

Broward County School District
No. 04-4253E and No. 05-0385E
Initiated by: Parent (04-4253E) and District (05-0385E)
Hearing Officer: J. D. Parrish
Date of Final Order: April 4, 2005

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

█,)	
)	
Petitioner,)	
)	
vs.)	Case No. 04-4253E
)	
BROWARD COUNTY SCHOOL BOARD,)	
)	
Respondent.)	
_____)	
BROWARD COUNTY SCHOOL BOARD,)	
)	
Petitioner,)	
)	
vs.)	Case No. 05-0385E
)	
█,)	
)	
Respondent.)	
_____)	

FINAL ORDER

Pursuant to notice a formal hearing was held in these cases on February 16, 2005, by video teleconference with the parties appearing from Fort Lauderdale, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner/Respondent:

█

(Address of record)

For Respondent/Petitioner:

Edward J. Marko, Esquire
Mary Stablein Lawson, Esquire
School Board of Broward County
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

As to Case No. 04-4253E: Whether the proposed placement for the student (Petitioner, ■■■) is necessary and appropriate to provide him with a free, appropriate public education (FAPE).

As to Case No. 05-0385E: Whether the evaluation is accurate and appropriate or if an independent educational evaluation is warranted.

PRELIMINARY STATEMENT

This case (DOAH Case No. 04-4253E) began in November 2004, when the parents of the student, ■■■, disagreed with a proposed change of placement for the student. Essentially, the parents want the student to remain in ■■■ current school assignment. The Respondent, School Board of Broward County, Florida, however, maintains that in order to assure the student receives a FAPE, he should be assigned to the ■■■ School. The second case, DOAH Case No. 05-0385E, arose when the parents, during the course of the discussions of the issues presented in the first case, requested an independent educational evaluation (IEE). The first case was referred to the Division of Administrative Hearings (Division) on November 22, 2004. The latter case was referred to the Division

on February 1, 2005.

It is undisputed that the student is entitled to services as an exceptional student. Exceptional student education (ESE) services have been provided to the student since [REDACTED] was in elementary school.

The transcript of the proceedings, filed with the Division on February 28, 2005, accurately outlines the evidence taken in the proceedings. Both parties filed post-hearing statements that have been fully considered in the decision reached herein.

FINDINGS OF FACT

1. The student, [REDACTED], is a [REDACTED]-year-old eighth-grade student enrolled at [REDACTED] School. The student has been designated the Petitioner in this cause because [REDACTED] opposes the proposed transfer of [REDACTED] school assignment to [REDACTED] School and requested a hearing to challenge that proposal. The Petitioner also seeks an IEE.

2. The Respondent, School Board of Broward County, Florida, is responsible for providing the Petitioner with a FAPE.

3. The Petitioner is eligible for, and has received, ESE services since elementary school.

4. The Petitioner receives services that are designated: emotional handicapped, other health impaired, and speech impaired.

5. The Petitioner's current individual education plan (IEP), adopted in February 2004, outlines the various goals,

services, and plans being implemented for this student. The Petitioner's parents did not challenge the 2004 IEP. As the 2005 IEP was not adopted prior to the initiation of this case, the case proceeded to hearing based upon the 2004 IEP. The normal course would have an IEP developed during the current school year be implemented during the subsequent school year.

6. The Petitioner's IEP provides for a behavior intervention plan (BIP) that was designed to address the numerous behavior issues this student presents within the school and home settings.

7. In February 2004, the IEP committee held a meeting to address the student's academic, behavior, and emotional progress. At that time the Respondent conducted re-evaluations to review the Petitioner's academic function, intellectual function, social/emotional function, adaptive behavior, and psychological process function. The parents were made aware of all phases of the re-evaluation.

8. Additionally, the Petitioner's parents provided the IEP committee that met in November 2004 with a report from Dr. Richard Douyon, the Petitioner's private psychiatrist. The report, dated May 25, 2004, included additional information considered by the IEP committee.

