

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

vs.

Case No. 16-4839E

MIAMI-DADE COUNTY SCHOOL BOARD,

Respondent.

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FINAL ORDER

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on November 15, 2016, in Miami, Florida.

APPEARANCES

For Petitioner: Stephanie Langer, Esquire
Langer Law, P.A.



For Respondent: Mary C. Lawson, Esquire
Miami-Dade County Public Schools
1450 Northeast Second Avenue
Miami, Florida 33132

STATEMENT OF THE ISSUES

Whether Respondent School Board committed a violation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.

§ 1400, et seq., in failing to provide Petitioner's [REDACTED] with the opportunity to inspect and review Petitioner's educational records; and, if so, whether said failure significantly impeded Petitioner's [REDACTED] opportunity to participate in the decision-making process regarding the provision of a free, appropriate public education ("FAPE") or impeded Petitioner's right to FAPE.

PRELIMINARY STATEMENT

On August 19, 2016, Respondent received Petitioner's due process complaint. Petitioner's complaint was forwarded to DOAH on August 22, 2016, and assigned to the undersigned. Petitioner's complaint alleges that, from February 1, 2016, to present, Respondent has refused to provide copies of certain educational records. Specifically, Petitioner alleges Respondent failed to provide therapy logs, clinician's tallies, the cumulative folder, and administered protocols. With respect to the protocols, Petitioner avers that the same have been requested for more than a year, and although "access has been provided," Respondent has refused to provide copies. It is further alleged that, Respondent's "restricted access in addition to withholding copies of certain educational records, has impeded [Petitioner's [REDACTED]] right to advocate for [Petitioner's] unique needs, hindering and denying [Petitioner] access to FAPE."

The final hearing was originally set for October 12, 2016. On September 22, 2016, Respondent filed a motion to continue the final hearing and the same was granted on October 4, 2016. The final hearing was re-scheduled for November 16, 2016, and was conducted, as scheduled. The final hearing Transcript was filed on November 29, 2016. The identity of the witnesses and exhibits and rulings regarding each are as set forth in the Transcript.

At the conclusion of the hearing, the parties stipulated that proposed final orders would be filed within 14 days of the final Transcript, and that the final order would be issued within 14 days thereafter. Accordingly, on November 29, 2016, the undersigned issued an Order Memorializing Deadlines for Proposed Orders and Final Order. The parties timely filed proposed final orders which have been considered in issuing this Final Order.

Unless otherwise indicated all rule and statutory references are to the version in effect at the time of the alleged violations. For stylistic convenience, the undersigned will use [REDACTED] pronouns in the Final Order when referring to Petitioner. The [REDACTED] pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. Petitioner is currently [REDACTED] years old and enrolled in a private school. In the 2015-2016 school year, [REDACTED] was in [REDACTED] and enrolled at a Miami-Dade County public school (hereinafter "School A").

2. During the 2015-2016 school year, Petitioner received IDEA services pursuant to the [REDACTED] and [REDACTED] eligibility categories.

Protocols:

3. Beginning on March 6, 2015, [REDACTED], S.S.P./N.C.S.P., one of Respondent's licensed school psychologists, evaluated Petitioner as part of a psycho-educational reevaluation. As stated in [REDACTED] report, the purpose of the evaluation was to "delineate [Petitioner's] strengths and weaknesses and to provide recommendations for [Petitioner's] future academic planning." The evaluation continued over the following dates: March 13, 2015; April 1 and 2, 2015; and April 9, 2015. [REDACTED] report was finalized on April 17, 2015.

4. Prior to the completion of the report, [REDACTED] met with Petitioner's [REDACTED] to administer two parental rating scales. After the report was finalized, [REDACTED] met with Petitioner's [REDACTED] to explain and interpret the testing protocols^{1/} [REDACTED] administered to Petitioner, and to field any

questions regarding the report.^{2/} On this occasion, [REDACTED] was accompanied by [REDACTED], Ph.D., Respondent's chairperson for psychological services in north Miami-Dade County Public Schools. [REDACTED] is also a licensed school psychologist. The meeting lasted approximately two hours.

