

Whether Respondent acted unlawfully in determining that [REDACTED] did not meet the criteria for exemption from the Florida Comprehensive Assessment Test (FCAT) examination for the year 2004.

Whether [REDACTED] is legally entitled to be promoted to the [REDACTED] grade.

PRELIMINARY STATEMENT

In a Petition for Due Process Hearing filed with DOAH on May 26, 2004, Petitioner [REDACTED] (Petitioner or [REDACTED] through [REDACTED] mother, Mrs. [REDACTED] (Mrs. [REDACTED] challenges the decision of [REDACTED] Individual Education Plan (IEP) team that [REDACTED] does not meet the criteria for exemption from state law which requires that all [REDACTED] grade students enrolled in public school participate in the state-mandated standardized testing, specifically the FCAT. [REDACTED] further challenges the decision by Respondent Palm Beach County School Board (Respondent or School Board) that be retained in [REDACTED] grade for failure to pass the FCAT.

Also on May 26, 2004, [REDACTED] petitioned on behalf of [REDACTED] younger child, [REDACTED] for an exemption from state-mandated standardized testing. The cases were consolidated for final hearing, which by agreement of the parties was set for July 8, 2004.

At hearing, on the record, [REDACTED] withdrew [REDACTED] claim(s) on behalf of [REDACTED] without prejudice to file a due process request as to any issue upon which relief may be granted at some future

date. Accordingly, the petition in case number 04-1968E is dismissed.

At the final hearing, Respondent presented the testimony of [REDACTED] Program Specialist for the School District of Palm Beach County; [REDACTED] Exceptional Student Education (ESE) Coordinator for [REDACTED] Elementary School; and [REDACTED] ESE Teacher at [REDACTED] Elementary School. Respondent's Exhibits numbered 1 through 8, 10, and 11 through 18 were received into evidence. Petitioner presented no witnesses and did not seek to enter any exhibits into the record.

At the conclusion of the hearing, the parties were invited to submit proposed orders, and agreed to do so, if they desired, by July 13, 2004. A transcript was ordered by the School Board in order to provide the parent with a written record of the proceedings, but due to the exigent circumstance that the new school year begins less than six weeks from the conclusion of the hearing, the parties agreed that entry of a final order should not be deferred to await the completion of the transcript.

The School Board's proposed order was timely filed and has been considered; no proposed order was filed on Petitioner's behalf.

Throughout this final order, references to statutes are to Florida Statutes (2003). References to Rules are to the Florida Administrative Code (2003).

FINDINGS OF FACT

Based on the testimony and documentary evidence presented at the final hearing and on the entire record of this case, the following findings of fact are made:

1. At all times material to this case, [REDACTED] was enrolled in the [REDACTED] grade at [REDACTED] Elementary School. There [REDACTED] received services pursuant to an IEP, which appropriately addressed [REDACTED] unique educational needs related to impairments in the areas of speech and language.

2. [REDACTED] is an exceptionally attractive and sweet-natured child, as is [REDACTED] younger brother [REDACTED] and an older sister who was not a party to this action. All three children attended the entire hearing, and demonstrated exemplary behavior throughout a proceeding that would tax the attention span of many adults.

3. As a result of [REDACTED] disabilities, [REDACTED] is a slow learner, but there is no evidence that [REDACTED] is cognitively impaired to the point where [REDACTED] cannot be reasonably expected to progress in the general curriculum and to attain a regular education diploma.

4. At all times relevant to this case, all students, including ESE students enrolled in Florida public school grades

three through ten, are required to participate in a student achievement testing program, usually the FCAT, as part of a statewide assessment program mandated by the Florida Legislature.

5. With reference to the FCAT as it applies to [REDACTED] graders, the objective is to assure that children who progress to [REDACTED] grade have completed the process of "learning to read" and are able to "read to learn."

6. At all times material to this case, it is required that all [REDACTED] graders sit for the FCAT examination in the winter of their [REDACTED] grade year, and to attain a Level 2 or above in reading.

7. As [REDACTED]'s [REDACTED] grade year (2002-2003) drew to a close, it was clear that [REDACTED] was functioning well below grade level and in danger of being unable to pass the reading portion of the FCAT examination the following year.

8. [REDACTED] teachers wanted to provide [REDACTED] an opportunity to strengthen [REDACTED] academics, in particular [REDACTED] substantial deficiencies in reading, without the pressures of the more advanced [REDACTED] grade curriculum.

9. For that reason, the professional members of the IEP team proposed that [REDACTED] repeat [REDACTED] grade.

10. Mrs. [REDACTED] adamantly opposed the recommendation. [REDACTED] love for and devotion to [REDACTED] are beyond question, and [REDACTED]

advocacy in support of █████ understanding of █████ child's best interests carried the day.

11. The IEP team knew that this decision had a low probability of producing positive results for █████

12. More specifically, the professional members on the IEP team were aware that, absent a change in state law, the School Board would have no lawful choice but to retain █████ in the █████ grade if █████ was unable to attain a passing score on the . . . grade FCAT. As matters stood at the end of █████ grade, there was little likelihood that █████ would be able to deliver the necessary FCAT performance by the time the FCAT would be given to █████ graders in their 2003-2004 school year. Neither did the School Board and the IEP team have reason to think that the law would be changed so as to provide the team with discretion to pass █████ and similarly situated ESE students on to the █████ grade in the event they failed the FCAT.

13. The law does recognize that ESE students may lack capacity to pass the FCAT; the examination is therefore not required of students who meet certain "exemption criteria" as set forth in the Florida Administrative Code. However, █████'s IEP team knew at the end of █████ █████ grade year that unless the exemption criteria was radically altered, there was no possibility that █████ would be exempt from the █████ grade FCAT.

