

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 10-0419E
)
MIAMI-DADE COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Administrative Law Judge Eleanor M. Hunter conducted a final hearing on March 3 and 4, 2010, by video teleconference between Miami and Tallahassee, Florida, that was concluded by telephone conference on March 8, 2010.

APPEARANCES

For Petitioner: Laverne O. Pinkney, Esquire
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For Respondent: Mary C. Lawson, Esquire
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STATEMENT OF THE ISSUES

The issues are (1) whether Petitioner's behavior during an incident at school on December 1, 2009, was a manifestation of a

disability or the direct result of Respondent's failure to implement an Individual Education Plan; and (2) whether any discipline is appropriate.

PRELIMINARY STATEMENT

On December 1, 2009, Petitioner, a middle school student, was involved in an incident with another student. That incident, later characterized as a battery, was determined by Respondent not to be a manifestation of Petitioner's disability, and an alternative education placement in lieu of expulsion was proposed.

On January 27, 2010, on behalf of Petitioner, [REDACTED] parents filed with Respondent Petitioner's Request for Exceptional Student Education Due Process Hearing to contest [REDACTED] expulsion from [REDACTED] current middle school placement, and to oppose the proposed alternative placement. The due process hearing was set for February 9, 2010. In order to comply with the requirements of Florida Administrative Code Rule 6A-6.03312(7)(a)(2)(c), the hearing was to have been held by February 20, 2010, and a final decision made by March 10, 2010. During a telephone pre-hearing conference held on February 3, 2010, the parties indicated that they had been unable to reach an agreement at the resolution meeting held February 2, 2010. Respondent noted that its witnesses would be unable to attend a hearing on February 9, 2010, because it conflicted with the administration of FCAT.

The parties agreed that Petitioner could waive the right to an expedited hearing and the applicable deadlines, and agreed to have the hearing rescheduled for February 23, 2010.

On February 15, 2010, Petitioner moved for a continuance due to the impending February 23rd absence from the state of one of Petitioner's witnesses. The case was rescheduled for March 3, 2010. On February 23, 2010, Petitioner filed an opposed Motion to Allow Witness to Testify By Telephone or, in the Alternative, for Continuance. During a motion hearing on February 26, 2010, the requirements for a witness to testify by telephone were outlined and Petitioner was required to provide assurances that the conditions could be met. Later that day, Petitioner filed a Status Report providing assurances that the conditions could be met and an Order Granting Motion to Allow Witness to Testify by Telephone was entered on March 1, 2010. The next day, after finding that one of the conditions (having a telephone in the hearing room) was not met, Petitioner filed an Emergency Motion for Continuance or, in the Alternative, to Hold Proceedings Open to Receive Expert Testimony. The Emergency Motion for Continuance was denied and ruling was reserved to discuss alternatives at the hearing. During the hearing, the parties agreed that Petitioner's last witness, Philip Lazarus, Ph.D., would testify by telephone on March 8, 2010.

On March 2, 2010, Respondent filed a Motion in Limine to exclude as irrelevant the testimony of six witnesses on Petitioner's Witness List. Ruling was reserved until the hearing without prejudice to the Respondent to raise objections to the relevance of specific questions when asked of each witness.

At the hearing, Petitioner presented the testimony of [REDACTED] (the alleged victim); [REDACTED]. (mother of [REDACTED]); Dr. Judy Chin; Marsha Spaner; Lenore Belaval; Maria A. Rodriguez; Genelle N. Qualloy; Marlon T. Williams; Nancy Aragon; Francene Hagarman; Arleen Tamargo; Gisella Timiraos; Rona Brandell; [REDACTED], Sr. (father of Petitioner); [REDACTED] (mother of Petitioner); and Philip Lazarus, Ph.D. (expert in psychology and school psychology). Petitioner's Exhibits 8 and 10 were received into evidence.

Respondent presented the testimony of Dr. Judy Chin; Marsha Spaner; Lenora Belaval; Nancy Aragon; Francene Hagerman; William Canfield, Jr.; Sally Roblin; Gisella Timiraos; Rona Brandell; Melinda Engelmann; Jan Scheidt; Yamile Llano; Dr. Wesley Warner; and Sue L. Buslinger-Clifford, Ed.D. (expert in school psychology). Respondent's Exhibits 1A, B and C; 2A, B and C; and 3 through 10 were received into evidence.

The four-volume Transcript of the hearing and Proposed Final Orders were filed with the Division of Administrative Hearings on March 30, 2010.

