STATE OF FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

**,

vs.

Petitioner,

PINELLAS COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

A final hearing was held in this matter before Todd P.

Resavage, an Administrative Law Judge of the Division of

Administrative Hearings (DOAH), on through through through through Largo, Florida.

APPEARANCES

For Petitioner: . ______, Esquire

, Esquire , Esquire

Special Education Law and Advocacy

Case No. 17-5886E

2509 First Avenue South

Saint Petersburg, Florida 33712

> Pinellas County School Board 301 Fourth Street Southwest Largo, Florida 33779-2942

STATEMENT OF THE ISSUES

Whether Respondent violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., in finding Petitioner ineligible for special education services

under the eligibility category of (); and, if so, to what remedy is Petitioner entitled.

PRELIMINARY STATEMENT

Respondent received Petitioner's Complaint on , and forwarded the same to DOAH on the same date.

The parties participated in mediation on , , , , however, as the parties wished to engage in further resolution thereafter, they requested an extension of the resolution period until , , . This request was granted.

On Requiring Response, directing the parties to advise as to whether the parties desired to continue the resolution period or set the matter for final hearing. On Respondent , Respondent filed a Notice of Case Status advising that the parties had been unsuccessful and requested the matter be set for hearing.

On , the parties filed a Joint Stipulation of Facts, wherein the parties stipulated to certain facts as admitted and requiring no further proof at hearing. To the

extent relevant, those stipulated facts are incorporated in this Final Order.

The final hearing was conducted as scheduled. The final hearing Transcript was filed on , , . The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript. Upon the conclusion of the final hearing, the parties stipulated that the proposed final orders would be filed no later than , , and that this Final Order would issue on or before , . The parties timely submitted 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 pronouns in the Final Order when referring to Petitioner.

The pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

- 2. Petitioner, in November , was determined to be a student. A student is one who has and is capable of .1/

In full-scale intelligent quotient (IQ) was . A more recent IQ obtained in indicates an IQ of . To date, Petitioner is considered a student. 3. Petitioner's academic record is A review of grades since reveals that has never made lower than a "," and the majority of grades have been ""s. curriculum includes or courses, some of those entitling to school credit as a school student. current cumulative GPA is documented as a . 4. is a , and student with and parents. Petitioner credibly testified that spends as much as to hours per day because, " ." In response to the query of how makes such good grades, candidly testified that " . " 5. Petitioner's have obtained for several years in the area of . Petitioner's credibly testified that started providing in grade (school year) to " " within the classroom. 6. Petitioner was by a psychologist in grade with . As contained in the

parties' Joint Stipulation of Facts, on , (during grade year), Petitioner was found eligible, under , with a disability of , and has had a since that time. Said plan is not at issue in this proceeding. The parties stipulated that Petitioner is a student identified with a disability.

- 8. On , , Petitioner's , believing that the existing was insufficient to meet Petitioner's needs, requested a evaluation and consideration of whether Petitioner would be eligible for exceptional student education and related services in the area of . The record evidence suggests that Petitioner's signed the appropriate consent for the evaluation on , .
- 9. On , Petitioner was evaluated and observed by , a licensed school psychologist and

mental health counselor for Respondent. . issued Report on 10. Of relevance to the issues here, . . administered clusters of the) on testing yielded scores that placed Petitioner in the " in comparison to national norms in the areas of (=) ,), and (=) with across report further documented that analyses had been completed using a variety of measures to sample Petitioner's .^{3/} Specifically, on , a assessment, utilizing probes, was conducted regarding Petitioner's . At that time, the assessment documented that Petitioner was performing at the percentile for and the percentile in . report further documented that by had improved to the percentile and to percentile. 12. Additionally, the report documented that testing administered in class on , revealed an grade level

performance on Lexile Percentile).

- and () was also conducted by . The results indicate that Petitioner on the past years.

 Specifically, for , Petitioner's "was a , and sections of the . By comparison, district scored a ; school a ; class a ; and peer subgroup a .
- 14. In 2016, Petitioner's Expectation for the was a , and scored a on both the sections. By comparison, district scored a ; school a ; class a ; and speer subgroup a .
- received training in the and program, as well as the program at home with Petitioner in and and was doing so at the time Petitioner's Complaint was filed.

- 17. Following . evaluation, an eligibility determination meeting was held on , , , to determine whether Petitioner was eligible as a student with a , pursuant to Florida Administrative Code Rule 6A-6.03018. The meeting was properly convened with all relevant members, including Petitioner's parent(s), in attendance.
- 19. Respondent's rationale for denying eligibility was formally set forth in its Prior Written Notice (PWN), dated

, which provides that:

Based on recent evaluation,
[Petitioner's] in to
[Petitioner's] same age peers. [] is
making adequate learning gains at this time
with only the provision of core general
education supports. Based on team decision,
[Petitioner] does not require interventions
that differ in intensity and duration from

what can be provided in general education resources alone.