5. During or prior to this meeting, Petitioner's [REDACTED] requested copies of the protocols. Respondent does not and has not provided parents copies of psychological testing protocols. In support of that posture, [REDACTED], Ph.D., instructional supervisor for psychological services, explained that Respondent is charged with ensuring test security and test validity, and, therefore, the protocols are not disseminated into the community. [REDACTED] further explained that, the issue of copyright law is also present, but "that's not the big concern."

6. Respondent, consistent with its long-standing procedure, would not provide copies of the protocols to Petitioner's [REDACTED]. Respondent would also not permit Petitioner to make copies or otherwise take photographs or scan the protocols.

7. On July 13, 2015, Respondent notified Petitioner of an individual education plan ("IEP") meeting scheduled for July 27, 2015. The following day, Petitioner's [REDACTED] executed Respondent's Consent Form for Mutual Exchange of Information

("consent form"), wherein [REDACTED] authorized Respondent to disclose "[a]ll testing protocols administered in the multi-disciplinary report dated 4 2015." On the consent form, Petitioner's [REDACTED] identified five entities or psychologists: the [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

8. Petitioner's [REDACTED] completed this form as [REDACTED] desired the protocols to be sent to one or more private psychologists, so that [REDACTED] could obtain an independent professional opinion regarding the report. On July 17, 2015, Petitioner's [REDACTED] also completed an authorization for exchange of information on the letterhead of [REDACTED].

9. Upon receipt of the consent form, [REDACTED] contacted the above-noted providers to ensure that properly credentialed individuals were there to receive the protocols. Only two of the contacted providers, [REDACTED] (who is in the same practice as [REDACTED]) and [REDACTED], returned [REDACTED] inquiry and agreed to receive the protocols.^{3/}

10. Respondent provided a copy of the requested protocols to [REDACTED] office. The protocols were received prior to the scheduled July 27, 2015, IEP meeting; however, Petitioner's [REDACTED] was unable to meet with [REDACTED] prior to the IEP meeting.

11. Upon Petitioner's [REDACTED] request, in the week preceding the July 25, 2015, IEP meeting, [REDACTED] met again with [REDACTED] and [REDACTED], the chairperson of social workers, on two separate days. During these meetings, the protocols administered by [REDACTED], rating scales from teachers, and the social worker's social history report were available for review and inspection. Again, Petitioner's [REDACTED] was not permitted to make copies of the available protocols.

12. After the July 27, 2015, IEP meeting, Respondent provided Petitioner's [REDACTED] with the opportunity to again review the requested records. Petitioner's [REDACTED] declined this opportunity to review and inspect because [REDACTED] wanted a copy of the records to refer to with [REDACTED] counsel, [REDACTED], etc.

13. On May 10, 2016, Petitioner's [REDACTED] requested the protocols from the "psycho-educational evaluation" in preparation for an upcoming meeting. On the same date, Respondent requested that Petitioner's [REDACTED] forward the name of a qualified evaluator so the psychological services department could arrange for the test protocols to be shared with the identified professional. Petitioner's [REDACTED] responded that [REDACTED] was "not asking for empty protocols but only those utilized and filled out about this student."

14. At an IEP meeting on May 17, 2016, [REDACTED] brought the requested protocols to the meeting. Petitioner's [REDACTED] and

counsel were able to review the protocols; however, they were not provided a copy of the same. On that date, Petitioner's [REDACTED] requested that Respondent provide a copy of the protocols to [REDACTED], so that Petitioner would discuss the protocols with [REDACTED] in preparation for an upcoming meeting.

