

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case ██████████
)
MIAMI-DADE COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Administrative Law Judge ***** conducted a final hearing on February 28, 2011, at the Miami-Dade County School Board Administration Building, 1450 Northeast Second Avenue, Miami, Florida.

APPEARANCES

For Petitioner: ██████████ Parents
(Address of record)

For Respondent: ██████████ Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue
Suite 400
Miami, Florida 33132

STATEMENT OF THE ISSUES

The issues are (1) whether Petitioner's ██████████ conduct was a manifestation of disabilities; and (2) whether the discipline imposed is consistent with providing Petitioner with a free appropriate public education.

PRELIMINARY STATEMENT

In 2010 and 2011, Petitioner, a [REDACTED] year-old, [REDACTED] grade student, was involved in several incidents that Respondent determined (1) were not manifestations of Petitioner's disabilities, and (2) justified an alternative education placement in lieu of expulsion. Following a manifestation determination meeting on January 14, 2011, that [REDACTED] [REDACTED] attended, Respondent was reassigned to the [REDACTED], which is also known as "[REDACTED]." The [REDACTED] received written notice of the decision in a letter dated January 19, 2011. On January 30, 2011, Petitioner's parents filed with Respondent Petitioner's Request for Exceptional Student Education Due Process Hearing that was expedited, to contest [REDACTED] reassignment in lieu of expulsion to [REDACTED]. By agreement of the [REDACTED] the hearing was scheduled for [REDACTED]

At the hearing, Petitioner's [REDACTED] and [REDACTED] testified on [REDACTED] behalf. Respondent presented the testimony of [REDACTED], Principal, [REDACTED] School ([REDACTED]); [REDACTED], Ph.D, School Psychologist; [REDACTED], [REDACTED] Exceptional Student Education (ESE) Teacher; [REDACTED] Principal, [REDACTED]; [REDACTED], [REDACTED] ESE Teacher; and [REDACTED], ESE Instructional Supervisor for Respondent.

Respondent's Exhibits 1-11, 13-17, and 19 were admitted into evidence.

The transcript of the hearing was scheduled to be filed on March 7, 2011. Due to a delay in receiving the transcript, Respondent was [REDACTED] an unopposed extension of time to file a proposed final order (PFO) from March 10, 2011, until March 24, 2011, when the PFO was received. Petitioner [REDACTED] file a PFO. The Transcript of the hearing was filed by email on March 30, 2011.

FINDINGS OF FACT

1. [REDACTED] was born on [REDACTED]. [REDACTED] receives special education services because [REDACTED] is [REDACTED] or [REDACTED] in [REDACTED] [REDACTED] and because [REDACTED] has a [REDACTED]. [REDACTED] parents say [REDACTED] also has [REDACTED] ([REDACTED]).

2. Respondent, the Miami-Dade County School Board (MDCSB), is responsible under the Individual with Disabilities Education Act (IDEA) for providing exceptional student education (ESE) services to [REDACTED]

3. The appropriate ESE services and measurable goals for the period of time at issue in this proceeding were set forth in Individual Education Plans (IEPs) dated [REDACTED] and [REDACTED].

4. Earlier that year, on May 26, 2010, MDCSB prepared a Functional Assessment of Behavior Intervention Plan (BIP) for [REDACTED]. The [REDACTED] were intended to address the following problem behaviors: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. [REDACTED] also was described as "[REDACTED]."

5. The May 2010 revision of [REDACTED] BIP was developed after [REDACTED] [REDACTED] an [REDACTED] from a locker room. As determined at a manifestation determination meeting held, the conduct was not caused by [REDACTED] disabilities. Therefore, [REDACTED] served a [REDACTED] day out-of-school-suspension for [REDACTED].

6. On [REDACTED], [REDACTED] received a referral for having been "[REDACTED]" and "[REDACTED]" during a "[REDACTED]" with a [REDACTED] student." As a result, [REDACTED] served a [REDACTED] day in-school suspension.

7. On [REDACTED], [REDACTED] sent an [REDACTED] to get a [REDACTED], although [REDACTED] parents noted that there [REDACTED] [REDACTED] in their home. On the same day, [REDACTED] was caught [REDACTED] on the grounds of a [REDACTED].

8. On [REDACTED], [REDACTED] wanted a [REDACTED] student to "[REDACTED]" in the cafeteria with [REDACTED]. When [REDACTED] resisted, [REDACTED] grabbed [REDACTED] by [REDACTED] book bag and dragged [REDACTED] across a table, causing [REDACTED] to fall and hurt [REDACTED] back and break [REDACTED] cellular telephone.

9. As the manifestation determination team concluded on [REDACTED], [REDACTED] behavior was [REDACTED] the result of [REDACTED] disabilities. [REDACTED] received an out-of-school suspension for [REDACTED] days for [REDACTED], [REDACTED], and [REDACTED] for the [REDACTED] and [REDACTED] incidents.

