

Palm Beach County School District  
No. 04-3879E  
Initiated by: Parent  
Hearing Officer: Patricia Hart Malono  
Date of Final Order: December 22, 2004

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

█, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 04-3879E  
 )  
PALM BEACH COUNTY SCHOOL BOARD, )  
 )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on December 2, 2004, in West Palm Beach, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: █, pro se  
(address of record)

For Respondent: Laura Pincus, Esquire  
Palm Beach County School Board  
Office of General Counsel  
3318 Forest Hill Boulevard, Suite C-302  
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STATEMENT OF THE ISSUE

Whether the Respondent is providing the Petitioner with a free appropriate public education.

PRELIMINARY STATEMENT

On October 28, 2004, ■■■, the parent of ■■■, filed with the Palm Beach County School Board ("School Board") on ■■■ behalf a request for a due process hearing in which she disputed the School Board's decision to change ■■■'s educational placement. The School Board transmitted the request to the Division of Administrative Hearings for assignment of an administrative law judge. A pre-hearing conference was held on November 8, 2004, and, pursuant to notice, the due process hearing was conducted on December 2, 2004.

After the hearing was convened, ■■■ stated her belief that the undersigned had engaged in an ex parte communication with counsel for the Petitioner and indicated that she had no confidence that the undersigned could conduct an impartial hearing. The undersigned invited ■■■ to make an oral motion to disqualify her, but ■■■ declined. The hearing proceeded, with the School Board presenting the testimony of Triciana Gray, Jessica Hind, Ashleigh Boone, Krista Kirche, and Dave Tobson; Respondent's Exhibits R-1 through R-7 were offered and received into evidence. ■■■ did not present any evidence; she presented only a closing statement.

No transcript was filed with the Division of Administrative Hearings, but the School Board timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Final Order.

#### FINDINGS OF FACT

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

1. ■■■ is an ■■■ grade student in the Palm Beach County school system. ■■■ has been classified as a student with a specific learning disability and, at the times material to this proceeding, has been receiving exceptional educational services pursuant to an Individualized Educational Program ("IEP") developed April 24, 2004.

2. Pursuant to the April 24, 2004, IEP, ■■■ receives instruction in language arts and mathematics in the exceptional student education ("ESE") program and instruction in all other academic and elective courses in the regular classroom setting.

3. At the time the April 24, 2004, IEP was developed ■■■ attended ■■■ School ("■■■"). ■■■ began the 2004-2005 school year at ■■■ but transferred to ■■■ School ("■■■") in October 2004.

4. On October 22, 2004, Triciana Gray, a teacher at ■■■, observed ■■■ and two other ■■■ pursuing and menacing a fourth

student, ■■■. Ms. Gray did not observe any aggressive behavior by ■■■ toward ■■■ or the two other ■■■. Ms. Gray called ■■■ to come to her, but ■■■ was backing away from ■■■ and the other two ■■■ and did not respond to her call.

5. Ms. Gray believed that a fight was about to start, and she asked students in the vicinity to go to a classroom and press the buzzer to summon help. When the four ■■■ moved to another location, Ms. Gray went to her classroom.

6. Jessica Hind, another teacher at ■■■, first saw the four . . . out of the windows at the back of her classroom. She pressed the buzzer in her classroom to summon help because ■■■ and the other two ■■■ were being verbally aggressive toward ■■■, and she observed students gravitating from the hallways toward the area where the altercation was taking place.

7. Ms. Hind did not observe the ■■■ fighting from the windows at the back of her classroom. Rather, ■■■ and the two other ■■■ pursued ■■■ to a location outside the front of her classroom. From her classroom door, Ms. Hind saw ■■■ and another ■■■, identified as ■■■, engaging in a fistfight with ■■■. Ms. Hind saw ■■■ on the ground and ■■■ and ■■■ kicking and punching ■■■. ■■■ fought back, and, although ■■■ got up from the ground and tried to run away, ■■■ pursued ■■■ and kept fighting; ■■■ turned and fought back.

8. Ashleigh Boone is one of the ESE coordinators at █, and she had worked with █ when █ attended █ as a █ grader. Ms. Boone also worked with █ as an █ grader, after █ transfer back to █ in October 2004. Ms. Boone attended █'s IEP meetings and dealt within █ when █ had behavior issues or referrals. After █'s transfer back to █ in October 2004, Ms. Boone also became a "safe haven" for █; her office was a place where █ could go if █ had problems, and Ms. Boone was in close contact with █. Ms. Boone entered into a behavior contract with █ on October 5, 2004, when █ returned to █.