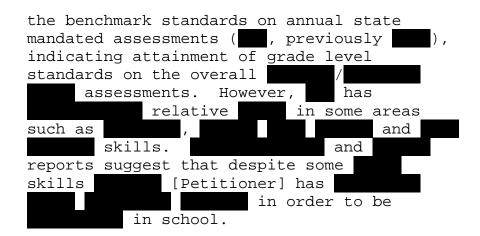
- 20. Aggrieved by this decision, and the findings of

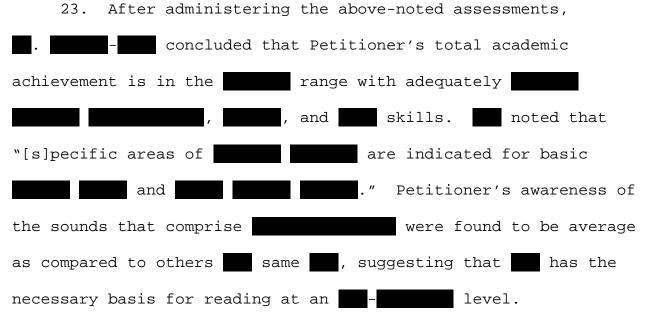
 . Petitioner's parents requested an Independent

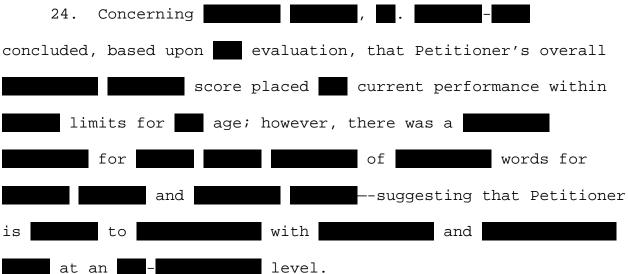
 Educational Evaluation (IEE). Respondent, without unnecessary

 delay, agreed to the IEE at public expense.
- The IEE was completed by - has a doctorate in private clinical psychologist. clinical psychology and has been licensed since purpose of the IEE was to provide further information concerning Petitioner's reading abilities. evaluated Petitioner on . As part of evaluation, reviewed Petitioner's background information, educational history, prior educational interventions, previous evaluations, and administered several assessments. Specifically, administered the) ; (-); and -) . 4/
- 22. The results of the evaluation are contained in

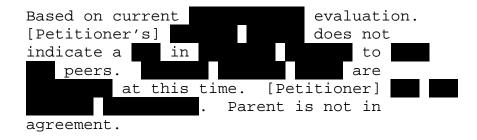
 . The report authored on the present authored on t







25. Confronting Petitioner's - concluded that should be at the same level as similar age peers and able to abilities were developed. that abilities, . found that Concerning Petitioner's abilities were developed; however, demonstrated a in for 26. report noted that Petitioner "exhibits a and somewhat profile" and that "[] demonstrates in both within results and that are of a in ()." Additionally, . . documented that, "[Petitioner] shows and - areas known to be with ." [i]n contrast to these obvious , [Petitioner] performs within the to range on annual state testing linked to Florida standards and receives in school." 27. In summary, . . - concluded that Petitioner's academic achievement is generally consistent with expectations based on age and ability, with the



In addition to authoring the PWN, on

- Respondent completed a form entitled " to "."

 This form documents that the school-based members of the team concluded Petitioner did not meet the eligibility criteria set forth in Florida Administrative Code Rule 6A-6.0331(4)(a)1., 2., and 3. The undersigned finds that Respondent satisfied its obligation to document its determination of eligibility as set forth in rule 6A-6.0331(5).

clinical setting. also did not offer any opinion as to Respondent's decisions denying eligibility for Petitioner.

- 33. Petitioner also presented the expert testimony of

 , Ph.D. has a doctorate in ______

 from the ______ of ____, and is

 the ______ professor and the undergraduate

 program director for the ______ of ____, and

 at the ______ of ____.

