

**Miami-Dade County School District
No. 07-2651E
Initiated by: District
Hearing Officer: Errol H. Powell
Date of Final Order: February 5, 2008**

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
Petitioner,)
)
vs.) Case No. 07-2651E
)
)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on November 8, 2007, in Miami, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lilliam Rangel-Diaz
Qualified Representative
Center for Education Advocacy, Inc.
5973 Southwest 42nd Terrace
Miami, Florida 33155

For Respondent: Mary Lawson, Esquire
Miami-Dade County School Board
1450 Northeast 2nd Avenue, Suite 400
Miami, Florida 33132

STATEMENT OF THE ISSUE

The issue for determination is whether the School Board should be permitted to complete a psychological reevaluation of [REDACTED] (the Child).

PRELIMINARY STATEMENT

On June 13, 2007, this matter was referred to the Division of Administrative Hearings as a result of the School Board filing a due process hearing request (DPH Request) on June 11, 2007, due to the Parents of the Child denying consent for an independent educational evaluation (IEE). Subsequently, through a motion to dismiss, the Parents of the Child agreed to an IEE. As a result, by Order dated June 28, 2007, the undersigned ordered the parties to advise in writing of the need to proceed with the process associated with a due process hearing. A telephone conference was held on July 3, 2007, in which the School Board advised, among other things, that the issue was not consent for an IEE but was consent for a psychological re-evaluation and the Qualified Representative advised that the Parents of the Child would not consent to the re-evaluation. (The issue was confirmed in writing by the School Board). By Order dated July 5, 2007 and Amended Order dated July 26, 2007, the undersigned determined that the School Board filed the DPH Request on July 2, 2007, although a copy was served on the Qualified Representative on June 28, 2007.

Motions for judgment on the pleadings were filed by each

party, and responses to each motion were filed by the parties. By Order dated August 6, 2007, the timelines for the process associated with a due process hearing request were extended. By Order dated August 30, 2007, the motions were denied and the timelines were ordered to begin again five days from the date of the said Order, i.e., September 5, 2007.

On September 24, 2007, a telephone conference was held. During the telephone conference, the parties agreed to an extension of the resolution period and to a date certain for the due process hearing should the resolution meeting not resolve the issue in dispute. By Order dated September 25, 2007, the resolution period and the 45-day decision requirement were extended.

On October 31, 2007, the Parents of the Child filed a motion to cancel the hearing and hold the case in abeyance due to a State Complaint being filed by the Parents of the Child with the State of Florida, Department of Education. The School Board filed a response to the motion. A telephone conference was held on November 2, 2007. Subsequently, on November 6, 2007, a motion for continuance was filed by the Parents of the Child, and a telephone conference was held on November 7, 2007, during which the motion for continuance was withdrawn.

At hearing, the School Board presented the testimony of five witnesses and entered 13 exhibits (Petitioner's Exhibits

numbered 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, and 15) into evidence. The Parents of the Child presented the testimony of one witness, who was one of the witnesses for the School Board, and entered 12 exhibits (Respondent's Exhibits numbered 1(A), 2(B), 3(C), 4(D), 5(E), 6(F), 7(G), 8(H), 9(I), 10(J), 11(K), and 14(N)), into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for December 21, 2007, again extending the 45-day decision requirement. By Order dated November 14, 2007, the 45-decision requirement was extended until January 28, 2008. The Transcript, consisting of one volume, was filed on December 3, 2007.

The School Board's post-hearing submission was timely filed on December 21, 2007. The post-hearing submission of the Parents of the Child was attempted to be filed by fax and e-mail on December 21, 2007, but was unsuccessful, and was again attempted by fax on December 24, 2007. Also, on December 24, 2007, the Parents of the Child filed a Motion to Correct the Record and Amended Notice of Filing Respondent's Proposed Final Order indicating, among other things, the problems encountered in attempting to file their completed post-hearing submission on December 21, 2007 and the filing of the post-hearing submission on December 24, 2007, to which the School Board did not file a

