

Broward County School District
No. 05-1512E
Initiated by: Parent
Hearing Officer: Florence Snyder Rivas
Date of Final Order: September 21, 2005

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. 05-1512
)
BROWARD COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case on July 27 and 28, 2005, in Coral Springs, Florida, before Florence Snyder Rivas, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████
(Address of record)

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

STATEMENT OF THE ISSUE

The issue is whether Respondent failed to reasonably implement Petitioner's Section 504 Accommodation Plan (504 Plan or accommodations) in violation of the Rehabilitation Act of 1973 during the 2004-2005 school year.

PRELIMINARY STATEMENT

By grievance form dated April 26, 2005, Petitioner alleged that Respondent failed to implement [REDACTED] 504 Plan in the 2004-2005 school year during which [REDACTED] was enrolled as a [REDACTED] grader at [REDACTED] School.

This matter was referred to the Division of Administrative Hearings by the Broward County School Board (School Board or Respondent) on April 25, 2005. On that day, Respondent mistakenly determined that this case arose under the Individuals with Disabilities in Education Act (IDEA) and commenced proceedings under that statute.

Upon closer examination, Respondent noted that Petitioner's claims arose exclusively under the Rehabilitation Act of 1973 and thereupon filed its Motion to Proceed Under Chapter 120.569 dated May 3, 2005 (Motion).

Following extensive briefing and oral argument, the undersigned concluded that the Motion was well taken and entered an Order granting same on May 25, 2005.

The identity of witnesses and exhibits and attendant rulings are reflected in the two-volume transcript filed on August 15, 2005. The parties timely filed Proposed Recommended

Orders; these and all relevant matters of record have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At the time of the final hearing, Petitioner was a [REDACTED]-year-old [REDACTED] who had recently completed [REDACTED] grade at [REDACTED] School.

2. At all times relevant to this case, Petitioner has Attention Deficit Disorder (ADD), a disability which rendered [REDACTED] eligible for a 504 Plan in accordance with the Rehabilitation Act of 1973. [REDACTED]'s 504 Plan included 17 accommodations.

3. The parties agree that the 504 Plan was reasonably calculated to accommodate [REDACTED]'s disability, and to enable [REDACTED] to progress in the [REDACTED] grade regular education curriculum alongside [REDACTED] disabled and non-disabled peers.

4. At all times material to this case, the accommodations provided in the 504 Plan were reasonably implemented throughout the school year.

5. The 504 Plan did not relieve [REDACTED] of the obligation to comply with the academic and behavioral expectation imposed upon every seventh grade regular education student at [REDACTED] School. Rather, teachers of the disabled and nondisabled alike were required to enforce behavioral and academic standards appropriate to the teacher's classroom. [REDACTED]'s teachers did so by reasonably implementing [REDACTED] 504 Plan.

6. [REDACTED]'s accommodations are described in the 504 Plan in

sentence fragments as follows: preferential seating; verbal, visual or physical prompting for redirection; requesting assistance as needed; planner used as a communication tool - signed by teacher and parent - student will request the signature; permission to highlight class tests and standardized test directions as allowed; extra copy of handouts for home; extra time for exams; breaks during tests if needed; isolated during test if needed; retake tests when ■■■'s grades reflect "Ds" and "Fs"; allowed to use computer for written and related art work; written as opposed to verbal directions; Alpha Smart for written language; additional study time for tests (as needed); extended time for assignments without being penalized (as needed); weekly communication with teachers and parents; and multi-task questions delivered as one question one at a time.

7. ■■■ was frequently dissatisfied with the manner in which ■■■ teachers implemented ■■■ 504 Plan and had frequent disagreements with them regarding how ■■■ accommodations were to be implemented.

8. Nothing in the 504 Plan relieves ■■■ from the obligation to perform assigned work with the help called for in ■■■ accommodations.

9. ■■■ felt a lot of anxiety in ■■■ grade, but ■■■ was substantially able to behave appropriately in class. On a few occasions when ■■■ did not behave appropriately, ■■■ teachers were able to redirect ■■■ in a manner consistent with ■■■ 504

Plan, and with policies and procedures applicable to [REDACTED] and to [REDACTED] [REDACTED] grade regular education peers, disabled or non-disabled.

