for an FM hearing system that [REDACTED] physician designated. The parents hoped that the FM listening device would allow [REDACTED] to stay focused and on task in [REDACTED] classroom work. The school site refused to pay for the FM device and advised the parents that, if used, they would have to provide the system.

5. The Petitioner's parents did, in fact, purchase the FM system for [REDACTED] at a cost of \$1,925.00. The system was used during the Petitioner's third-grade school year (2004-2005).

6. Despite being aware of the need for the FM device, the school site did not convene a child study team, did not suggest that [REDACTED] might be eligible for ESE services, and did nothing to provide the student with an individualized educational plan (IEP) to assist the student who continued to struggle academically. Instead, the school site put [REDACTED] on an academic improvement plan that reiterated all of the strategies that had not proved successful.

7. In anticipation of [REDACTED]'s fourth-grade school year, the

teacher, Mrs. Walton, visited ██████'s third-grade class and was aware that ██████ required the use of the FM device. Additionally, the fourth-grade teacher was aware of the Petitioner's learning struggles and ██████ continuing efforts to achieve academic success.

8. When ██████ progressed to fourth grade, the teacher refused to wear the FM device. Although ██████ claimed that the device might somehow adversely affect ██████ unborn child (Mrs. Walton was pregnant at the time), the school site could have placed ██████ in another fourth-grade class prior to the beginning of the school year.

9. Instead of addressing ██████'s lack of academic progress during second or third grade, school site personnel referred the parents to the Sylvan Learning Center for additional help. Because they were unaware of other potential remedies available to them, the parents spent a total of \$8,311.00 on tutoring at the Sylvan Learning Center. Because of this additional assistance, the Petitioner was able to progress to the fourth grade.

10. During the fourth-grade school year there came a time when the parents could no longer afford to pay the expenses associated with the Sylvan Learning Center. Instead, they paid \$1,230.00 to teachers at the school site to provide ██████ with additional tutoring help. Despite this help, ██████ failed the fourth grade and must repeat it during the next school year.

11. In November 2005, the school personnel knew or should

have known that [REDACTED] was struggling academically and could be eligible for ESE services. In fact, at that time the school recommended that [REDACTED] be tested by a private clinician. The school personnel led the parents to believe that it might be some time before the school district would be able to test their [REDACTED] and that a private psychological evaluation would be in [REDACTED] best interests.

12. Faced with the uncertainty of their [REDACTED]'s academic school year, and being unaware of their rights as the parents of an exceptional student, the parents opted to retain and pay for a private psychological evaluation.

13. In January 2006 (after the school site had done nothing to further the testing of their [REDACTED]), the parents withdrew their consent to have [REDACTED] tested by the school district and proceeded to have [REDACTED] evaluated at the University of Miami. The parents paid \$1,500.00 for the evaluation.

14. In March 2006, the school site was given the psycho-educational evaluation report completed by the University of Miami personnel. This report has been unchallenged by the Respondent.

15. In addition to the report, the parents also obtained an independent speech/language assessment that cost \$150.00. This assessment supported the previous findings regarding the [REDACTED]'s hearing impairment. Further, coupled together, the psycho-educational evaluation and the speech/language assessment

suggested that [REDACTED] learns through audible expression. Thus, given [REDACTED] hearing impairment, [REDACTED] has not been able to fully or reasonably access learning for some time. Although more testing was recommended, it was certain that [REDACTED]'s failure to make academic progress was tied to [REDACTED] hearing impairment.

16. Despite this information being timely provided to the school site, [REDACTED] was notified that [REDACTED] would be retained in the fourth grade in March 2006.

17. When they received word that [REDACTED] would likely be retained, the parents were disappointed. They felt that they had done everything within their power to assist [REDACTED]. The parents challenged the retention proposed for their [REDACTED]. On April 27, 2006, the parents and school personnel participated in a mediation conference regarding the retention.

18. As a result of the mediation, the school site agreed to accept the psycho-educational evaluation report completed by the University of Miami and to perform a comprehensive speech/language evaluation. The school site did not, however, acknowledge that [REDACTED] was eligible for ESE services.