10. On [REDACTED], [REDACTED] was charged with [REDACTED] and [REDACTED] by [REDACTED]. The police reported to [REDACTED] officials that [REDACTED] [REDACTED] violence [REDACTED] another [REDACTED] by [REDACTED] [REDACTED]; then went to the student's home and there, [REDACTED] and [REDACTED]; and threatened [REDACTED] with further violence from [REDACTED] "[REDACTED]." The police reported the beating as "[REDACTED]." Because of a [REDACTED] of [REDACTED], the parents of the victim insisted on transferring the student to another school.

11. On [REDACTED], after determining that [REDACTED] violent conduct [REDACTED] a manifestation of [REDACTED] disabilities, the [REDACTED] IEP team reassigned [REDACTED] from [REDACTED] to an alternative educational setting, [REDACTED], or [REDACTED], in lieu of [REDACTED].

12. The [REDACTED] initially [REDACTED] with the alternative placement, but now [REDACTED] and now [REDACTED] the manifestation determination. At hearing, they asserted that [REDACTED] behavior resulted from another disability, [REDACTED] and that the [REDACTED] was on notice of this additional disability.

13. A diagnosis of [REDACTED] has been made by a number of medical doctors, according to [REDACTED]. The record supports [REDACTED] claim that the [REDACTED] staff [REDACTED] that [REDACTED] was taking [REDACTED], as indicated on an IEP dated [REDACTED], and was also [REDACTED] that the [REDACTED] had [REDACTED] the issue at previous IEP meetings³.

14. Asked at hearing to assume that [REDACTED] has [REDACTED], [REDACTED] members of the manifestation determination team distinguished [REDACTED] behavior from that of students with [REDACTED].

15. The school psychologist noted that [REDACTED] behavior is [REDACTED] [REDACTED] and "[REDACTED]," despite the description in [REDACTED] BIP. Rather, [REDACTED] most serious conduct, that which has given rise to [REDACTED] possible expulsion, is [REDACTED]. [REDACTED] threatens other students with violence, then carries out [REDACTED] threats. In general, [REDACTED] acts constitute [REDACTED] [REDACTED].

16. [REDACTED] [REDACTED] ESE teacher, who is certified in varying exceptionalities, also recognized differences between [REDACTED] behavior and that of students with [REDACTED]. [REDACTED] described [REDACTED] as [REDACTED], [REDACTED], and [REDACTED] in and out of class. [REDACTED] students are [REDACTED] by having to perform specific tasks and require shorter assignments. By

contrast ██████████ ██████████ to finish ██████████ work and makes ██████████ scores on tests.

17. In ██████████ alternative educational setting at ██████████, ██████████ is doing ██████████. That school uses a ██████████ developed modification plan with positive behavior supports that allow students to accumulate points from teachers to ██████████ rewards.

18. Focusing on positive rather than negative behavior, the system awards points for being on time, being in uniform, using appropriate language, keeping hands to yourself, and being cooperative, among other specific goals. During the third nine weeks of school, ██████████ achieved ██████████ points (or ██████████) from ██████████ teachers on ██████████ days.

19. Teachers at ██████████ have the support services of a full-time school psychologist. An ESE teacher assists teachers who have ESE students like ██████████ in general education classes. ██████████ has made only ██████████ and ██████████ grades since ██████████ has been enrolled at ██████████.

20. ██████████ IEP is being implemented at ██████████. Although ██████████ has ██████████ ██████████ in ██████████, ██████████ being ██████████ or ██████████ in ██████████ causes ██████████ to have some ██████████. ██████████ has weekly ██████████ to address those ██████████ with a specialist who comes to the school.

21. ██████████ also has weekly individual ██████████ sessions with the school psychologist. ██████████ is exhibiting ██████████ in

the classroom at [REDACTED] where the total school enrollment is [REDACTED], and teacher-to-student ratio is [REDACTED] to [REDACTED].

22. [REDACTED] expressed her concern as follows:

But, the part that I [REDACTED] was [REDACTED] being sent to a school that nobody talks [REDACTED] about it.

[REDACTED] went on to comment on [REDACTED] progress saying that:

And [REDACTED] doing [REDACTED] in that school. [REDACTED] grades, the grade, I [REDACTED] [REDACTED] complaints about them.

And [REDACTED] actually stop by [REDACTED] taking the [REDACTED], that I was told by the age of [REDACTED] that [REDACTED] had to start taking it. [REDACTED] was taking [REDACTED], [REDACTED].

23. Similarly, [REDACTED] testified as follows:

The thing that I didn't like was the moving from [REDACTED] to that school, [REDACTED]. I [REDACTED] have anything against that school. The problem is with what people say about [REDACTED].

24. [REDACTED] has had [REDACTED] disciplinary incident at

[REDACTED]. [REDACTED] stole a cellular telephone from a physical education coach's office, for which [REDACTED] received a [REDACTED] day out-of-school suspension.

Ultimate Findings of Fact

25. [REDACTED], through [REDACTED] parents, [REDACTED] to prove that the behavior that ultimately resulted in the recommendation for [REDACTED] was related to [REDACTED] identified disabilities. They also [REDACTED] to demonstrate that it was related to [REDACTED].

