

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.)
) Case No. 12-3976E
PALM BEACH COUNTY SCHOOL BOARD,)
)
Respondent.)
)
_____)

FINAL ORDER

Pursuant to notice, a final hearing was conducted on March 6 and 7, 2013, by video teleconference between West Palm Beach and Tallahassee, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Barry Seth Balmuth, Esquire
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For Respondent: Laura E. Pincus, Esquire
Palm Beach County School Board
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STATEMENT OF THE ISSUE

Whether [REDACTED] (Petitioner or the Student) was denied a free appropriate public education (FAPE) under section 504 of the Rehabilitation Act of 1973.

Whether Respondent discriminated against the Student based upon the Student's disability.

PRELIMINARY STATEMENT

The Student is referred to in this Final Order as the Petitioner or the Student to protect the Student's privacy. This Final Order has been written in compliance with the standing request of the Florida Department of Education that DOAH ALJs write orders involving students in a gender-neutral fashion without naming the Student's school. All state statutory references are to Florida Statutes (2012).

At the times relevant to this proceeding, the Student was enrolled in a public elementary school in Palm Beach County, Florida. At times relevant to this proceeding, the Student had a 504 plan and was enrolled in a kindergarten class taught by Joan Purdy.

On December 11, 2012, Petitioner, through counsel, filed a request for a "Due Process Hearing." This request was made pursuant to the Individuals with Disabilities Education Act (42 U.S.C. § 1400 et seq.) (IDEA). On December 13, 2012, Respondent

filed a Notice of Insufficiency, which pointed out that the Student was neither a student under IDEA, nor was it alleged that the Student qualified as a student under IDEA. On December 19, 2012, the presiding ALJ entered his Order of Insufficiency.

On December 20, 2012, Petitioner filed an Amended Due Process Complaint alleging claims under Section 504 of the Rehabilitation Act (29 U.S.C. § 794) and the Americans with Disabilities Act (42 U.S.C. § 1210 et seq.) (ADA). Respondent filed a motion to dismiss on December 21, 2012. The Motion to Dismiss was denied on January 10, 2013.

On January 31, 2013, Petitioner filed a Second Amended Due Process Complaint, "[p]ursuant to Section 504 of the Rehabilitation Act of 1973 . . . , the ADA . . . and any other Federal law protecting the rights of disabled children" ^{1/}

On February 5, 2013, this case was transferred to the undersigned "for all further proceedings."

On February 27, 2013, the parties filed their Joint Statement of Undisputed Facts, which contain stipulated facts. Those stipulated facts have been incorporated into the Findings of Fact set forth in this Final Order.

At the final hearing, the parties jointly presented the testimony of the principal of the Student's school, an instructional technology support assistant at the Student's

school, Sandra Gero (Respondent's Chief of Human Resources), Britoni Garson (a human resources specialist), and a guidance counselor at the Student's school. In addition, Petitioner presented the testimony of Petitioner's mother. Respondent also presented the testimony of Ms. Purdy and the Student's current first grade teacher. Petitioner's pre-marked Exhibits 1, 2, 5-10, and 12-15 were offered and received into evidence. Respondent's pre-marked Exhibits 1, 2, 4, 6, 9, 12, and 15 were offered and received into evidence.

No transcript was filed. Both parties timely filed proposed final orders, which have been duly considered by the undersigned in the preparation of this Final Order.

FINDINGS OF FACT

1. The Student was born in [REDACTED].
2. Prior to kindergarten, the Student participated in a voluntary pre-k program at Imagination Station.
3. For the 2011-12 school year, the Student enrolled in kindergarten in a regular education classroom taught by Ms. Purdy. On the "School Entry Health Exam" form, the Student's mother listed a lactose free diet as the only medical concern.
4. On the "New and Returning Student Registration" form, Petitioner's mother did not list any medical concerns or behavioral issues.

5. Ms. Purdy's kindergarten class for the 2011-12 school year consisted of 19 students.

6. At "meet your teacher" event prior to the beginning of the 2011-12 school year, the Student's mother informed Ms. Purdy that the Student had difficulty going to the bathroom in a timely fashion.

7. The Student's parents are not together, but they are both involved with the Student's education.

8. On November 18, 2011, Ms. Purdy met with the Student's parents to discuss the Student's progress. The notes taken of the meeting reflect that the Student was making good progress academically, but the Student was having difficulty focusing and following directions. The parents agreed to reinforce a behavior plan at home. A folder was set up to facilitate communication at home between the Student and the parents.