response. The docket of the Division of Administrative Hearings reflected, and reflects, that the post-hearing submission of the Parents of the Child was filed on December 24, 2007. Filing the post-hearing submission on December 24, 2007, extended the 45-day decision requirement three more days to January 31, 2008. However, unbeknownst to the parties and the undersigned, only a portion of the post-hearing submission of the Parents of the Child was filed on December 24, 2007. The error was discovered by the Division of Administrative Hearings, and the Qualified Representative was notified. Upon being notified, the Qualified Representative immediately filed the post-hearing submission of the Parents of the Child on January 29, 2008. In view of the problems encountered by the Parents of the Child in filing their post-hearing submission, it is accepted as filed on January 29, 2008. The 45-day decision requirement is hereby extended to February 7, 2008, reflecting the additional days in filing the post-hearing submission by the Parents of the Child. The parties' post-hearing submissions were considered in the preparation of this Final Order.

FINDINGS OF FACT

1. At the time of hearing, the Child was nine years of age and is now ten years of age.
2. The Child attends an elementary school in the School Board's district and is in the third grade.

3. No dispute exists that the Child is an exceptional education student, eligible for Exceptional Student Education (ESE), and that the Child's education is governed by the Individuals with Disabilities Education Act (IDEA). The Child has been found eligible for the ESE program based on the following areas of eligibility: Autism and Language Impaired.

4. The Child's current individual education plan (IEP) consists of the IEPs developed on March 27, 2007 and May 5, 2007 (Current IEP).

5. The Current IEP provides, among other things, that the Child's educational placement is a general education class, with the curriculum content in English, using English for speakers of other languages (ESOL) strategies; and that the Child's priority education needs are in English acquisition skills, reading skills, math skills, written language, task completion, expressive/receptive language, and social skills/pragmatic.

6. Also, the Current IEP provides, among other things, the Child with several accommodations and supplementary aids and services, including daily paraprofessional assistance.

7. Additionally, the Current IEP provides, among other things, that the related services required are assistive technology and occupational therapy, within the educational environment. Further, the Current IEP indicates, among other things, that the home language for the Child is Bengali, Bangla;

that, for an extended period of time, the Parents of the Child had requested evaluations in Assistive Technology and Augmentative Communication and had signed a consent for an Assistive Technology Assessment, but that the evaluations had not been performed; that the Child would be provided software to enhance written language skills.

8. At the IEP meeting of May 15, 2007, the results of the Assistive Technology Assessment, having been performed at the request of the Parents of the Child, were considered. Based on the results of the Assistive Technology Assessment, recommendations were incorporated in the IEP of May 15, 2007.

9. Furthermore, the Current IEP indicates that a behavioral intervention plan (BIP) was developed on September 25, 2006, was updated on March 27, 2007, and was attached to and incorporated by reference to the IEP. The Parents of the Child had requested the School Board to conduct a Functional Assessment of Behavior (FAB), and the FAB was conducted on September 13, 2006.

10. Moreover, the IEP of March 27, 2007, indicates, among other things, that the IEP team desired a reevaluation because the Child had not been evaluated since May 21, 2001, but that the Parents had refused to consent to a re-evaluation.

11. Following the development of the IEP of March 27, 2007, the School Board indicated, in an informed notice dated

March 28, 2007, that it wanted to conduct a complete psychological re-evaluation of the Child to determine the appropriate functional level of performance of the Child in order to provide the Child with a free appropriate public education (FAPE) in the least restrictive environment (LRE). At the IEP meeting of May 15, 2007, the School Board maintained its position of wanting to conduct a complete psychological re-evaluation.

12. The Child was promoted by the School Board to the third grade.

13. The Child's 2006-2007 report card reflects final grades of A in Art and Music, B in Language Arts, EDSL, Mathematics and Social Studies, and C in Reading, Science, and Physical Education.

14. In the Spring of 2007, the School Board administered to the Child the Stanford Achievement Test, Tenth Edition (SAT-10). The Child scored a percentile of 28 in Reading Comprehension, which placed the Child in the "lower end of the average profile"; and scored a percentile of 26 in Mathematics, which placed the Child in the "lower end of the average profile." Even though the Child scored in the "average profile," the Child was identified as needing assistance and was, therefore, eligible for summer school.