FINDINGS OF FACT

1. Petitioner, [REDACTED], was born in [REDACTED] on [REDACTED] [REDACTED]. [REDACTED] came to the United States in 2007 and was placed in classes for English speakers of other languages (ESOL). [REDACTED] was an [REDACTED] grade student at a middle school (Middle School) when [REDACTED] was cited, on December 1, 2009, for violating the Miami-Dade County Public Schools (MDCPS) Code of Student Conduct.

2. The Middle School video showed that, at the end of the school day, [REDACTED] left class, walked down a stairwell, hit one female student on her buttocks, pushed another student, and then struggled with [REDACTED] [REDACTED], [REDACTED] [REDACTED] was trying to take a cell phone from [REDACTED] because [REDACTED] believed that [REDACTED] had sent a text message saying, "I love you" to another boy.

3. When the two students were taken to the office, [REDACTED] had a bloody nose. [REDACTED] told an assistant principal that [REDACTED] let go of [REDACTED] arm and the phone hit [REDACTED] in the nose. [REDACTED] testified credibly that [REDACTED] threw the phone at [REDACTED] and it hit [REDACTED] nose. It was impossible for administrators to tell from the school video exactly what happened between the two of them, although both students said it was an accident. [REDACTED] clearly

intended to have the confrontation with [REDACTED]. As a result of the incident, [REDACTED] was suspended for ten days.

4. [REDACTED] is classified as a child with a disability within the meaning of the Individual with Disabilities Education Act (IDEA). [REDACTED] qualifies for services for specific learning disabilities (SLD) in mathematics, reading and language. Based on this classification, [REDACTED] has received exceptional student education (ESE) services, as set forth in an Individualized Education Program (IEP), first developed February 20, 2009, and subsequently updated before the incident on September 29, 2009.

5. The MDCPS police were called to the Middle School to investigate the incident. The police did not arrest [REDACTED], but they did prepare an Incident Report. The report and an Expulsion Request and Case Management Referral Form were submitted to the School Operations/Alternative Education Office. The referral form erroneously indicated that [REDACTED] had committed a Group III violation of the MDCPS Student Code of Conduct, an assault, and that drugs and a weapon were involved. When the error was corrected, the incident was properly classified as a Group IV violation, a battery, with no drugs or weapons involved. Both Group III and Group IV infractions can result in expulsion.

6. An interim IEP was developed at a conference on December 16, 2009, the IEP team determined that the battery was

not a manifestation of ██████'s disability because the conduct did not have a direct or substantial relationship to ██████ disability, and that it was not the direct result of a failure to implement the IEP of September 29, 2009. The team recommended that ██████ be reassigned to an all-male alternative school (Alternative School), after hearing that the Alternative School has smaller general education classes, inclusion classes, and a structured school-wide positive behavioral support system with a staff trained to implement the system. ██████'s IEP can be implemented at the Alternative School. Once enrolled at Alternative School, ██████ can also earn ██████ re-enrollment at the Middle School² with good behavior and a minimum 2.0 grade-point average.

7. ██████'s father participated in the IEP meeting with the assistance of a Spanish-language translator but he disagreed with the decision. He visited the Alternative School and disagreed that it would be an appropriate placement.

8. ██████ began immediately demonstrating academic and behavioral problems when ██████ first came to the Middle School in the Fall of 2007. From September 2007 through December 2009, with the notable exception of two male teachers (one of whom co-taught with a female teacher in a science class that included both general education and ESE students), ██████ female teachers complained about ██████'s "problem behaviors." ██████ was "defiant

to adults," had "conflicts with peers," was talkative, disruptive, rude, disrespectful, profane, and often off-task.

█ male history teacher, testified that █ was talkative and playful, but that █ could behave and focus when █ wanted to get a good grade or to get a good report on █ behavior. █ was not rude or disrespectful to him, although █ was manipulative in terms of trying make sure █ got good reports.

█ male science teacher also testified that he could redirect █ with a tap or by saying, "Let's get to work." Like █ history teacher, █'s science teacher noticed that █ could improve █ behavior when █ had to have daily or weekly progress reports.

9. As a result of █ behavior, the School Support Team/Student Development Team (SST/SDT) met in October 2007, and developed an intervention plan to attempt to improve █ behavior. The team recommended that █ father take █ for a neurological examination to rule out physical problems, but that was not done because the family lacked health insurance.

