

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 09-5355E
)
BREVARD COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice a formal hearing was conducted by video teleconference on April 30, 2010, with the parties appearing from Melbourne, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████, parent of the student, ██████████
(Address of record)

For Respondent: Harold T. Bistline, Esquire
Stromire, Bistline & Miniclier
1037 Pathfinder Way, Suite 150
Rockledge, Florida 32955

STATEMENT OF THE ISSUE

The issue is whether Petitioner is eligible for exceptional student educational (ESE) services.

PRELIMINARY STATEMENT

Petitioner's parent initiated this case to challenge Respondent's decision to dismiss [REDACTED] from ESE services. Respondent, Brevard County School Board (Respondent or School Board) notified the parent that ESE services for the student would be ended in September 2009. It is Respondent's position that the student is not eligible for ESE services. For confidentiality, the parent, [REDACTED], will be referred to by initials or as "the parent." Petitioner, the student [REDACTED], will be identified as [REDACTED] or "the student." Where reference to gender cannot be avoided the masculine will be used but should not be presumed as the correct gender of the student.

Respondent sent Petitioner's request for a due process hearing to the Division of Administrative Hearings (DOAH) on October 1, 2009. An initial conference call was conducted with the parties on October 12, 2009, wherein the parties agreed that the case should be scheduled for hearing for December 3 and 4, 2009. The student was in a "stay put" mode and Respondent continued to provide ESE services. Those services continue pending the outcome of this case.

A Notice of Hearing and Pre-Hearing Order was entered on October 20, 2009. As the hearing approached a second conference call was conducted that resulted in the postponement of the hearing. The case was then scheduled for January 21 and 22,

2010. The parties continued to review the issue of the case and ultimately, after two more continuances, the hearing was scheduled for April 30, 2010. All of the extensions granted were with the consent of the parties. It was hoped that additional time for negotiations would lead to a resolution of the case. As the student continued to receive ESE services, no party was disadvantaged by the extensions.

At the hearing, the parties presented testimony from witnesses along with documentary exhibits. Information identifying the witnesses and all exhibits received in evidence is denoted in the transcript of the proceeding. The two-volume Transcript (requested by the parent) was filed with DOAH on May 19, 2010. On May 27, 2010, Respondent filed a Proposed Final Order.

FINDINGS OF FACT

1. At all times material to the allegations of this case, Respondent was a duly constituted School Board charged with the responsibility to operate, control and to supervise public schools within the Brevard County, Florida, public school district. As such, Respondent is responsible for providing a free appropriate public education (FAPE) to its ESE students.

2. At all times material to the allegations of this case, Petitioner is a student enrolled in the Brevard County public schools. At the time of hearing Petitioner was [REDACTED] years of age

and was completing first grade at [REDACTED] Elementary School ([REDACTED]). Due to medical issues, Petitioner received educational services as a homebound student for portions of the school year.

3. Prior to enrolling at [REDACTED], Petitioner attended public school in Miami-Dade County, Florida. As a pre-kindergarten student with developmental delays, Petitioner was identified as an ESE student by the Miami-Dade school personnel and was afforded an individualized education plan (IEP) to address the issues presented by the delays and attention deficit hyperactivity disorder (ADHD), a second diagnosis.

4. For the [REDACTED]/[REDACTED] school year Petitioner enrolled at [REDACTED] for kindergarten and was assigned to a class taught by Ms. Eising. The IEP brought from Miami-Dade was implemented for the school year.

5. At the end of the kindergarten year, Respondent staffed an IEP meeting with the parent to review the student's performance and future needs. On or about April 23, 2009, a new IEP was developed.

6. On or about September 9, 2009, a staffing was conducted to review the student's progress, an independent educational evaluation, and other factors pertaining to the student's performance. After the staffing, Respondent advised the parent that Petitioner was not eligible to continue ESE services.

7. The parent disagreed with Respondent's assessment of the student and filed the instant action.

8. During the student's kindergarten year, Ms. Eising, who is certified in early childhood education, observed Petitioner's behavior and charted the Petitioner's academic performance. Ms. Eising found the student to be very smart, academically successful, and on a par with other students in the class. With regard to behavior, Ms. Eising observed that Petitioner behaved appropriately when compared to other students. Although initially active and unable to remain seated for long periods of time, over the course of the school year Petitioner adjusted to the school environment and eventually complied with classroom rules and restrictions. Petitioner was popular and made friends easily. The school year was passed without any major difficulty. It is undisputed that Petitioner needed to improve in certain areas of performance but overall was satisfactory.