15. As to the Current IEP, the witnesses for the School

Board testified that the Current IEP provides the Child with a FAPE in the LRE. Their testimony is found to be credible. The Parents of the Child agree that the Current IEP provides the Child with a FAPE in the LRE. The evidence demonstrates that the Current IEP provides the Child with a FAPE in the LRE.

16. At the time of hearing, during the 2007-2008 school year, the Child was having no behavioral problems.

17. During the 2007-2008 school year the Child's class was administered a Diebels test, which is a fluency test showing how many words a child is able to read, without any comprehension being involved. The Child scored 92 words a minute, which was in the average range for a third grade student in fluency.

18. In September of 2007, one of the Child's third grade teachers administered a STAR diagnostic reading test, which was administered to the teacher's entire third grade. The Child scored a 1.5, which is grade equivalent, i.e., the Child scored on a 1.5 grade level. However, the test failed to reveal the Child's area(s) of difficulty, such as auditory or language.

19. That same third grade teacher noticed that the Child's paraprofessional was providing the Child with, what the teacher considered, too much assistance, which the teacher believed was not helping the Child to learn, so the teacher requested the paraprofessional to alter the manner of providing assistance. The Child's grades fluctuated between As, Ds, and Fs.

20. At the time of hearing, at the conclusion of the first quarter of the 2007-2008 school year, the Child had received the following grades: C in Language Arts, C in Reading, C in ESOL, C in Mathematics, C in Science, C in Social Studies, B in Physical Education, A in Music, and A in Art.

21. In the future outlook for third graders, they must take the Florida Comprehensive Achievement Test (FCAT).

22. The School Board's expert testified that a re-evaluation is usually performed when more information is needed to determine the nature of a particular learning or behavior problem that is persistent so that the school, with input from the parents of a child, can define or design more effective interventions. The expert further testified that continued monitoring of a student with disabilities is important in order to design good interventions. The expert's testimony, as set forth, is found to be credible.

23. The evidence demonstrates that the School Board continues to monitor the Child.

24. However, the evidence failed to demonstrate that persistent learning or behavior problems had been identified for the Child.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction of these proceedings and the parties thereto

pursuant to Sections 1001.42(4)(l) and 1003.57(1), Florida Statutes (2007).

26. The School Board has the burden of proof in these proceedings. Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). The standard of proof is a preponderance of the evidence. DeVine v. Indian River County School Board, 249 F.3d 1289, 1292 (11th Cir. 2001).

27. In its DPH Request, the School Board indicated that it desired "a complete psychological evaluation [sic] of the Child to determine current functioning levels to appropriately address the student's educational needs and provide a free appropriate public education (FAPE) in the least restrictive environment (LRE)."

28. The School Board sought a reevaluation of the Child at the IEP meeting of March 27, 2007, and provided the Parents of the Child with an informed notice, dated March 28, 2007, seeking a complete psychological evaluation, which was in actuality a reevaluation. The Parents of the Child refused to consent. At the IEP meeting of May 15, 2007, the School Board again requested consent for a complete psychological reevaluation, and again, the Parents of the Child refused.

29. Section 1001.42(4)(l), Florida Statutes (2007), provides, among other things, that the School Board shall "Provide for an appropriate program of special instruction,

facilities, and services for exceptional students"

30. States must comply with the IDEA in order to receive federal funding for the education of handicapped children. The IDEA requires states to establish policy which assures that children with disabilities will receive a FAPE. Through an IEP, the educational program accounts for the needs of each disabled child.

31. Definitions applicable to the IDEA are set forth at 20 U.S.C.S. Section 1401. FAPE is defined as follows:

- (9) . . . The term 'free appropriate public education' means special education and related services that—
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program

IEP is defined as follows:

- (14) . . . The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised
. . . .

Special education is defined as follows:

- (29) . . . The term 'special education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—
(A) instruction conducted in the classroom,

in the home, in hospitals and institutions, and in other settings; and
(B) instruction in physical education.