15. As requested, on May 24, 2016, Respondent issued correspondence to [REDACTED] enclosing the testing protocols used in the April 17, 2015, reevaluation. The correspondence provided that:

These materials are being provided to you as a professional who is qualified to interpret them and under the expressed condition that you will not disseminate copies to any other party including the [REDACTED] and their attorney(s)/advocate(s). The protocols have been reviewed with the [REDACTED] on multiple occasions by the school psychologist who conducted the evaluation. By signing this letter on the bottom, you acknowledge receipt of the evaluation protocols and agree not to disseminate them. By signing the bottom of this letter you also agree to safeguard the enclosed materials and to return them immediately upon request by Miami-Dade County Public Schools.

16. On July 6, 2016, Petitioner's [REDACTED] made a "final request" for copies of Petitioner's protocols. Respondent did not provide copies to Petitioner's [REDACTED] and the instant due process complaint followed on August 19, 2016.

17. Based on the evidentiary presentation, the undersigned is effectively precluded from making factual determinations

regarding the nature and content of the protocols at issue. The protocols were neither offered by either party as an exhibit nor did the parties request that the undersigned conduct an in camera inspection. While ██████ testified that Petitioner's name was "on the protocols" ██████ administered, it is unclear as to whether ██████ was referring to the bare test protocol/question booklet or to the sheet(s) on which Petitioner's answers were recorded or to some variation thereof. It appears undisputed that the protocols are not placed in the student's cumulative file, but rather, placed in a separate protocol file.

18. It is also undisputed that on each occasion that Respondent provided the protocols for inspection and review, Petitioner's ██████ was not permitted to inspect and review the same without at least one District employee also present.

Cumulative file:

19. Petitioner's ██████ testified that, prior to January 2016, ██████ had requested a copy of Petitioner's "cumulative file" and Respondent had provided the same.^{4/} ██████ further testified that, after January 2016, ██████ was not provided a copy of the requested cumulative file. Due to the evidentiary presentation, the undersigned cannot discern from the record when Petitioner's ██████ made the post-January 2016 request for a copy of the cumulative file or to whom the request was made.

20. It is undisputed that after the 2015-2016 school year had ended, on July 10, 2016, Petitioner's ██████ issued email correspondence to ████████████████████ requesting "copies of any documentation/educational records that was added to [Petitioner's] cumulative school file after Jan 30, 2016 to present." ██████, ██████ at School A, testified that School A provided a copy of the cumulative file "[p]ossibly last January." ██████ also testified that, at the end of the 2015-2016 school year "many records were copied or originals were given to ██████ during the summer, this past summer." ████████████████████ was unaware of any outstanding record requests from Petitioner's ██████.

21. The record fails to set forth which records, of the 24 enumerated categories potentially contained in the cumulative file, were not provided by Respondent following the request of July 10, 2016.

Clinician's tallies and therapy logs:

22. Petitioner's ██████ testified that, at some point in the 2015-2016 school year ██████ requested copies of "clinician's tallies," but Respondent did not provide a copy. Petitioner's ██████ could not provide any specificity as to when ██████ first requested said copies. Referencing the June 13, 2016, IEP, ██████ defined the term as follows:

Q. So when we're talking about clinician tallies, can you tell me what you mean by that?

A. In the IEP, it talks about how the goals are being monitored and kept up in using clinician data; you know, that they're keeping track of what's going on with [REDACTED] using, you know, clinician--here, let me see if I can find something. Can you tell me where the latest IEP is?

Q. Tab 36, I believe.

A. Okay. So under "Communication", it talks about how they're going to be documenting [REDACTED] progress all along using clinician tallies and their observations of what--you know, as they're providing services.

23. In the absence of any evidence to the contrary, the undersigned finds that Petitioner's [REDACTED] requested clinician's tallies on July 10, 2016. On that date, Petitioner's [REDACTED] issued correspondence to [REDACTED] requesting [REDACTED] "provide all service logs, including but not limited to, tallies, observations, etc. by clinicians for OT, Language and PT for ALL the years [Petitioner] attended [School A], to date."