19. [REDACTED] struggles with visual processing. The psycho-educational evaluation report completed by the University of Miami confirmed that she learns "by hearing, not by looking." Based upon [REDACTED] hearing loss, [REDACTED] is at an academic and social disadvantage because it is likely [REDACTED] does not understand and process classroom instructions.

20. Despite the clear and unambiguous language of the psycho-educational evaluation report completed by the University of Miami, the school site failed or refused to accept [REDACTED] as eligible for ESE services.

21. On or about May 18, 2006, the school site issued its determination that [REDACTED] was ineligible for ESE services and would be retained in the fourth grade for the 2006-2007 school year.

22. Thereafter, the parents filed a Request for Due Process Hearing on May 23, 2006, to challenge the denial of eligibility, to seek reimbursement for the expenses incurred for [REDACTED] and to seek compensatory education for the student.

23. During the 2005-2006 school year the school site prepared an academic improvement plan (AIP) for [REDACTED]. The AIP did not adequately address [REDACTED] deficits and did not recognize [REDACTED] inability to learn visually. The school site did not agree to develop an IEP for [REDACTED] until after the instant case was filed.

24. After this case was filed, the parties attended a resolution conference that resulted in [REDACTED] being deemed eligible for ESE services. Consequently, the school site agreed that an IEP is appropriate for [REDACTED], and the parents, working with school personnel, have agreed to an IEP for the upcoming school year.

25. The Respondent has not, however, accepted any

responsibility for the failure to timely identify [REDACTED] as a student with ESE eligibility. Additionally, the Respondent has refused to pay expenses incurred by the parents in connection with the assessments and tutoring provided for [REDACTED]

26. The Petitioner has struggled academically for no fewer than three school years. The Petitioner must repeat fourth grade during the 2006-2007 school year. At no time during the most recent school year did the school site provide for or offer [REDACTED] accommodations or other special ESE services to afford [REDACTED] with an opportunity to succeed academically.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.57(1), and 1003.57(5), Fla. Stat. (2005). See also Fla. Admin. Code Rule 6A-6.03311.

28. The Petitioner bears the burden of proof in this cause. See Schaffer v. Weast, 126 S. Ct. 528; 105 LRP 55797 (2005). She has met that burden.

29. The Respondent is required by the Florida K-20 Education Code to provide for "an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable." §§ 1001.42(4)(1) and 1003.57, Fla. Stat. (2005).

30. "Exceptional students" as defined by Florida law are students who have been "determined eligible for a special program

in accordance with rules of the State Board of Education." The term "exceptional student" includes students with disabilities such as deaf or hard of hearing and specific learning disabled. See § 1003.01 (3), Fla. Stat. (2005). It is undisputed that the Petitioner meets this definition. The Petitioner requires a hearing aid and has a learning disability in that [REDACTED] requires audible assistance to learn. The School District was apprised of [REDACTED] hearing disability in 2004. The learning disability was more fully articulated after the evaluation at the University of Miami. During the third-grade year, the Petitioner's teacher used the FM device to assist the Petitioner. During the fourth-grade year (2005-2006), the year the Petitioner must now repeat, the teacher refused to use the FM device and made no accommodation for the Petitioner's hearing impairment. The school site did not make, at any time, provision for assistance for [REDACTED] learning disability. Moreover, the Respondent did not acknowledge that the Petitioner was entitled to or eligible for accommodations with regard to [REDACTED] hearing disability until the Petitioner's parents filed the instant action.

31. In order to be eligible to receive federal funding under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. (IDEA) states must ensure that exceptional students receive a FAPE. In order to provide a FAPE, exceptional students are to receive special education and related services at public expense, under public supervision and direction, and

without charge to the parent. Such education is to meet the standards of the State educational agency and shall include an IEP. See 20 U.S.C. § 1401(9). In this case [REDACTED] was not afforded an IEP until the parents filed the request for due process hearing. Therefore, not only did the Respondent fail to timely identify [REDACTED] as an exceptional student, it failed to promptly initiate testing and other procedures necessary to draft an appropriate IEP for [REDACTED].