10. Respondent allows parents to make the final decision as to whether a regular education student takes regular or advanced classes. At [REDACTED] parents' insistence, [REDACTED] was enrolled in academic subjects which are difficult and challenging for students who do not labor under any disability.

11. Petitioner was frequently absent from school to the detriment of [REDACTED] academics.

12. Petitioner testified in [REDACTED] own behalf. [REDACTED] is very familiar with the details of [REDACTED] 504 Plan, and was attentive and actively engaged with the process at all times as the 15 1/2 hours of hearing transpired across two consecutive days.

13. As [REDACTED] put it, [REDACTED] had the same problems as any teenager would have. [REDACTED] acknowledges that for [REDACTED] and many of [REDACTED] friends, [REDACTED] grade is a difficult time.

14. [REDACTED] aspired to high grades and good relations with [REDACTED] teachers, and was able to achieve those goals much of the time.

15. [REDACTED] can understand and comply with instructions.

16. [REDACTED] is disinclined to take personal responsibility. [REDACTED] grades and relations with teachers suffered on occasions when [REDACTED] did not comply with academic and behavioral expectations imposed upon every [REDACTED] grade student at [REDACTED] School, disabled and non disabled alike.

17. The 504 Plan contemplates weekly communication between home and school. Respondent was in much more frequent contact.

18. Three of Petitioner's teachers were called by Petitioner as witnesses in [REDACTED] case in chief and were questioned regarding [REDACTED]'s school work and behavior.

19. Tawny Kilgore-Trefzger was Petitioner's social studies teacher. In that capacity, she supervised [REDACTED] "planner," on which [REDACTED] received a grade of "80."

20. [REDACTED] did not receive a perfect grade of "100" on the planner because [REDACTED] did not take responsibility for its daily maintenance.

21. At the beginning of the school year, Ms. Kilgore-Trefzger attempted to use the planner to communicate with [REDACTED]'s parents, but this device proved ineffective and was replaced with e-mail communication.

22. Ms. Kilgore-Trefzger acknowledged receipt of virtually every e-mail from [REDACTED] but did not respond to the substance of every question or assertion contained in [REDACTED] e-mails. To have done so would have unreasonably diverted time and attention from Ms. Kilgore-Trefzger's daily duties to [REDACTED] and to [REDACTED] classmates in her [REDACTED] grade social studies classes.

23. Ms. Kilgore-Trefzger provided [REDACTED] with multiple copies of all assigned work. [REDACTED] knows that additional copies are available to all students in the classroom worksheet bin. On

one occasion ■■■ insisted that ■■■ could find a worksheet, and Ms. Kilgore-Trefzger assisted ■■■ in locating the worksheet.

24. On or about April 13, 2005, Ms. Kilgore-Trefzger privately spoke with ■■■ regarding ■■■ propensity to "avoid assignments and Mom and teacher having to work so hard for ■■■ responsibilities." ■■■ was upset by this discussion.

25. Occasionally, Ms. Kilgore-Trefzger sent ■■■ to another classroom in order to accommodate ■■■ need for fewer distractions while completing a particular assignment.

26. As the school year drew to a close, Ms. Kilgore-Trefzger permitted ■■■ to complete assignments in class rather than run the risk that ■■■ might lose the assignment as ■■■ did with increasing frequency as the year progressed. Ms. Kilgore-Trefzger reasonably viewed this as an accommodation which would benefit ■■■ in light of ■■■ frequent absences and struggles with the ■■■ grade curriculum.

27. ■■■ was successful in Ms. Kilgore-Trefzger's class, maintaining B's and C's and earning her recommendation to regular education social studies placement for the upcoming ■■■ grade year.

28. Jaime Kole was ■■■'s science teacher. Mr. Kole has taught for 33 years and is well aware that it is never appropriate to call attention to a student's peers that ■■■ has a 504 Plan. From time to time, Mr. Kole would be speaking to

the entire class to remind all that with respect to any assignment they might have failed, for any reason, to hand in, "it's better to hand it in late and have it graded with a lesser score than to not hand it in at all." ■■■ on occasion would respond gratuitously, "that doesn't include me."