9. Petitioner was promoted to first grade at [REDACTED] and was assigned to Ms. Haynes' class. Ms. Haynes has taught first grade for seven years. She holds a master's degree in reading and special education. It was Ms. Haynes' task to implement the IEP developed in April 2009 for the student.

10. As the first-grade teacher, Ms. Haynes was able to observe Petitioner's behavior and review the student's academic progress. With regard to behavior, Ms. Haynes observed the

student at [REDACTED] seat, paying attention, timely completing work assignments, and participating appropriately.

11. With regard to the student's academic performance, Ms. Haynes noted that Petitioner is an excellent student. Petitioner's first-grade progress report demonstrated outstanding and satisfactory performance in all areas. Petitioner successfully made the transition from kindergarten to first-grade without noted difficulties. Many first-grade students mature and become more accustomed to school with time. Ms. Haynes observed that Petitioner had adjusted well to first grade and was typical to other students in the class.

12. Ms. Walter is a support teacher for ESE at [REDACTED]. Her role is to consult with ESE teachers and to offer assistance when needed to ensure that ESE students receive FAPE. Making sure IEPs are appropriately implemented is part of Ms. Walter's supporting role. Should a teacher encounter difficulties with an ESE student, Ms. Walter is available for consultation and may offer input regarding strategies or other helps to assist the teacher. Part of Ms. Walter's job is to observe classrooms and to offer support as needed.

13. With specific regard to Petitioner, Ms. Walter has not been called upon to assist either Ms. Eising or Ms. Haynes. Neither teacher required strategies or helps to address Petitioner's needs. Ms. Walter observed Petitioner and found

█ to be cooperative and appropriate for a first grade student. Petitioner exhibited behavior consistent with a student who understands the assignment and works to complete it. Ms. Walter was in Petitioner's first-grade classroom several times per week and noted the student was on-task and acting appropriately.

14. Ms. Simon is a school psychologist employed by Respondent. She performed a psychoeducational evaluation of Petitioner on November 12, 2008. Psychoeducational evaluations are required by law for ESE students such as Petitioner and are necessary to verify an ESE student's ability and achievement.

15. With specific regard to Petitioner, Ms. Simon found that the student's intellectual ability was within the average range with above-average ability in the non-verbal realm. Ms. Simon determined there was no discrepancy between Petitioner's cognitive ability and the demonstrated achievement or academic performance. Petitioner was academically on par with other kindergarten students.

16. Ms. Simon found Petitioner to be intelligent, affable, sociable and engaged appropriately in conversation. Petitioner had a slight misarticulation that did not adversely affect the testing process or the results of the evaluation.

17. Based upon the results of the psychoeducational evaluation and the student's performance from kindergarten

through first grade, Petitioner is performing at grade level and commensurate with ■■■ intellectual ability.

18. Petitioner exhibits behavior problems at home that are not repeated at school. It is the concern regarding Petitioner's behavior at home and in the community that has prompted the parent's challenge to discharging the student from ESE services. Historically, the student has exhibited unacceptable behaviors such as aggression, property destruction, elopement, tantrums, or noncompliance with directives. None of the professionals who witnessed Petitioner's behavior at school reported those behaviors.

19. To address the undesirable activities at home, the parent has enlisted the assistance of Behavior Services of Brevard funded through the Children's Home Society. Ms. Abellon, who was assigned to the case, along with the family developed a behavioral plan (the plan) for the student that rewards appropriate behavior. Instances of inappropriate behaviors have diminished since the plan was implemented.

20. In accordance with the plan, Petitioner earns tokens based upon compliance with directives and appropriate behavior. The student may then redeem the tokens for preferred items such as food or game time. In essence, good behavior is rewarded by something the student wants.