9. Ms. Boone was called to the scene of the fight. A crowd of students had gathered, and a police officer was restraining █. Ms. Boone observed that █ was very excited and had obviously been in a fight; █ was not wearing shoes or a shirt, and █ did not have █ book bag.<sup>1</sup>

10. Ms. Boone took █ to her office, where █ prepared a statement in which █ admitted having started the fight with █ by pushing █. Ms. Boone telephoned █, █'s mother, and █ came to the school and picked up █.

11. █ was not injured in the fight. █ suffered an injury to █ ear<sup>2</sup>; it was bleeding badly when the fight was broken up, and █ was taken to the hospital, where █ received

stitches. ■■■ could not be identified as the student who injured ■■■'s ear.

12. As a result of the fight, ■■■ was suspended from school for a period of ten school days, beginning October 25, 2004, and ending November 8, 2004.<sup>3</sup>

13. On October 28, 2004, ■■■'s IEP team met to consider an interim alternative education placement for ■■■. ■■■ attended and was given a copy of the Summary of Procedural Safeguards. At the meeting, the IEP team modified the April 27, 2004, IEP to reflect that it had considered positive behavior intervention, strategies, and supports for ■■■ based on a determination that ■■■ behavior impedes ■■■ learning and to reflect that ■■■ was to receive a standard diploma. The team also decided that an alternative educational placement would be appropriate for ■■■.

14. The Conference Record for the October 28, 2004, IEP team meeting reflects that the team discussed the fight on October 22, 2004, and decided that ■■■'s placement should be changed to the ■■■ Center ("■■■").

15. ■■■ Center is a school operated by Affiliated Computer Services under contract with the School Board. It provides alternative educational services and offers a highly structured school environment. The campus is small, with approximately 200 students. The students are not permitted to move around the campus without an escort. The classes are small, and there is a

teacher and a behavioral specialist in all areas of the school's academic program.

16. ■■■ Center employs a behavior token economy system under which school is treated as a job. Students receive a "salary" of \$125.00 token money each week; they must pay \$95.00 per week in rent and can put the remainder of their "salary" in an account. The students can use the token money accumulated in their accounts to buy things and privileges; they also move up a "level" when they have accumulated a certain amount of token money. When students break rules, they must write "checks" on the account, and, if they are required to write too many checks, they drop a "level." The goal of the behavior program at ■■■ Center is to help the students who are placed in alternative education to improve their behavior and make the transition back to their home schools.

17. ■■■ Center has two ESE teachers, and ■■■ can be provided with language arts and mathematics instruction in a small ESE class, as required by ■■■ IEP. In addition, the teachers in the regular classrooms at ■■■ Center can provide the accommodations included in ■■■'s IEP.

18. The change in placement was discussed with ■■■ on October 28, 2004, and she was shown the alternative education packet. ■■■ emphatically disagreed with the change in ■■■'s placement.

19. Ms. Boone participated in the October 28, 2004, IEP meeting. In her opinion, the transfer to the █████ Center was appropriate. █████ had had behavior issues other than the fight during the month that █████ had been at █████ in the 2004-2005 school year, and █████ had had many behavior problems when █████ was a █████th grade student at █████. Ms. Boone considers the October 22, 2004, fight very serious because █████ and another █████ attacked a student who was trying to avoid a fight and because █████ and the other student pursued █████ for the purpose of engaging █████ in a fight. Ms. Boone also believes that █████'s starting the fight with █████ was premeditated; █████ told Ms. Boone that █████ and █████ had had an altercation in their neighborhood approximately two weeks before the fight on the █████ campus.

20. █████ is a very large school, with over 900 students, and the campus is very large and spread out. Ms. Boone believes that █████ Center, with its smaller, more structured setting, would be a better educational environment for █████ than █████.

21. █████ was provided with a Prior Written Notice (Change of Placement/FAPE) form at the IEP conference on October 28, 2004, notifying her that █████ would be transferred to an alternative education facility, where █████ would receive language arts and mathematics in an ESE class, as set forth in █████ April 26, 2004, IEP, with the remainder of █████ academic and elective classes in regular classrooms with █████ non-disabled



peers. The notice provided that the change in placement would be initiated on November 10, 2004.