9. On December 6, 2011, the school's guidance counselor provided a letter reflecting the concerns the school and the parents were having as to the Student's behaviors. It was noted that the Student had just hit another student in the mouth with a rock. The ADDES checklist (a checklist used to evaluate students for attention deficit disorder) had been completed by the parents and by the teacher. The letter included the following observation:

Unfortunately, [the Student's] behaviors are becoming more aggressive and [the Student] is hurting other children. [The Student] has a very difficult time sitting either at [the Student's] desk or on the carpet during lessons without touching other people, other things, or flailing [the Student's] arms and leg around [the Student]. [The Student] is not following directions or completing any of [the Student's] work. We are extremely concerned, as are the parents, who are working closely with us at school to find techniques to help [the Student]. The parents, who are not together, are both working to help [the Student]. The parents have told us they are seeking medical intervention at this time. We hope this information can be of help. Please let me know if you need anything else.

10. On December 9, 2011, a conference was held with Ms. Purdy and Petitioner's father. A new behavior plan was put into place. The parents had met with a psychologist on December 6. The plan was for the psychologist to work with the parents and to speak with the Student. The Department of Children and Families had become involved with the mother and the home environment. Academically, homework was not being consistently completed.

11. On February 3, 2012, a telephone conference took place to discuss the Student. Participating in the conference were the Student's mother, Ms. Purdy, the school principal, the school guidance counselor, and a school nurse. Because the Student was having toileting accidents on a daily basis, a paraprofessional was identified to assist the Student with

bathroom issues. The conference notes reflect that the telephone conference was followed-up by an in-person conference with the mother later that day. The following is reflected under the heading "Conclusion and Recommendation:"

[The Student's] behaviors are interfering with [the Student's] learning and the teacher's teaching. A possible 504 plan may be written to provide accommodations in the classroom. Parent will follow up with medical consultation and will continue with the Youth Service Bureau case worker. Mom requests that the school contact her first if there are any problems during the day. Mom has parent teacher meetings already scheduled for next Tuesday with [the Student's] teacher. Mrs. Purdy will reactivate a daily behavior plan for [the Student] to follow and reward as earned.

12. On February 23, 2012, the Student was determined eligible for a Section 504 plan based upon a documented diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). The record of the meeting reflects the major life activities that were "substantially limited" were "bathrooming and impulse control."

13. On February 23, 2012, a 504 plan was drafted for the Student. The plan allowed for the following accommodations: seating near a positive role model, increased distance between desks, allowance to sit on a chair away from carpet time [sic], a behavior contract, time out procedures when appropriate, praise targeted behaviors which are improved, ignore

inappropriate behaviors not drastically outside classroom limits, make consequence or rewards immediate, and provide assistance with "bathrooming". Ms. Purdy signed the Student's 504 plan and was familiar with its contents.

14. Petitioner was the only student in Ms. Purdy's class with a 504 plan.

15. In March 2012, the Student was having problems with a classmate (Student B). A few days before March 15, 2012, Ms. Purdy met with the Student, Student B, and the parents of both students. During that meeting, after the adults had talked, the two students talked and seemed to resolve their differences.

16. On or about March 15, 2012, Ms. Purdy engaged with her class in an activity she called conflict resolution. This activity was videotaped. The video begins with the Student and Student B discussing the conflict that had existed between them (the Student had pushed Student B). Student B reluctantly participated in the activity. The two students had a short exchange that included Student B telling the Student in front of Ms. Purdy's class that the Student had made Student B sad. The Student apologized and agreed not to touch Student B in the future. Ms. Purdy then had the two students shake hands.

17. After the two students shook hands, Ms. Purdy was ready to turn off the video and end the activity. At that

point, another student (Student C) raised her hand and asked to participate, indicating that the Student had touched her head. After going through the type of exercise she had with Student B, Ms. Purdy had the Student apologize to Student C and agree not to touch Student C in the future. Ms. Purdy then had the two students shake hands.

18. Thereafter three other students voiced complaints about the Student's behavior, and the exercise described above was repeated three more times.^{2/}

19. During the entire video, Ms. Purdy provided all of the students, including the Student, with positive feedback. Ms. Purdy referred to the exercises as solving problems.

20. When the school principal heard about the video, she requested to see it. After viewing the video, she immediately referred the matter to Employee Relations because, in her opinion, the video depicted an inappropriate activity.

21. As a result of the videotaping, Ms. Purdy was immediately removed from the Student's classroom and did not return to any classroom for the remainder of the 2011-12 school year.

22. Neither of the Student's parents reported any issues with Ms. Purdy's teaching or interactions with the Student prior to the video exercise.

23. There was no evidence that the Student was negatively impacted by the video exercise.

24. At the time of the formal hearing, the Student was a first grade student at the same public school the Student attended during the 2011-12 school year. The Student's new teacher testified, credibly, that the Student is doing well and is performing on grade level academically.

25. As part of the Second Amended Due Process Complaint, a request for tutoring was made on behalf of the Student. That request was withdrawn by the Student's attorney during the formal hearing.

26. The Student's attorney, on behalf of the Student, has requested counseling for the Student. There was no evidence that the Student is in need of counseling.