9. All parties have agreed that the Petitioner, at all times material to this matter, continues to meet eligibility requirements as emotionally handicapped (EH).

10. The conflict arose due to the fact that the Respondent recommended a change in placement for the student. The Respondent sought to reassign the student from [REDACTED] current school, [REDACTED] School, to a separate day school for students who are severely emotionally disturbed (SED). The Respondent maintains that the SED eligibility and placement (in this case at [REDACTED] School) more appropriately addresses the student's behavior, social, and emotional needs. Additionally, the reassignment is appropriate because the student requires an increased supervision to ensure his physical safety, to monitor [REDACTED] health and/or emotional concerns, and to more intensely employ the interventions necessary to deal with the student's inappropriate behaviors.

11. The Petitioner's father believes the proposed placement is inappropriate because it is farther from the Petitioner's home than the current school assignment and because the Petitioner has represented [REDACTED] will not attend school at the [REDACTED] setting. The basis for the student's refusal to attend school at [REDACTED] is not addressed in the record. The Petitioner's father claimed he could not "make" the Petitioner go to the school, presumably due to the student's size and strong will to the contrary.

12. A psychiatrist assigned to the [REDACTED] School observed the Petitioner for a two-hour period in [REDACTED] current regular class setting. Additionally, the psychiatrist reviewed the Petitioner's records maintained by the Respondent. Based upon

the review of the records, the documented reports of the Petitioner's inappropriate conduct in class, and the observations made during her time in the Petitioner's classroom, the psychiatrist opined that the Petitioner requires close monitoring and additional assessment in a more restrictive educational environment. The Petitioner requires a highly structured, supervised, and controlled therapeutic environment.

13. The psychiatrist attended the IEP meeting in November 2004 and reported the foregoing findings to the IEP group and parent. At that time the psychiatrist further advised the parent and IEP group that the proposed change in placement would also be necessary if the student were to achieve meaningful educational progress.

14. The Petitioner has made little, if any, academic, behavioral, or social progress in the last year. ■■■ has not demonstrated the coping skills to control his inappropriate impulses. The Petitioner has not formed close friendships with the other students in ■■■ class. In fact, some students have refused to sit in proximity to the Petitioner.

15. Academically, the Petitioner performs on elementary grade levels for reading and math.

16. The Petitioner does not complete homework assignments.

17. The Petitioner does not participate meaningfully in class activities.

18. The Petitioner does not control ■■■ bowel movements and

distracts the class by a "show and tell" of sorts involving ■■■ lack of control over the body function.

19. The Petitioner does not stay on task to the assignment presented. A "good" day for Petitioner might require redirection to the task at hand only two or three times per class.

20. The proposed placement at ■■■ School will afford the student with an opportunity to make meaningful progress in the areas of academics, socialization, behavioral, and control of emotions.

21. The incidents of encopresis create a classroom environment that is not conducive to learning, disrupts the other students' ability to learn, and is potentially harmful to students' health. Lack of bowel control and inappropriate actions following the incidents is a safety concern to the Petitioner as well as other students. These incidents are on-going and unabated. In fact, in the week preceding the hearing in this cause the student had another bout that resulted in inappropriate conduct and behavior. The student has not adopted any intervention strategy that alleviates this concern.

22. It is unknown at this time whether the incidents are the result of the Petitioner's emotional issues or are related to a health or physical medical issue. The incidents occur on the average of two times per week. Additional testing and evaluation must be performed to answer this concern.

23. In addition to the foregoing, the student has exhibited

inappropriate behaviors such as: inappropriate touching of others, sexual gesturing, throwing objects such as paper or pencils, derogatory comments such as name calling, sexual comments, and yelling at staff. The Petitioner has demonstrated little impulse control to reign in these types of behaviors.

24. To try and alleviate some of the inappropriate behaviors the Respondent was provided sessions with a family counselor, small group instruction, preferential seating, and frequent bathroom breaks. In fact, bathroom breaks have been provided as frequent as class changes.