22. It appears from the Exceptional Student Education (ESE) Referral Procedures Checklist form that no manifestation determination had been completed as of October 28, 2004, when the referral to an alternative educational placement was made. In Section B of the form, there is a checklist of items of documentation that were to be collected by the IEP team. There is an "N/A" notation in the box checked opposite the statement that the IEP team had collected, "for students with 10 days of out of school suspension," a "completed Manifestation Determination . . . and Discipline Report of ESE Students."<sup>4</sup>

23. The evidence presented by the School Board is sufficient to establish that the ESE services set forth in █████'s April 26, 2004, IEP can be provided at the █████ Center, that █████'s behavior interfered with █████ ability to benefit from █████ education at █████, and that the █████ Center provides the small, structured environment necessary for █████ to benefit from █████ education. █████ or a similar comprehensive █████ school would not provide a sufficiently structured environment and the smaller classes that would allow █████ to benefit from the instruction being provided █████ by the School Board.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 1003.57(5), Florida Statutes (2004).

25. Section 1001.41, Florida Statutes, which sets forth the powers of a district school board, provides in pertinent part:

The district school board, after considering recommendations submitted by the district school superintendent, shall exercise the following general powers:

\* \* \*

(4) ESTABLISHMENT, ORGANIZATION, AND OPERATION OF SCHOOLS.--Adopt and provide for the execution of plans for the establishment, organization, and operation of the schools of the district, including, but not limited to, the following:

\* \* \*

(1) *Exceptional students*.--Provide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable in accordance with the provisions of s. 1003.57.

26. Section 1003.57, Florida Statutes, provides as follows:

Exceptional students instruction.--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.

(3) The district school board annually provide information describing the Florida School for the Deaf and the Blind and all other programs and methods of instruction available to the parent of a sensory-impaired student.

(4) The district school board, once every 3 years, submit to the department its proposed procedures for the provision of special instruction and services for exceptional students.

(5) No student 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. The parent of an exceptional student evaluated and placed or denied placement in a program of special education shall be notified of each such evaluation and placement or denial. Such notice shall contain a statement informing the parent that he or she is entitled to a due process hearing on the identification, evaluation, and placement, or lack thereof. Such hearings shall be exempt from the provisions of ss. 120.569, 120.57, and 286.011, except to the extent that the State Board of

Education adopts rules establishing other procedures and any records created as a result of such hearings shall be confidential and exempt from the provisions of s. 119.07(1). The hearing must be conducted by an administrative law judge from the Division of Administrative Hearings of the Department of Management Services. The decision of the administrative law judge shall be final, except that any party aggrieved by the finding and decision rendered by the administrative law judge shall have the right to bring a civil action in the circuit court. In such an action, the court shall receive the records of the administrative hearing and shall hear additional evidence at the request of either party. In the alternative, any party aggrieved by the finding and decision rendered by the administrative law judge shall have the right to request an impartial review of the administrative law judge's order by the district court of appeal as provided by s. 120.68. Notwithstanding any law to the contrary, during the pendency of any proceeding conducted pursuant to this section, unless the district school board and the parents otherwise agree, the student shall remain in his or her then-current educational assignment or, if applying for initial admission to a public school, shall be assigned, with the consent of the parents, in the public school program until all such proceedings have been completed.

(6) In providing for the education of exceptional students, the district school superintendent, principals, and teachers shall utilize the regular school facilities and adapt them to the needs of exceptional students to the maximum extent appropriate. Segregation of exceptional students shall occur only if the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(7) In addition to the services agreed to in a student's individual education plan, the district school superintendent shall fully inform the parent of a student having a physical or developmental disability of all available services that are appropriate for the student's disability. The superintendent shall provide the student's parent with a summary of the student's rights.

27. The rules of the Florida Department of Education that govern the programs and services available for exceptional students are found in Florida Administrative Code Rule Chapter 6A-6. Rule 6A-6.03312, Discipline Procedures for Students with Disabilities, provides in pertinent part:

For students whose behavior impedes their learning or the learning of others, strategies, including positive behavioral interventions and supports to address that behavior must be considered in the development of the students' individual educational plans (IEPs). Procedures for providing discipline for students with disabilities must be consistent with the requirements of this rule.

(1) Definitions.