14. Put another way, it was entirely foreseeable, and in fact foreseen by the professionals on the IEP team, that in failing to insist that ■■■ repeat ■■■ grade, the day of reckoning was merely being passed along to the successor IEP team.

15. ■■■ matriculated to ■■■ grade. ■■■ IEP team met on September ■■■ 2003. Among other things, the FCAT exemption criteria was examined with reference to ■■■ As ■■■ ■■■ grade teachers had correctly foreseen, ■■■ did not fulfill the criteria.

16. The decision was therefore appropriately made and documented in the IEP that ■■■ would sit for the FCAT to be administered in March 2003. Testing accommodations were appropriately provided. The accommodations included administering the examination orally and in a small group setting.

17. Also at this IEP meeting, the team appropriately determined that additional evaluations were necessary in order to determine if ■■■'s educational needs could be better served.

18. Parental consent was required for the tests proposed by the IEP team. Mrs. ■■■ did not execute the necessary consents, and school officials made no effort to seek the assistance of the School Board's lawyers in availing ■■■ of the opportunity to have the issue brought before DOAH, which is

authorized by law to grant consent for evaluation in appropriate circumstances.

19. Mrs. ■ signed the consent forms in the spring of this year. Any impact the results of the evaluations may have had upon the IEP team's application of the exemption criteria to ■ is moot with respect to the ■ grade FCAT.

20. In due course, ■ sat for the FCAT with ■ fellow non-exempt third grade classmates. Despite the accommodations provided to ■, ■ was unable to achieve the required Level 2 score in reading.

21. Mrs. ■ was timely notified that ■ would in all likelihood be retained in ■ grade.

22. One avenue remains by which ■ may be permitted to matriculate to ■ grade in the coming school year. Pursuant to law, Respondent provides ■ and others similarly situated an alternative method of assessment known as the SAT-9. This examination will be provided for ■ and others on August 2, 2004. Those who pass can be promoted, notwithstanding a failing FCAT score.

23. Children who fail the FCAT and do not otherwise qualify for promotion will repeat the ■ grade, but it will not be the same ■ grade experience as they had the previous year. Rather, state law requires that ■ graders who fail the FCAT be provided an intensive reading program. This help is substantial. It is

more than federal law--which mandates only that a special education student be provided a free, appropriate education in the least restrictive environment---requires states to provide to ESE students. It is also more than would be provided to a student--whether enrolled in regular or special education--who passes the FCAT, yet reads well below grade level.

24. It should be noted that [REDACTED]'s failure to have mastered reading at the level necessary to earn promotion to [REDACTED] grade is not the result of any fault on [REDACTED] part. [REDACTED] tries hard. [REDACTED] has made, and continues to make, progress on [REDACTED] IEP academic goals. [REDACTED] has always embraced learning, and it can be hoped that with continued support from a united home and school, [REDACTED] will continue to make real progress on realistic goals.

25. Mrs. [REDACTED] argues with eloquence and conviction that it is fundamentally wrong to deny a willing, cooperative student the opportunity to go on to [REDACTED] grade with [REDACTED] friends and classmates solely because [REDACTED] cannot pass an examination which all agree is academically over [REDACTED] head.

26. It may be observed that mandatory retention based upon standardized testing is a controversial issue. Mrs. [REDACTED]'s arguments reflect one point of view in the public debate that is ongoing in the media and in the legislature.

27. At present, Florida's public policy, as expressed through controlling law, holds that the larger goal of enhancing

the quality of Florida's public schools by providing objective means of measuring the performance of individual schools and students must take precedence over the desires of parents to spare their children the possibility of negative social and emotional consequences which may--but not necessarily must--come with being retained.

28. It is hoped that the formal hearing served to clarify for Mrs. [REDACTED] the legal environment in which IEP team decisions are made, and to provide [REDACTED] with assurance that [REDACTED]'s situation is by no means unique, and that the teachers and other professionals who serve children who are required to repeat [REDACTED] grade have substantial experience devising strategies to make the experience a positive one.

CONCLUSIONS OF LAW

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

30. Florida has a statewide assessment program whereby all students in grades three through ten are required to take the FCAT. § 1008.22, Fla. Stat.

31. The decision to exclude any student with a disability from the FCAT is made by the IEP Team. Fla. Admin. Code R. 6-A1.0943(a).

32. Pursuant to Florida Administrative Code Rule 6A-1.0943, an ESE student is exempt from the FCAT requirement, if and only if, [REDACTED] IEP team determines that [REDACTED] fulfills both parts of a two-part exemption standard, specifically:

The student's demonstrated cognitive ability prevents the student from completing required coursework and achieving the Sunshine State Standards as incorporated by reference in Rule 6A-1.09401 . . . even with appropriate and allowable course modifications, and

The student requires extensive direct instruction to accomplish the application and transfer of skills and competencies needed for domestic, community living, leisure, and vocational activities.

33. As noted above, the IEP team applied the exemption criteria correctly, determining that [REDACTED] was not exempt from the obligation to sit for the FCAT.

34. [REDACTED] did not pass the FCAT and must therefore be retained in the [REDACTED] grade, unless [REDACTED] passes the upcoming SAT-9. § 1008.25(5), Fla. Stat.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the School Board of Palm Beach County, Florida, acting through [REDACTED]'s IEP Team, appropriately determined that [REDACTED] did not meet exemption criteria, and was therefore required by law to sit for the [REDACTED] grade FCAT examination. It is further ORDERED that the School Board of

Palm Beach County appropriately determined that [REDACTED] is subject to mandatory retention in [REDACTED] grade.

DONE AND ORDERED this 21st day of July, 2004, in Tallahassee, Leon County, Florida.

S

FLORENCE SNYDER RIVAS
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Division of Administrative Hearings
this 21st day of July, 2004.

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.