21. The school did not use a similar behavioral plan. Instead, the student was redirected back to task if observed not behaving as expected. Neither Ms. Eising nor Ms. Haynes thought Petitioner exhibited difficulty complying with the redirection. Over the course of kindergarten and first grade, each teacher observed Petitioner become more compliant as the school year progressed so that the need for redirection was not as frequent.

22. Additionally, Petitioner's behavior with other students was age appropriate. Since the behavior was acceptable and the student appeared to be popular with classmates, the teachers did not express concern that inappropriate behaviors were interfering with the student's social well-being.

23. The parent believes that an IEP using behavioral strategies such as the plan being implemented at home is needed to ensure the student's future academic success. Neither Ms. Abellon nor her supervisor, Ms. Fiol, observed the student in the classroom setting. No evidence was presented that disputes the student's academic success despite concerns regarding the student's home and community behaviors.

24. Any student may have a behavioral plan. It is not necessary to be designated as an ESE student to provide behavioral structure for a student who may be struggling with behavioral issues. In Petitioner's case, the classroom

management plan used by Ms. Haynes adequately addressed the student's behavioral issues.

25. Ms. Minuse is a certified behavior analyst employed by Respondent. Ms. Minuse observed Petitioner in school settings (classroom, cafeteria, etc.) on numerous occasions.

26. According to Ms. Minuse, the student is a typical first grader. Petitioner attends to the teacher, participates appropriately, raises ■■■ hand to speak, and has many friends.

27. Petitioner has been absent from school for pneumonia at least three weeks during the first-grade year. When at school the student may go to the school nurse to receive a nebulizer treatment for asthma. On occasions when Petitioner was away from the classroom or at the clinic, Ms. Haynes made sure the student received instruction and made up work missed. According to Ms. Haynes, Petitioner is an excellent student academically. Even though Petitioner missed a lot of days, the student was able to catch up. Petitioner's reading level is above first grade.

28. When Petitioner was in kindergarten the student would fidget in the seat or fail to sit on ■■■ bottom as students are required to do. In those instances Ms. Eising would direct the student to sit appropriately and remain seated. Over the course of the school year the instances of fidgeting lessened.

29. According to the parent, the student has been chronically ill since birth. An early diagnosis, failure to thrive, was monitored and Petitioner was able to get services to address speech and oral motive therapy and other needs. At age three the student was assessed and provided services by Early Steps. That same year Petitioner required brain surgery. Through Miami-Dade public schools the student received therapies to partner with home services. As a result, the student made progress. The parent believes that interventions are necessary for the student to be successful.

30. Additionally, the parent believes that the medications that Petitioner requires contribute to behavioral issues. Petitioner takes steroids to address medical concerns. Last summer the student had another brain surgery to correct Chiari malformation. The parent believes there is a significant discrepancy between the student's ability level and the achievement demonstrated. The student's measured IQ, according to the parent, is 115.

CONCLUSIONS OF LAW

31. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.57(1), and 1003.57, Fla. Stat. (2009).

32. In administrative proceedings, the burden of proof is on the party asserting the affirmative of an issue. See Young

v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993); and Balino v. Department of Health & Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Petitioner bears the burden of proof in this cause. See Schaffer v. Weast, 546 U.S. 49 126 S. Ct. 528, 105 LRP 55797 (2005). Petitioner argues that the student is eligible for ESE services and that the failure to provide services will result in the denial of FAPE. Proof must be by a preponderance of the evidence. The "preponderance" of the evidence means the greater weight of the evidence. See Fireman's Fund Indemnity Co. v. Perry, 5 So. 2d 862 (Fla. 1942).

33. Section 1003.57, Florida Statutes (2009), provides, in part:

(1)(a) 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 provides the necessary professional services for diagnosis and evaluation of exceptional students.

34. Section 1003.01, Florida Statutes (2009), defines "exceptional student" and provides:

(3)(a) "Exceptional student" means any student who has been determined eligible for a special program in accordance with rules of the State Board of Education. The term includes students who are gifted and students with disabilities who have an intellectual disability; autism spectrum

disorder; a speech impairment; a language impairment; an orthopedic impairment; an other health impairment; traumatic brain injury; a visual impairment; an emotional or behavioral disability; or a specific learning disability, including, but not limited to, dyslexia, dyscalculia, or developmental aphasia; students who are deaf or hard of hearing or dual sensory impaired; students who are hospitalized or homebound; children with developmental delays ages birth through 5 years, or children, ages birth through 2 years, with established conditions that are identified in State Board of Education rules pursuant to s. 1003.21(1)(e).