26. [REDACTED] IEP can and is being successfully implemented in the alternative educational setting. [REDACTED] is receiving a free appropriate public education (FAPE) in that setting and progressing well.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569, 120.57(1), and 1003.57(1)(e), Fla. Stat. (2010).

28. Petitioner bears the burden of proof in this case. 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. § 120.57(1)(j).

29. Under the Individuals with Disabilities Education Act (IDEA), students with disabilities are entitled to having FAPE by receiving special education and related services, when necessary. 20 U.S.C. § 1401(9).

30. There is no question that Petitioner is a student with disabilities who is eligible to receive ESE and [REDACTED] as a student who is [REDACTED] and as one who has [REDACTED]. See §§ 1003.57(1)(a) and 1003.01(a), Fla. Stat. (2010); and Florida Administrative Code Rules 6A-6.03013(4)(a) and 6A-6.03018(4)(a).

31. There is also [REDACTED] that Petitioner [REDACTED] acts that constitute Group III, IV, and V violations of the MDCPS

Code of Student Conduct which endangered the health, safety, and well-being of other students before [REDACTED] placement in the alternative setting.

32. In relevant part, 34 Code of Federal Regulations Section 300.530 provides that the discipline of an ESE student may be authorized as follows:

(a) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(c) Additional authority. For disciplinary changes in placement that would exceed [REDACTED] consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

(d) Services. (1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must--

(i) Continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and

to progress toward meeting the goals set out in the child's IEP; (Emphasis added.)

33. The federal and state regulatory schemes have been described as "cooperative federalism." Town of Burlington v. Dep't of Educ., 736 F.2d 773, 785 (1st Cir. 1984), aff'd 471 U.S. 359 (1985).

34. A manifestation determination is likewise required by the state, pursuant to Florida Administrative Code Rule 6A-6.03312(3), which is as follows:

(3) Manifestation determination. A manifestation determination, consistent with the following requirements, must be made within ten (10) days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct.

(a) In conducting the review, the school district, the parent, and relevant members of the IEP Team (as determined by the parent and the school district) must:

1. Review all relevant information in the student's file, including any information supplied by the parents of the student, any teacher observations of the student, and the student's current IEP; and

2. Determine whether the conduct in question was caused by, or had a direct and substantial relationship to the student's disability or whether the conduct in question was the direct result of the school district's failure to implement the IEP.

(b) If the school district, the parent, and relevant members of the IEP Team determine that a condition in subparagraph (a)2. above was met, the conduct must be determined to

be a manifestation of the student's disability and the school district must take immediate steps to remedy those deficiencies. (Emphasis added.)

35. To develop an adequate IEP for Petitioner, Respondent was required to evaluate Petitioner in all areas of suspected disabilities. See 34 C.F.R. § 300.532(g).

36. The parents gave Respondent notice of [REDACTED] as a suspected disability and they believed that [REDACTED] was to or the cause of the conduct for which Petitioner is being disciplined. Cases interpreting IDEA, however, indicate that [REDACTED] is not a specifically identified disability and, when [REDACTED] is severe enough to substantially interfere with learning or participation in school activities, a student is eligible for services under Section 504 of the Rehabilitation Act not IDEA. See, e.g., Brittan(CA) Sch. Dist., 16 IDELR 1226 (OCR 1990).

37. A student with [REDACTED] can be eligible for services under IDEA if the condition also qualifies under some recognized category of disability, typically as a "health impairment," an "emotional disturbance," or a "specific learning disability." See 34 C.F.R. § 300.8(c)(0); 34 C.F.R. § 300.8(c)(4); and 34 C.F.R. § 300.8(c)(10); and see, e.g., Letter to Cohen, 20 IDELR 73 (OCR 1993).

38. Because IDEA offers a more extensive array of services and because, in this case, Petitioner's classification with a

██████████ can subsume the conditions attributable to ██████████, the manifestation determination that ██████████ identified disabilities are not related to ██████████ violations of the school code of conduct was appropriate.

39. Respondent fully complied with all applicable provisions of IDEA, the Code of Federal Regulations, Florida Statutes, and Department of Education rules in determining that Petitioner's misconduct was not a manifestation of ██████████ disabilities, and that ██████████ conduct ██████████ caused by a ██████████ to implement ██████████ IEP. Respondent also established that the IEP, as implemented at the alternative school, has already and is reasonably expected to continue to provide Petitioner with FAPE.

Based on the foregoing, it is ORDERED that the relief requested in the due process challenge is denied.

DONE AND ORDERED this 31st day of March, 2011, in
Tallahassee, Leon County, Florida.

S

██████████
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of March, 2011.

ENDNOTES

¹. Although it is the usual practice to omit references to gender in Exceptional Student Education Cases, gender is obvious in this case because of the name of the proposed alternative educational setting.

². Although the ██████████ pronoun is used, it is not intended to indicate the victim's gender.

³. According to the uncontroverted testimony of Respondent's witnesses, a diagnosis of ██████████ has to be made by a medical doctor and no such documentation was provided to the ██████████. At hearing, the ██████████ ██████████ understood and agreed to provide the medical 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)(b), Florida Statutes (2009), 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), and Florida Administrative Code Rule 6A-6.03311(9)