25. In spite of the interventions, increased supports, and efforts to assist ■■■, the Petitioner has made little academic or emotional progress in the last year. The proposed placement will provide the best option to assure this Petitioner can get back on track. The environment at ■■■ School will give the student the additional structured supports he requires.

26. The Petitioner presented no evidence to support any reason why the student would not be benefited from the proposed change in placement. All of the professionals familiar with the student's lack of progress determined this proposed placement would better address the student's needs.

27. Similarly the Petitioner presented no evidence to support the need for an IEE. The evaluations performed by the school personnel for the areas they are authorized to review adequately denote the progress or lack of progress this student

has made. The evaluation most needed for this student (a full medical evaluation to determine the source of the encopresis) is within the exclusive control of the parent.

28. The Respondent has a duty to this student to provide a FAPE in the least restrictive environment. It is determined that the environment at ■■■ School best addresses that responsibility. Despite the best efforts of the professional staff, the setting and services at ■■■ School have not fully addressed this student's needs.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding. § 1003.57(5), Fla. Stat. (2004).

30. The Respondent seeks the change of placement for this student and, therefore, bears the burden of proof in this cause. See Devine v. Indian River County School Board, 249 F.3rd 1289 (11th Cir. 2001). The placement of the burden of proof is premised on the idea that, when a student is learning in a program that was jointly developed by the school district and the parents (in this case the IEP from February 2004), the party attacking the program should show why it is inappropriate. In this case, the student is not learning in ■■■ current program. ■■■ is not making substantial progress in any discipline.

31. To the contrary, the Respondent has established that additional supports and services are necessary to achieve

meaningful progress. The Respondent has met the burden of proof to establish that the change of placement (coincidental to a new IEP) is required.

32. The Petitioner fails to accept the reality that incidents of encopresis, disruptions in the classroom, and failure to make meaningful academic progress demonstrate that this student needs more supervision, more assistance, and more support than is available in the current setting. The [REDACTED] School setting will better enable this student to make meaningful progress. The parents must cooperate and participate if meaningful progress is to be made.

33. The Respondent cannot assure homework is completed. The Petitioner does not complete homework. If the parents are unable to secure the completion of homework, the student will continue to fall short of expected performance guidelines. Nevertheless the completion of homework cannot be the Respondent's burden.

34. Similarly, the resolution of whether the encopresis is physical (medical) or emotional must be determined. The obvious health and safety problems resulting from these incidents cannot go unresolved. The disruption to school classes must be abated. In this regard the parents should take whatever medical diagnostic steps and procure whatever treatment needed to cure this issue. If there is any mechanism for the Respondent to assist in this regard, it should do so.

35. The Respondent has complied with the procedural requirements of law. The Respondent has timely requested and considered the inputs of the various professionals who have attempted to evaluate and recommend the best course for this Petitioner. It is concluded that the more restrictive environment found at ■■■ School is the best opportunity for this student to make meaningful educational progress. If future incidents and behavior suggest the Petitioner no longer requires the more restrictive setting, a change can be made at that time. Once the student shows ■■■ is able to curb ■■■ poor impulsivity and ■■■ inappropriate conduct, ■■■ academic progress may improve. Further, without the distractions of ■■■ behavior, ■■■ may well be able to return to a less restrictive classroom setting. This student is capable of making progress, but it will take the concerted effort of all to address the issues that are interfering with ■■■ ability to learn. Inasmuch as it will be a long haul, it is respectfully suggested that the parents advise the student that ■■■ will attend ■■■ School, will complete ■■■ homework, should cooperate with the counseling that is being provided, and model to the student, by appropriate behavior, a dedicated commitment to the program proposed at ■■■ School.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the proposed placement for the student be approved. The parties are directed to complete the revisions to

the IEP, if necessary, so that the implementation at ■ School may begin as soon as practical. As to the request for an IEE, inasmuch as the evaluations performed by the Respondent adequately address this student's needs, the request for an IEE is denied.

DONE AND ORDERED this 4th day of April 2005, in Tallahassee, Leon County, Florida.

S

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of April 2005.

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.