27. Ms. Purdy's personnel file reflects that she has been subject to discipline. During the 1991-92, school year, Ms. Purdy struck a colleague following an argument. In November 2003, Ms. Purdy was reprimanded by her principal for using inappropriate force in handling her students. In November 2011, Ms. Purdy was reprimanded for being too harsh both verbally and physically with her students.^{3/} The school principal was unaware of Ms. Purdy's disciplinary history until after the video exercise occurred.

28. Petitioner failed to establish that Ms. Purdy or Respondent discriminated against the Student based on the Student's disability.

29. There was no evidence that Respondent failed to provide the Student FAPE.

CONCLUSIONS OF LAW

30. DOAH has jurisdiction over the subject matter and parties to this case pursuant to sections 120.569, 120.57(1), and 120.65(7)^{4/} and section 504 of the Rehabilitation Act of 1973.

31. Under section 504, the ultimate burden of proof or persuasion is on the party seeking relief. Shaeffer v. Weast, 546 U.S. 49, 58 (2005). In this case, the burden is on the Student.

32. The Student has a disability and is entitled to the benefits of the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

33. Respondent is a public entity to which both the Rehabilitation Act of 1973 and the Americans with Disabilities Act apply.

34. The School Board is required to provide the Student with FAPE pursuant to 34 C.F.R. § 104.33(a). Pursuant to 34 C.F.R. § 104.33(b), FAPE is "the provision of regular or special education and related aids and services that (i) are designed to

meet individual needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.6."

35. Section 504 is an anti-discrimination statute that protects students from being excluded from participation in or being denied the benefits of any program that receives federal financial assistance. 34 C.F.R. § 104.4.

36. Under section 504, a complaining party must show that he/she is: an individual with a disability, (b) otherwise qualified for participation in the program receiving federal funds, and (c) being excluded from participation in, being denied benefits from, or being subjected to discrimination because of his or her disability. See 29 U.S.C. § 794(a); and Timothy H. v. Cedar Rapids Cmty. Sch. Dist., 178 F.3d 968 (8th Cir. 1999).

37. Respondent is required to provide for the education of the Student with nonhandicapped children to the maximum extent appropriate pursuant to 34 C.F.R. § 104.34(a), which provides, in relevant part, as follows:

(a) Academic setting. A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall

place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. . . .

38. Respondent has complied with that provision in that the Student was, at all times relevant to this proceeding, placed in a regular classroom and performing at grade level.

39. Petitioner relies on the provisions of 34 C.F.R. §§ 104.35(c) and 104.36 in arguing that the School Board failed to comply with section 504 by placing the Student in Ms. Purdy's class because of her disciplinary record, or without the school principal knowing of her disciplinary record.

40. 34 C.F.R. § 104.35(c) is as follows:

(c) Placement procedures. In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 104.34.

41. 34 C.F.R. § 104.36 provides as follows:

A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

42. Petitioner's alleged section 504 violation must be rejected because Petitioner failed to prove that Ms. Purdy or Respondent discriminated against the Student based on the Student's disability and because Respondent provided the Student with FAPE.

43. Petitioner's reliance on the provisions of sections 104.35(c) and 104.36 is misplaced. The references to educational placement in those provisions are to the type classroom to which a student with a disability is assigned, i.e., whether the student is assigned to a regular or special education classroom. The references are not to a particular classroom taught (or not taught) by a particular teacher.

Based on the foregoing, it is ORDERED that Seconded Amended Due Process Complaint filed by Petitioner on January 31, 2012, is dismissed and all relief requested therein is denied.

DONE AND ORDERED this 5th day of April, 2013, in Tallahassee, Leon County, Florida.

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CLAUDE B. ARRINGTON
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Filed with the Clerk of the
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this 5th day of April, 2013.

ENDNOTES

^{1/} While counsel for the Student argues that the Student should be awarded counseling services as a result of the alleged discrimination against the Student, counsel frankly admits that this proceeding has been brought to exhaust administrative remedies prior to filing suit in another forum.

^{2/} These complaints were of behaviors typical of kindergarten students. One student complained that the Student had punched him in the stomach. Another complained that the Student had used his pencil without permission. The third complained that the Student had "echoed" her, by repeating what she had said. There was no evidence that the behaviors that produced the complaints resulted from ADHD.

^{3/} Counsel for the Student argues that Respondent should not have kept the Student in Ms. Purdy's room after his 504 plan was

implemented because of her prior disciplinary history. Ms. Purdy's prior disciplinary history is, as the School Board argued in its PRO, completely unrelated to the poor judgment she used in conducting the video exercise. The School Board had no reason to remove Ms. Purdy as the Student's teacher prior to the video exercise.

^{4/} The Palm Beach County School Board has contracted with DOAH to conduct hearings pertaining to section 504 plans.

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)(b), Florida Statutes, 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).