32. An "appropriate" public education requires that the exceptional student be provided "personalized instruction with 'sufficient supportive services to permit the child to benefit from the instruction.'" Hendry County School Board v. Kujawski, 498 So. 2d 566, 568 (Fla. 2nd DCA 1986) quoting Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 188 (1982). Throughout [REDACTED] fourth-grade year, [REDACTED] received no supportive services to permit [REDACTED] to be successful. And, in fact, [REDACTED] was not successful. Although teachers at the school site were willing to provide additional tutoring for [REDACTED], it was provided at the parents' expense.

33. Section 1003.57, Florida Statutes (2005), provides, in part:

Each district school board shall provide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable, including provisions that:

(1) The district school board provide the necessary professional services for diagnosis and evaluation of exceptional students.

(2) The district school board provide the special instruction, classes, and services, either within the district school system, in cooperation with other district school systems, or through contractual arrangements

with approved private schools or community facilities that meet standards established by the commissioner.

34. In this case, it is concluded the Respondent failed to provide the necessary professional services for the diagnosis of the Petitioner's learning disability. Further, the Respondent failed to timely respond and appropriately address [REDACTED] hearing impairment by providing appropriate special instruction and services for [REDACTED].

35. It is further concluded that the parents expended monies on behalf of their [REDACTED] for tutoring and for an FM device that were required because the Respondent failed to address [REDACTED] disabilities. It is concluded the Respondent failed to provide [REDACTED] with a FAPE. [REDACTED] was unable to access learning without additional services and assistances that the school site failed to provide. Further, the school site failed to advise the parents of their rights as the parents of a hearing impaired student.

36. Section 1003.55, Florida Statutes (2005), mandates that hearing impaired students be entitled to an IEP. This school

site did not acknowledge that the Petitioner was entitled to ESE services and to an IEP until forced to do so.

37. It is undisputed that the Petitioner has not achieved academic success. For the fourth-grade year ■■■ did not have the benefit of the FM device. The school site has not developed strategies or a plan to assist ■■■ to successfully access ■■■ education. These parents did all within their means to help their ■■■. They are not able to make educational decisions without valid input from the professionals who dealt with their child. To continue to pay exorbitant fees for outside tutoring was not within their means or required by law. The school site should have addressed ■■■'s academic needs in the third grade. At that time school personnel knew ■■■ was struggling academically, they knew ■■■ required a hearing aid, and they knew (and the teacher used) the FM device was helpful. The parents have spent thousands of dollars trying to supplement their ■■■'s education. The school site should have ordered testing for ■■■; the school site should have developed an IEP to accommodate ■■■ hearing disability, and should have afforded ■■■ with additional instruction at no cost to the parents.

38. It is difficult to understand how ■■■ could have been left unassisted. The procedural safeguards set forth in Florida Administrative Code Rule 6A-6.03311 are designed to assure that this type of situation should not occur. The Petitioner was not timely evaluated and deemed eligible for services, was not

provided with a FAPE, and must now repeat a grade level due, in part, to the school site's failures.

39. The Petitioner has asked for reimbursement for expenses incurred. Had the school site timely and properly addressed ██████'s needs, the expenses would not have been incurred by the parents. It is concluded the parents are entitled to reimbursement for the FM device (\$1,925), the tutoring services obtained at the Sylvan Learning Center (\$8,311), the tutoring fees charged by the school site (\$1,230), the cost of the psycho-educational evaluation performed by the University of Miami (\$1,500), and the expense of the speech and language assessment (\$150).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Miami-Dade County School Board provide the Petitioner, ██████ with compensatory educational services to fully address ██████ language and hearing impairments based upon the failure of the school district to provide a FAPE for this student. It is further ordered that the parents be reimbursed for the expenses they incurred for ██████ as outlined in paragraph 39 above.

DONE AND ORDERED this 27th day of July, 2006, in
Tallahassee, Leon County, Florida.

S

J. D. PARRISH
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of July, 2006.

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 30 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 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(5), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.