24. Similarly, regarding the therapy logs, Petitioner's [REDACTED] testified that, at some point in the 2015-2016 school year, [REDACTED] requested copies of therapy logs, but Respondent did not provide a copy. Petitioner's [REDACTED] could not provide any specificity as to when [REDACTED] first requested said copies. In the absence of any evidence to the contrary, the undersigned finds

that Petitioner's ██████ requested therapy logs on July 10, 2016, pursuant to the email correspondence to ██████ noted above.

25. From the evidentiary presentation, it does not appear that any IEP meetings were requested, scheduled or conducted after July 10, 2016. As noted in paragraph 1, Petitioner did not return to School A for the 2016-2017 school year.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to section 1003.57(1)(c), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

27. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

28. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a [FAPE] that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children

from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on the agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Alabama State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

29. In Board of Education of Hendrick Hudson Center School District v. Rowley, 458 U.S. 176 (1982), the Supreme Court held that a two part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. As an initial matter, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Rowley, 458 U.S. at 206-207. A procedural error does not automatically result in a denial of FAPE. See G.C. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to a free, appropriate public education, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. Winkelman v. Parma City Sch. Dist., 550 U.S. 5-16, 525-26 (2007).

30. Here, Petitioner's Complaint asserts a procedural error. In essence, Petitioner avers that Respondent's failure to provide certain education records and restricted access to

educational records, has impeded Petitioner's [REDACTED] right to advocate for Petitioner's unique needs, hindering and denying Petitioner access to FAPE.

31. The IDEA's implementing regulations provide that school districts "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by [the school district]" 34 C.F.R. § 300.613(a). This opportunity applies to records concerning the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. 34 C.F.R. § 300.501(a). Section 300.613(b) provides that, the right to inspect and review education records includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

34 C.F.R. § 300.613(b) (1)-(3).

32. The school district must comply with a request "without unnecessary delay" and before any meeting regarding an

IEP, any due process hearing, or resolution session, and in no case more than 45 days after the request has been made.

34 C.F.R. § 300.613(a). Florida Administrative Code Rule 6A-1.0955(6)(b), entitled "Education Records," provides that a school district shall comply with a request within a reasonable period of time, but in no case more than 30 days after it has been made.

33. Section 300.611(b) provides that education records "means the type of records covered under the definition of 'education records' in 34 CFR part 99 (the regulations implementing the Family Education Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA))." FERPA, in turn, defines education records as "those records that are: (1) directly related to a student; and (2) [m]aintained by an educational agency or institution or by a party acting for the agency or institution." 34 C.F.R. § 99.3. A "record" itself is defined under FERPA as "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." Id.

34. Although there is no statutory definition of an educational record "directly related to a student," the phrase is often considered synonymous with the term "personally identifiable information" under 34 C.F.R. § 99.3. The term

personally identifiable information includes, but is not limited to:

- (a) The student's name;
- (b) The name of the student's parent or other family members;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number, student number, or biometric record;
- (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

Id.

Test Protocols:

35. The determination of whether a test protocol is an education record requires a fact driven inquiry as to whether the subject document directly relates to the student, i.e., whether the document contains personally identifiable information. In Letter to Shuster, 11 FAB 30 (OSEP 2007), the

Office of Special Education Programs, in response to a query regarding test protocols as educational records, reiterated its long-standing policy as follows:

Records that are not directly related to a student and maintained by an agency or institution are not "educational records" under FERPA and parents do not have a right to inspect and review such records. For example, a test protocol or question booklet which is separate from the sheet on which a student records answers and which is not personally identifiable to the student would not be a part of [REDACTED] or [REDACTED] "education records."

36. As a corollary, if the student's personally identifiable information is integrated throughout the test protocol at issue, the protocol may be an education record, subject to parental inspection and review. Letter to Price, 57 IDELR 50 (OSEP 2010); Letter to Anonymous, 111 LRP 18281 (FPCO 2010) (A test protocol is not generally an education record unless it includes the student's name or other personally identifying information and the student's answers to the questions in the test protocol.); Letter to Thomas, 211 IDELR 420 (FPCO 1986) (noting that where test protocols are intermingled with or contain personally identifiable information, then they are education records to which parents must have access).