10. █'s behavior did not improve. In sixth grade, █ received referrals for turning in another student's mathematics homework as █ own, shoving another student, throwing pencils to stick them in the ceiling, throwing pieces of gum to hit other students, making sexual implications about and inappropriately touching girls, using profanity, lying about

whether ■ had served detentions, and being disruptive in detention. The mathematics teacher who caught ■ attempting to cheat by turning in another student's homework near the beginning of the school year and who was, after that, extremely strict on ■, like the male teachers, could control and redirect ■ with a stern look.

11. When ■'s behavior showed little improvement with the SST/SDT (also called RTI/SDT) intervention plan, a Functional Assessment of Behavior Interview (FAB) was conducted and became the basis for the development of a Behavior Intervention Plan (BIP) on January 10, 2008. The BIP required daily progress reports from ■ teachers and weekly counseling to teach ■ self control and better decision making.

12. During the 2008 - 2009 school year, when ■ was in ■ grade, ■ continued to receive referrals and discipline for making inappropriate remarks to a girl, touching another student on the buttocks, fighting and tripping students, skipping detentions and lying about it, and for passing around a drawing of genitals.

13. ■'s father blamed his ■'s behavior on the death of ■ grandfather with whom ■ lived with in ■ for two years, before joining ■ parents in the United States. The grandfather's death occurred in November 2008, however, which does not explain ■'s problem behaviors that began as early

as September 2007. More problematic is the father's refusal to believe much of what school personnel told him and to believe that he was being called to come to school for behaviors that were not serious.

14. In December 2008, [REDACTED] was given a number of assessments as a part of a comprehensive psycho-educational evaluation. [REDACTED]'s verbal IQ was 93, which is in the average range and indicates that he has no cognitive disability. On the Behavior Assessment System for Children, Second Edition ("BASC-2") designed to diagnose emotional and behavioral disorders, [REDACTED] scored in the "at risk" range. At risk means that [REDACTED] has an adjustment problem that is not yet severe enough to require formal intervention, but does require careful monitoring. The school psychologist suggested monitoring and interventions.

15. The school psychologist concluded that cultural misunderstandings, insecurity, and over-defensiveness were causing some of [REDACTED]'s conflicts with others. [REDACTED] sees people making faces but cannot understand what they are saying about [REDACTED]. [REDACTED] is also very controlling, as evident from the incident with [REDACTED].

16. The psychologist and [REDACTED]'s teachers had no reasons to believe that [REDACTED] should be evaluated further for a possible

Emotional Behavioral Disability (EBD).³ [REDACTED] actions stem from external not internal difficulties.

17. To address [REDACTED]'s cultural and assimilation issues, a school guidance counselor already had referred [REDACTED] for weekly counseling at the Bertha Abess Children's Center that provided Title III services for ESOL students. [REDACTED] received that counseling from September 2007 to April 2008.

18. [REDACTED]'s behavior was more disruptive and antisocial than impulsive, so no further evaluation for attention deficit disorder was required.⁴

19. [REDACTED] was diagnosed with a SLD in reading due to a severe discrepancy between [REDACTED] ability and achievement. The SLD diagnosis led to the development of [REDACTED]'s initial IEP on February 20, 2009. At that time [REDACTED] BIP was updated and incorporated into the IEP by reference. Weekly counseling was to have been continued.

20. On September 29, 2009, a second IEP was developed for [REDACTED] to review the educational services being provided to [REDACTED]. It also incorporated the BIP for weekly counseling in the guidance counselor's office. All of the services required by the IEP were provided, except weekly counseling in the guidance counselor's office.

21. During the 2009-2010 school year, Marsha Spaner was the guidance counselor at the Middle School. She counseled

██████ in her office approximately every two weeks, not weekly as the BIP required.

22. Petitioner's expert, Dr. Philip Lazarus, agreed with the evaluation that showed that ██████'s has an SLD. He also agreed with the manifestation determination team's conclusion that the battery was not related to ██████'s SLD. But he believes that ██████'s behavior could be related to an EBD.⁵ Dr. Lazarus could not do a psychological evaluation of ██████ because he is not bilingual and, therefore, he could not reach a conclusion regarding a possible EBD.