- did not offer any opinions concerning Respondent's eligibility decisions, and, therefore, testimony was of very limited value to the pending issues.
- and is presently in private practice. Respondent called this witness to, among other things, explain the variances between the testing results obtained by . and . noted that scores from evaluation were in the range; however, most of the reading scores in evaluation were below average. opined that testing scores are a reflection of that particular student's performance on a particular day, thus there is going to be some variance.
- 36. opined that Petitioner's evaluation by

 . and . are consistent with a student that
 has conceded that there are some significant
 differences in the basic scores; however, opined that
 the scores are not to be viewed in isolation from the balance of
 available information.
- 37. ______, one of Respondent's school psychologists, credibly testified that in making the eligibility determination for _____, the team not only reviews ______ assessments, but also ______ assessments, _____ results, examinations, grades, ______ scores, results from the _____, "and other things of that nature." _____ opined that, ______ and

by a student in ______, would be relevant to determining whether a student requires accommodations under a ______, but would not be relevant to the consideration of _____ eligibility and the need for specialized instruction. This specific opinion is not credited.

CONCLUSIONS OF LAW

- 40. 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 rule 6A-6.03311(9)(u).
- 41. 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).

- 42. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education 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).
- 43. The IDEA contains "an affirmative obligation of every [local] public school system to identify students who might be disabled and evaluate those students to determine whether they are indeed eligible." L.C. v. Tuscaloosa Cnty. Bd. of Educ., 2016 U.S. Dist. LEXIS 52059 at *12 (N.D. Ala. 2016)(quoting N.G. v. D.C., 556 F. Supp. 2d 11, 16 (D.D.C. 2008))(citing 20 U.S.C. § 1412(a)(3)(A)). This obligation is referred to as "Child Find," and a local school system's "[f]ailure to locate and

evaluate a potentially disabled child constitutes a denial of FAPE." Id. Thus, each state must put policies and procedures in place to ensure that all children with disabilities residing in the state, regardless of the severity of their disability, and who need special education and related services, are identified, located, and evaluated. 34 C.F.R. § 300.111(a).

- 44. All determinations regarding eligibility for special education are therefore governed, in the first instance, by the definition of a "child with a disability." Pursuant to 20 U.S.C. § 1401(3)(A), a "child with a disability" is a child:
 - (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title [20 USCS §§ 1400 et seq.] as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
 - (ii) who, by reason thereof, needs special education and related services.
- 45. Thus, eligibility determinations proceed in two steps. The first prong determines the existence of a disorder—here, a . The second prong identifies whether the child with a qualifying disorder "needs" special education and related services as a result of that disorder. Doe v. Cape Elizabeth Sch. Dist., 832 F.3d 69, 73 (1st Cir. 2016).

- 46. A is defined as follows:
 - means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.
 - does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of an intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage.
- 34 C.F.R. § 300.8(c)(10); see Fla. Admin. Code R. 6A-6.03018(1).
- 47. In Florida, a student meets the eligibility criteria as a student with a if all of the following criteria are met:

 - 1. When provided with learning experiences and instruction appropriate for the student's chronological age or grade level standards pursuant to Rule 6A-1.09401, F.A.C., the student does not achieve adequately for the student's chronological age or does not meet grade-level standards as adopted in Rule 6A-1.09401, F.A.C., in one or more of the following areas based on the review of multiple sources which may include group

and/or individual criterion or normreferenced measures, including individual
diagnostic procedures:

- a. Oral expression;
- b. Listening comprehension;
- c. Written expression;
- d. Basic reading skills;
- e. Reading fluency skills;
- f. Reading comprehension;
- g. Mathematics calculation; or
- h. Mathematics problem solving.

[and]

2. The student does not make adequate progress to meet chronological age or grade-level standards adopted in Rule 6A-1.09401, F.A.C., in one or more of the areas identified in subparagraph (4)(a)1. of this rule when using a process based on the student's response to scientific, research-based intervention, consistent with the comprehensive evaluation procedures in subsection 6A-6.0331(5), F.A.C.

[and]

- 3. The group determines that its findings under paragraph (a) of this subsection are not primarily the result of the following:
- a. A visual, hearing, or motor disability;
- b. Intellectual disability;
- c. Emotional/behavioral disability;
- d. Cultural factors;

- e. Irregular pattern of attendance and/or high mobility rate;
- f. Classroom behavior;
- q. Environmental or economic factors; or
- h. Limited English proficiency.

Fla. Admin. Code R. 6A-6.03018(4)(a); see also 34 C.F.R. § 300.309(a).6/

- 48. Here, it is undisputed that Petitioner has ______, a qualifying IDEA disorder for _____. It is further undisputed that Petitioner has been previously determined eligible to receive services and protection under ______ based on ______.7. Thus, it must be determined whether Petitioner, who has a qualifying IDEA ______ (_______), satisfies the criteria for ______ eligibility; and, if so, whether ______ needs special education and related services.
- 49. Petitioner contends that, in the categories of basic reading and reading fluency, does not "does not "

assessments were administered to Petitioner for the specific purpose of determining reading deficits.