29. Mr. Kole responded to ■■■ in this circumstance by moving close to ■■■ and quietly re-confirming that ■■■ could hand in assignments "on a late basis." Even so, ■■■ earned a "D" in science based upon ■■■ test scores and completed homework assignments.

30. On one occasion, Mr. Kole sent ■■■ for a time-out of less than five-minutes' duration because ■■■ was unable to respond to Mr. Kole's prompts requiring ■■■ to refrain from "distracting the students from what I had to present to the class." This upset ■■■.

31. Among the teachers whose testimony was offered by ■■■, Mr. Kole was the most liberal in interpreting the 504 Plan in a manner that put the least responsibility on ■■■.

32. Teacher Denise Aber would directly confront ■■■ when ■■■ failed to perform or underperformed on a test, asking of ■■■ if ■■■ had done ■■■ best. ■■■ disliked such inquiries by Ms. Aber but they were appropriate and necessary for Ms. Aber to adequately fulfill her duties with respect to teaching ■■■ and implementing ■■■ 504 Plan.

33. ■ perceives that it is a violation of the 504 Plan for a teacher to call it to ■ attention when ■ is behaving inappropriately, or advises ■ to comply with class requirements. To the contrary, teachers are required to enforce reasonable classroom standards with respect to disabled and non-disabled students alike.

34. ■ was disarmingly candid in ■ admission that ■ is able to understand and to comply with instructions.

35. Any negative consequence ■ experienced over the course of ■ grade was consistent with the 504 Plan and was not attributable to any act of discrimination.

36. ■ came to believe that the 504 Plan did not permit ■ to fail or to be disciplined, but this view was not reasonable and lacks factual or legal support.

37. Petitioner's teachers construed and implemented ■ 504 Plan reasonably, and reasonably required ■ to act in good faith to follow rules which apply equally to all students enrolled in regular education classes. With the minimal assistance provided for in ■ 504 Plan, ■ matriculated to eighth grade, although ■ grades were not as high as ■ felt ■ deserved.

38. In sum, all of Petitioner's accommodations were reasonably implemented during the 2004-2005 school year.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction pursuant to Section 120.569, Florida Statutes.

40. Petitioner alleged a failure to reasonably implement ■ 504 Plan and has the burden to prove by a preponderance of the evidence that ■ is entitled to relief. M.S. v. Seminole County School Board, (DOAH Case No. 99-0887E November 12, 1999); D.L.S, II v. Seminole County School Board, (DOAH Case No. 99-0887E November 12, 1999)(citing Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981), and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977)).

41. The parties agree and the record supports the conclusion that ■'s accommodations, if reasonably implemented, fulfill Section 504's purpose, which is to prevent discrimination against handicapped persons by implementing accommodations that help place them on equal footing with other students. See In re Student With a Disability, 31 IDELR at 9 (citing Berg v. Florida Dep't of Labor & Employment Sec., 163 F.3d 1251 (11th Cir. 1998))("The laws in this country directed towards ending discrimination against people with disabilities are designed not to provide a disabled person with benefits because of his or her disability . . . but to eliminate unfair burdens imposed only on those with disabilities.").

42. Section 504 does not require affirmative action on behalf of handicapped persons, nor does it compel a particular outcome, but only the absence of discrimination against those persons. Whitehead v. Whitehead, 918 F.Supp. 1515, 1520 (M.D. Fla. 1996); Smith v. Robinson, 468 U.S. 992, 1018 (1984).

43. Petitioner has failed to fulfill [REDACTED] burden of proof; instead, the evidence established that the accommodations provided for [REDACTED] were reasonably implemented throughout [REDACTED] [REDACTED] grade year at [REDACTED] School.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent enter its final order of dismissal.

DONE AND ENTERED this 21st day of September 2005, in Tallahassee, Leon County, Florida.

S

FLORENCE SNYDER RIVAS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of September, 2005.

COPIES FURNISHED:

Eileen L. Amy, Administrator
Exceptional Student Education Program
Administration and Quality Assurance
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

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



(Address of record)

Dr. Franklin R. Till, Jr., Superintendent
Broward County School Board
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

Honorable John L. Winn
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Daniel J. Woodring, General Counsel
Department of Education
Turlington Building
325 West Gaines Street
Tallahassee, Florida 32399-0400

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.