37. As noted above, the parents have a right to request copies of the records if failure to provide the copies would

effectively prevent the parent from exercising the right to inspect and review. While the term "effectively prevent" is not defined, it has been interpreted to mean that, for example, a parent or parent's expert may receive copies of records when they reside beyond commuting distance. Woods v. Northport Pub. Sch., 487 Fed. Appx. 968 (6th Cir. 2012) (concluding that where parents themselves did not want to review protocols, but wanted an expert who lived out of town to review the same, failure of school district to provide records to parent's expert resulted in IDEA substantive violation); Fed. Reg. 46,688 (2006); Letter to Anonymous, 213 IDELR 188 (OSEP January 19, 1989) ("[A] parent shall receive copies of the records when ■■■ or ■■■ lives too far from the school district to see the records in person.").

38. Where the subject protocol is determined not to be an educational record, the parent still has the right, pursuant to 34 C.F.R. § 300.613(b) (1), to request an explanation and interpretation of the record. In Letter to Shuster, supra, OSEP opined that the explanation and interpretation by the school "could entail showing the parent the test question booklet, reading the questions to the parent, or providing an interpretation for the response in some other adequate manner that would inform the parent."

39. As discussed in the Findings of Fact, due to the evidentiary presentation, the undersigned concludes that

Petitioner failed to meet [REDACTED] burden of proof that the protocols at issue in this proceeding are Petitioner's educational records. Assuming arguendo that the protocols constitute Petitioner's educational records, Petitioner failed to establish that Respondent violated its duty to provide Petitioner with the requisite opportunity to inspect and review. Indeed, the evidence establishes that Respondent provided Petitioner's [REDACTED] with the opportunity to timely inspect and review the protocols and provided District personnel to explain and interpret the protocols. Additionally, while the record fails to establish that Petitioner's intended professional expert(s) lived beyond commuting distance from where the protocols were maintained, and, therefore, in absence of copies would be effectively prevented from reviewing the protocols, Respondent provided copies of the requested protocols to those experts who were available to receive the same.

40. Regarding Petitioner's allegation that Respondent failed to provide a copy of the cumulative file, clinician's tallies and therapy logs, Petitioner failed to meet [REDACTED] burden. Petitioner's evidence in this regard consisted of vague allegations that were unsubstantiated by the evidence. Petitioner's [REDACTED] could not testify as to when, if ever, prior to July 10, 2016, [REDACTED] requested said records. Respondent countered Petitioner's allegations with the similarly broad

testimony that, in response to Petitioner's request of July 10, 2016, "many records were copied or originals were given to [REDACTED] during the summer, this past summer." Although the undersigned would have no reservation in finding a procedural violation for the failure to timely provide access or copies of said education records, the record simply fails to support such a determination.

41. Having determined that Respondent did not commit a procedural violation of the IDEA in failing to provide Petitioner's parents with the opportunity to inspect and review Petitioner's educational records, it follows that Respondent did not significantly impede Petitioner's parents' opportunity to participate in the decision-making process regarding the provision of FAPE or impede Petitioner's right to FAPE.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Complaint is denied in all respects.

DONE AND ORDERED this 21st day of December, 2016, in
Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of December, 2016.

ENDNOTES

^{1/} Although neither party presented a working definition of "test protocols," the term commonly refers to written instructions on how a test must be administered and the questions posed. The term may also include score sheets on which students mark their answers and tables on which examiners calculate the student's scores.

^{2/} Based on the evidentiary presentation, the exact date of this meeting is unclear.

^{3/} Although the record establishes that ██████ received the protocols, the record fails to establish when ██████ authorized receipt of the protocols and fails to establish when ██████ received the same.

^{4/} Pursuant to Respondent's Policy 8330, Student Records, the cumulative file includes Category A Records (permanent information) with 11 enumerated categories and Category B Records (temporary information) with 13 enumerated categories. This policy further provides that, "[i]ndividual exceptional student records shall be kept separate from regular cumulative records."

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or

b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).