(a) Change of placement. For the purpose of removing a student with a disability from the student's current educational placement as specified in the student's individual educational plan (IEP) under this rule, a change of placement occurs when:

1. The removal is for more than ten (10) consecutive school days, or
2. A series of removals constitutes a pattern because the removals cumulate to

more than ten (10) school days in a school year, and because of factors such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another.

\* \* \*

(i) Manifestation Determination. A manifestation determination examines the relationship between the student's disability and a specific behavior that may result in disciplinary action.

\* \* \*

(3) Manifestation Determination. A manifestation determination, consistent with the following requirements, must be made any time disciplinary procedures result in a change of placement.

(a) In conducting the review, the IEP team and other qualified personnel shall:

1. Consider all relevant evaluation and diagnostic information including information supplied by the parents of the student, observations of the student, the student's current IEP and placement, and any other relevant information, then

2. Determine that, in relationship to the behavior subject to disciplinary action:

a. The student's IEP and placement were appropriate and whether the special education services, supplementary aids and services, accommodations and modifications as defined in paragraphs (2)(e) and (f) of Rule 6A-6.03028, F.A.C., and positive behavior intervention strategies were provided consistent with the student's IEP and placement;

b. The student's disability impaired the ability of the student to understand the

impact and consequences of the behavior subject to disciplinary action; and

c. The student's disability impaired the student's ability to control the behavior subject to disciplinary action.

(b) If the IEP team and other qualified personnel determine that the student's behavior was not related to the disability, the relevant disciplinary procedures applicable to students without disabilities may be applied to the student in the same manner in which they would be applied to students without disabilities. However, services consistent with subsection (5) of this rule must be provided.

(c) With the exception of placement in an interim alternative educational setting, as described in paragraphs (1)(j) and (6)(b) of this rule, if the IEP team determines that the student's behavior was a manifestation of the disability, the student's placement cannot be changed by school personnel as a disciplinary intervention. However, the IEP team may determine that a change of placement is necessary to provide the student a free, appropriate public education in the least restrictive environment.

(d) If the IEP team and other qualified personnel determine that any of the requirements of subparagraph (3)(a)2. of this rule were not met, the behavior subject to disciplinary action must be considered a manifestation of the student's disability.

(e) The review described in paragraph (3)(a) of this rule may be conducted at the same IEP meeting that is required by paragraph (4)(b) of this rule.

28. Based on the findings of fact herein, the School Board cannot place █████ in █████ Center as a disciplinary intervention

because the IEP team did not conduct a manifestation determination prior to or on October 28, 2004, when it decided to change ■■■'s placement. In order to place ■■■ in ■■■ Center as a disciplinary measure, the IEP team would have had to determine that ■■■'s behavior was not related to ■■■ disability. See Fla. Admin. Code R. 6A-6.03312(3)(b). In the absence of such a determination, it must be presumed that ■■■'s behavior was a manifestation of ■■■ disability. In such a circumstance, the change in placement could take place only if it was necessary to provide ■■■ with a free appropriate public education in the least restrictive environment. See Fla. Admin. Code R. 6A-6.03312(3)(c).

29. Based on the findings of fact herein, the change in placement from ■■■ to ■■■ Center was necessary to provide ■■■ with a free appropriate public education in the least restrictive environment.

#### CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED the decision of ■■■'s IEP team that ■■■ be placed in the ■■■ Center is sustained.

DONE AND ORDERED this 22nd day of December, 2004, in Tallahassee, Leon County, Florida.



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PATRICIA HART MALONO  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of December, 2004.

## ENDNOTES

<sup>1/</sup> ■ had taken ■ clothing off in the 200 wing of the ■ campus, and ■ and the other ■(s) had ■ from the 200 wing to the 300 wing of the campus, which was quite a long distance.

<sup>2/</sup> Ms. Boone testified that ■ had a "chunk" missing from ■ ear.

<sup>3/</sup> The School Board conceded during opening argument that, as a result of a computer error, it failed to consider that ■ had been suspended from ■ Academy for three days during the 2004-2005 school year. As a result, ■ was suspended from school for a period in excess of ten school days, in violation of the procedures established in Florida Administrative Code Rule 6A-6.03312.

<sup>4/</sup> In addressing an issue raised by ■ at the beginning of the hearing, counsel for the School Board stated that a meeting had been scheduled for November 23, 2004, for the purpose of completing a manifestation determination.

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.