32. The Code of Federal Regulations (C.F.R.) implements the federal statutes. The C.F.R. applicable to the pertinent sections of the IDEA is 34 C.F.R. Section 300 (2006).¹ FAPE is found at 34 C.F.R. Section 300.17 and is defined as follows:

Free appropriate public education or FAPE means special education related services that—
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA [State educational agency], including the requirements of this part;
(c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

IEP is found at 34 C.F.R. Section 300.22 and is defined as follows:

Individualized education program or IEP means a written statement that is developed, reviewed and revised in accordance with §§ 300.320 through 300.324.

Special education is found at 34 C.F.R. Section 300.39 and is defined as follows:

(a) General. (1) Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—
(i) Instruction conducted in the classroom,

in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) Special education includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section—

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

(ii) Travel training; and

(iii) Vocational education.

* * *

(3) Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards with the jurisdiction of the public agency that apply to all children.

* * *

(5) Vocational education means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

33. In general, a FAPE must be available to all children residing in a state between the ages of 3 and 21, inclusive.

34 C.F.R. § 300.101(a).

34. A state meets the IDEA's requirement of a FAPE when it

provides personalized instruction with sufficient support services to permit the disabled child to benefit educationally from that instruction. The instruction and services must be provided at public expense, meet the state's educational standards, approximate grade levels used in the state's regular education, and correspond to the disabled child's IEP. Board of Education of Hendrick Hudson Central School District v. Rowley, 102 S. Ct. 3034 (1982).

35. The School Board complied with the Federal Regulations in seeking consent for the reevaluation from the Parents of the Child. 34 C.F.R. § 300.300(c)(i).

36. Once a parent refuses to consent to a reevaluation, the School Board "may, but is not required to, pursue the reevaluation" through the due process hearing request. 34 C.F.R. § 300.300(c)(ii). The School Board chose to pursue the reevaluation through the due process hearing request.

37. Furthermore, the School Board does not violate its obligation if it declines to pursue the reevaluation. 34 C.F.R. § 300.300(c)(iii). The School Board chose to pursue the reevaluation even though the School Board would not be in violation of the IDEA if it chose not to pursue the reevaluation.

38. The evidence demonstrates that the Child's Current IEP provides the Child with a FAPE in the LRE.

39. The School Board's expert, whose testimony was found to be credible, testified that a reevaluation is usually performed when more information is needed to determine the nature of a particular learning or behavior problem that is persistent so that the school can define or design more effective interventions; and that continued monitoring of a student with disabilities is important in order to design good interventions.

40. Even though the evidence demonstrates that the School Board continues to monitor the Child, the evidence failed to demonstrate that persistent learning or behavior problems had been identified for the Child.

41. Thus, the evidence fails to demonstrate, at this time, that a reevaluation is necessary or that reasonable grounds exist for a reevaluation, and is, therefore, warranted.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that a complete psychological reevaluation of the Child shall not be conducted by the School Board.

DONE AND ORDERED this 5th day of February, 2008, in Tallahassee, Leon County, Florida.

S

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of February, 2008.

ENDNOTE

^{1/} Unless indicated otherwise, 34 C.F.R. Section 300 refers to the 2006 Code of Federal Regulations.

COPIES FURNISHED:

Lilliam Rangel-Diaz
Qualified Representative
Center for Education Advocacy, Inc.
5973 Southwest 42nd Terrace
Miami, Florida 33155

[REDACTED]

(Address of record)

Mary Lawson, Esquire
Miami-Dade County School Board
1450 Northeast 2nd Avenue, Suite 400
Miami, Florida 33132

Deborah K. Kearney, General Counsel
Department of Education
1244 Turlington Building
325 West Gaines Street
Tallahassee, Florida 32399-0400

Patricia Howell, Program Director
Bureau of Exceptional Education
and Student Services
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

Dr. Rudolph F. Crew, Superintendent
Miami-Dade County School Board
1450 Northeast Second Avenue, No. 912
Miami, Florida 33132-1394

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(e), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(e) and 120.68, Florida Statutes.