35. When a student is deemed eligible for ESE services provision is made through the IEP to address the needs of the student. "Special education services" is defined as:

. . . specially designed instruction and such related services as are necessary for an exceptional student to benefit from education. Such services may include: transportation; diagnostic and evaluation services; social services; physical and occupational therapy; speech and language pathology services; job placement; orientation and mobility training; braillists, typists, and readers for the blind; interpreters and auditory amplification; rehabilitation counseling; transition services; mental health services; guidance and career counseling; specified materials, assistive technology devices, and other specialized equipment; and other such services as approved by rules of the state board.

See § 1003.01(3)(b), Fla. Stat. (2009).

36. Florida Administrative Code Rule 6A-6.030152 provides:

(1) Definition. Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems. This includes, but is not limited to, asthma, attention deficit disorder or attention deficit hyperactivity disorder, Tourette syndrome, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and acquired brain injury.

(2) General education interventions and activities. Prior to referral for evaluation, the requirements in subsection 6A-6.0331(1), F.A.C., must be met.

(3) Evaluation. In addition to the provisions in subsection 6A-6.0331(5), F.A.C., the evaluation for determining eligibility shall include the following:

(a) A report of a medical examination, within the previous twelve-month (12) period, from a physician(s) licensed in Florida in accordance with Chapter 458 or 459, F.S., unless a report of medical examination from a physician licensed in another state is permitted in accordance with paragraph 6A-6.0331(3)(c), F.A.C. The physician's report must provide a description of the impairment and any medical implications for instruction; and,

(b) An educational evaluation that identifies educational and environmental needs of the student.

(4) Criteria for eligibility. A student with other health impairment is eligible for exceptional student education if the following criteria are met:

(a) Evidence of other health impairment that results in reduced efficiency in schoolwork and adversely affects the student's performance in the educational environment; and,

(b) The student needs special education as defined in paragraph 6A-6.03411(1)(kk), F.A.C.

(Emphasis Added)

37. Respondent does not dispute the diagnosis of ADHD for Petitioner. Further, representations regarding the student's behavior outside the educational environment are not disputed. Additionally, that the student failed to thrive in his pre-kindergarten life is not disputed. The student must meet the criteria for ESE services currently. Petitioner failed to demonstrate that the student currently meets the criteria for ESE placement. To the contrary, Respondent established that the student (by all accounts a bright, friendly child) performs academically as expected for a first-grade student. Bouts of fidgeting or other symptoms of behavioral issues have been adequately addressed by the teacher's classroom management plan. The student has not exhibited any behavior at school that cannot be controlled and addressed by interventions available to teachers for all students.

38. Critical to the resolution of this case, however, is that the student's academic performance has not been reduced as a result of behavioral issues. The student is performing

commensurate with Petitioner's cognitive or intellectual ability. There is no major discrepancy between performance and ability. Petitioner has demonstrated academic success despite medical and behavioral concerns.

39. A student who is ADHD is eligible for ESE services when the condition rises to a level that it interferes with his ability to learn. More pronounced behavioral issues may also interfere with other students' ability to pay attention to instruction. Nothing in this record suggests that Petitioner has interfered with classmates' learning, damaged school property, or exhibited any behavior that could not be redirected.

40. Professional educators are held to a high standard of ethics and conduct in Florida. The parent in this cause has taken the untenable position that all of Petitioner's teachers, evaluators, and observers in the school setting have misrepresented the student's performance and behavior. The preponderance of the credible evidence supports the conclusion that despite the ADHD diagnosis, Petitioner is performing at or above grade level (reading) such that any alleged impairment has not adversely affected the student's academic achievement. Therefore, Petitioner is not currently eligible for ESE services.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner be discharged from ESE services as the student is not currently eligible.

DONE AND ORDERED this 18th day of June, 2010, in Tallahassee, Leon County, Florida.

S

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 18th day of June, 2010.

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 90 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 90 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(b), Florida Statutes; or
- c) only if the student is identified as "gifted", files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(b) and 120.68, Florida Statutes.