- 50. The undersigned finds that the probes analysis also provides evidence of a in as as Petitioner's , on , was still only at the percentile.
- 51. In contrast to the specific assessments administered by - addressing potential , other evidence supports the contrary position that Petitioner is achieving and progress in the areas of and . First, Petitioner's results / demonstrate that is on the in meeting expectations. Second, Petitioner's for the past years (" ") are grades in indicator of and skills. Third, Petitioner's success in other courses, even though not specifically tailored to measure , is competent evidence to weigh and in considering eligibility. Fourth, the specific assessments administered by . (months prior to the assessments) placed Petitioner in the range in the categories at issue. Finally, the observations by Petitioner's teachers in the classroom, who testified at final hearing,

provide competent evidence weighing against a finding of eligibility.

- 52. Petitioner's overall performance is the result of , and devoted , and devoted parents, as well as accommodations provided by the school pursuant to . While Petitioner's may have contributed, in part, to reading academic success to date, the impact is difficult to quantify based on the evidence presented.
- 53. As discussed in <u>Doe</u>, <u>infra</u>, the weight due to any particular factor depends on the unique circumstances of the child. <u>Doe</u>, 832 F.3d at 81. "[W]e determine that, much as no single assessment or measure could support a finding of a deficit, no single assessment or measure may undermine a finding of a deficit where other measures could support such a finding." <u>Id</u>.
- student's , , and could mask , the undersigned concludes that the greater evidence establishes that Petitioner did not satisfy the eligibility criteria at the time of eligibility determination meetings. Accordingly, the undersigned concludes that Petitioner failed to establish the first prong of the eligibility analysis.

- 55. Assuming, arguendo, that Petitioner had established that the criteria for , Petitioner is further required to establish that needs specialized education and related services by reason of disability.
- skills and suggests, as a proposed conclusion, that be provided a program for hour per day, days per week, for years. Applying a similar analysis to that above in the first prong, the evidence establishes that, at the time of the eligibility determinations at issue in this proceeding, Petitioner was not in need of special education and related services. Although Petitioner's IEE by placed in the placed at issue, this one assessment does not override the balance of evidence pointing to the lack of need for special education and related services. Accordingly, Petitioner failed to present sufficient evidence to satisfy the second prong of the inquiry.

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 2nd day of August, 2018, in Tallahassee, Leon County, Florida.

S

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

Filed with the Clerk of the Division of Administrative Hearings this 2nd day of August, 2018.

ENDNOTES

- ^{1/} See Fla. Admin. Code R. 6A-6.03019(1).
- The ACH is a comprehensive set of individually administered tests to measure educational achievement in the areas of reading, mathematics, written language, oral language, academic skills fluency, and applications.
- The report documents that is an online program utilized by Respondent to monitor progress at the Tier 3 level. The report further provides that, although Petitioner's parent refused multi-tiered learning supports beyond the original general education learning plan, a goal for improvement in Petitioner's measured oral reading fluency rate was established to better assess her learning gains in response to only core instruction and general education learning supports.
- The is an individually administered test that evaluates academic achievement in reading, math, and writing, and oral language (expressive and receptive); the assesses phonological awareness, phonological memory, and rapid naming in children and adults ages 5 to 24; the is a norm-referenced test of oral reading rate, accuracy, fluency, and comprehension.

- The class provides three high school science credits.
- Florida Administrative Code Rule 6A-1.09401 sets forth the Student Performance Standards, defined as the Next Generation Sunshine State Standards, establishes core content of the curricula to be taught, and specifies the core content knowledge and skills that K-12 public school students are expected to acquire.
- $^{7/}$ Accordingly, it was previously determined that her dyslexia substantially limits one or more major life activities. See 29 U.S.C. § $705(20)(B)\,.$
- ^{8/} The parties do not dispute the validity or reliability of any of the selected assessments administered.

COPIES FURNISHED:

Pinellas County School Board 301 4th Street Southwest Post Office Box 2942 Largo, Florida 33779-2942 (eServed)

Special Education Law and Advocacy 2509 First Avenue South St. Petersburg, Florida 33712 (eServed)

Special Education Law and Advocacy 2509 First Avenue South St. Petersburg, Florida 33712 (eServed)

Department of Education 325 West Gaines Street Tallahassee, Florida 32399 (eServed) Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Pinellas County School Board
301 4th Street Southwest
Largo, Florida 33770-2942

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).