23. Dr. Lazarus agreed that ██████ also was given an appropriate assessment to screen for emotionally-based behavior problems, the BASC-2. Being antisocial rather than having an EBD would be more consistent with ██████'s being a popular, social child who is playful, happy and has a ██████. The only mention in ██████ records regarding possible depression was soon after the death of ██████ grandfather, which would not be abnormal.⁶

24. With regard to the nexus between ██████'s conduct and the failure to counsel ██████ weekly, Dr. Lazarus testified on direct as follows:

But, the other related services [sic] that was supposed to be provided was the counseling services, and it says that the counseling would be done in the counselor's office and it would be done on [a] weekly

basis. . . . And so that was a significant part of the IEP. And, perhaps, if that was implemented, he may have had a different type of outcome.
(Emphasis added.)

ULTIMATE FINDINGS OF FACT

25. Petitioner failed to prove that the IEP team's review of all relevant information was inadequate.

26. Petitioner failed to prove that the conduct in question was caused by, or had a direct and substantial relationship to, ██████'s disability.

27. Petitioner failed to prove that the conduct in question was the direct result of the School District's failure to implement the IEP.

28. Petitioner failed to prove that the IEP cannot be implemented in the proposed alternative placement. Considering ██████ unique problems with females and ██████ need for a structural behavioral reward system, the Alternative School is an appropriate placement for ██████

CONCLUSIONS OF LAW

29. 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. (2009).

30. 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), Fla. Stat. (2009).

31. There is no dispute that Petitioner is entitled to ESE and related services. See §§ 1003.57(1)(a) and 1003.01(3)(a), Fla. Stat. (2009).

32. Respondent proposes to transfer Petitioner from the Middle School to the Alternative School as discipline for [REDACTED] misconduct. There is no dispute that the change of placement is intended to last for at least two nine-week periods and is, therefore, subject to the requirements of Section 34 CFR 300.530(e) and Florida Administrative Code Rule 6A-6.03312(3).

33. Federal law imposes certain requirements on states in order to qualify for federal funding. Applicable provisions of the Code of Federal Regulations are as follows:

34 CFR 300.530 Authority of school personnel.

(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 10 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; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

* * *

(e) Manifestation determination. (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine--

(i) If the conduct in question was caused

by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e) (1) (i) or (1) (ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e) (1) (ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

(f) Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must--

(1) Either--

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a

change of placement as part of the modification of the behavioral intervention plan. (Emphasis added.)

34. The federal and state regulatory scheme, has been described as "cooperative federalism." Town of Burlington v. Department of Education, 736 F.2d 773, 785 (1st Cir. 1984), aff'd 471 U.S. 359 (1985). Under the scheme, Respondent must likewise reach essentially the same conclusions as those required by federal law, pursuant to Florida Administrative Code Rule 6A-6.03312(3), which is as follows:

Discipline Procedures for Students with Disabilities.

For students with disabilities whose behavior impedes their learning or the learning of others, strategies, including positive behavioral interventions and supports to address that behavior must be considered in the development of their individual educational plans (IEPs). School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the requirements and procedures in this rule, is appropriate for a student with a disability who violates a code of student conduct.

(1) Definitions applicable to discipline of students with disabilities. For purposes of this rule, the following definitions apply:

(a) Change of placement because of disciplinary removals. For the purpose of removing a student with a disability from the student's current educational placement as specified in the student's IEP under this rule, a change of placement occurs when:

1. The removal is for more than ten (10) consecutive school days,

* * *

(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. 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 [REDACTED]

disabilities, and that [REDACTED] conduct was not caused by a failure to implement [REDACTED] IEP. Respondent established that the IEP dated December 16, 2009, if implemented at the Alternative School, would provide Petitioner with FAPE.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Miami-Dade County School Board implement the IEP dated December 16, 2009.

DONE AND ORDERED this 28th day of April, 2010, in Tallahassee, Leon County, Florida.

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ELEANOR M. HUNTER
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of April, 2010.

ENDNOTES

1. Although it is the usual practice to omit reference to gender in Exceptional Student Education Cases, references to gender are made in this case because gender has been shown to be a relevant factor and because similar references have been made in both Proposed Final Orders.

2. The record indicates that [REDACTED] and [REDACTED] parents may have moved to a different address in a different school zone. In that event, [REDACTED] would be able to attend the district school in that zone after [REDACTED] leaves the Alternative School.

3. Florida Administrative Code Rule 6A-6.03312(3)(a) does not provide for an evaluation of the appropriateness of the IEP or the adequacy of the underlying evaluation in making a manifestation determination. These findings are made solely because the issues were addressed at hearing and in both Proposed Final Orders.

4. Id.

5. Id.

6. Id.

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.