

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

vs.

Case No. 21-3530EDM

DUVAL COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

A due process hearing was held by Zoom teleconferencing on February 8 and 9, 2022, before Administrative Law Judge Jessica E. Varn, with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Beverly Oviatt Brown, Esquire
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For Respondent: Kelly Hebden Papa, Esquire
James Everett Millard, Esquire
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STATEMENT OF THE ISSUE

Whether the School Board denied the student a free and appropriate public education (FAPE) by failing to locate and evaluate the student to determine the student's eligibility under Section 504 of the Rehabilitation Act

of 1973, 29 U.S.C. § 795, *et. seq.* (Section 504), or for exceptional student education (ESE) services under 20 U.S.C. § 1400, *et. seq.* (IDEA).¹

PRELIMINARY STATEMENT

Petitioner, on behalf of the student, filed a request for a due process hearing (Complaint) on or about November 17, 2021. The gravamen of the Complaint was a challenge to the placement of the student in an alternative school based on a violation of the code of student conduct. The case was initially designated as a disciplinary matter, and set for hearing on December 16, 2021. The hearing was held as scheduled. Petitioner sought disciplinary protections afforded to students suspected as being eligible for ESE, and specifically sought an order removing the student from the alternative school and reinstating the student at the comprehensive high school. At the hearing, Petitioner withdrew the disciplinary claim at the hearing and the matter was rescheduled for a hearing on the remaining issue, whether the School Board had failed to meet its child find obligation, on February 8 and 9, 2022.

At the due process hearing, the parties presented the testimony of 16 witnesses, and both parties' proposed exhibits were stipulated into evidence. At the conclusion of the hearing, the parties agreed to file proposed final orders 21 days after the Transcript was filed, and the final order would be entered 42 days after the Transcript was filed. The Transcript was filed on

¹ At the start of the due process hearing, the undersigned asked Petitioner's counsel for clarification on the scope of the issues that would be presented at the due process hearing. Counsel stated that the sole issue for determination was whether the School Board had failed in its child find obligation. The Complaint had listed several other issues, but counsel's presentation of evidence focused on the single child find issue. In Petitioner's Proposed Final Order, Petitioner lists all the issues raised in the Complaint. This Final Order will only address the single issue raised at the due process hearing, the child find issue, and considers the remainder of the issues set forth in the Complaint and in Petitioner's Proposed Final Order, for which no evidence was presented, as dismissed with prejudice.

February 25, 2022. The parties filed timely proposed final orders which were considered in preparation of this Final Order.

Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged violations. For stylistic convenience, the undersigned will use female pronouns in this Final Order when referring to Petitioner. The female pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. Prior to the due process hearing, the parties stipulated to the following facts:

Stipulated Facts

2. The student is enrolled in one of the School Board's schools; and, at the time of filing the Complaint, the student was in the [REDACTED] grade.

3. The student was placed at [REDACTED] following the Final Order of a Hearing Officer on October [REDACTED], 2021.

4. The School Board did not conduct a manifestation meeting before the placement change.

5. The student enrolled in [REDACTED] on [REDACTED], 2021.

6. Petitioner did not use the HOPE scholarship.

7. The student has never had a 504 Plan.

8. The student has never had an individualized educational plan (IEP).

9. Prior to filing the Complaint, Petitioner did not notify or provide the School Board with the [REDACTED] report completed by [REDACTED] [REDACTED], LLC.

10. Months before the incident resulting in a placement change, the student's [REDACTED] filed a bullying and harassment report with [REDACTED] School A.

11. Prior to the filing of the Complaint, the School Board had not performed a [REDACTED] evaluation of the student.

12. The student did not receive multi-tiered system of supports (MTSS) for behavior while in [REDACTED] or [REDACTED] school prior to the filing of the Complaint.

Background History

13. The student has a [REDACTED] and a [REDACTED] who are eligible for ESE and have IEPs. By all accounts, the student's [REDACTED] is described as involved and attentive to [REDACTED] children's needs, as well as comfortable communicating with school staff.

14. At the conclusion of [REDACTED] grade, the student's report card reflected a student performing at grade level in all subjects and behaving appropriately at school.

15. During the fall semester of [REDACTED] grade, the student earned average to above average grades in all subjects, and had no documented behavior issues.

16. In the spring semester of [REDACTED] grade, the student was disciplined for running in the hallway and bumping into another student, teasing and ridiculing another student in the hallway, and for being disrespectful to a cafeteria worker. At the end of the school year, she was involved in a fight with her peers in a classroom, which resulted in a [REDACTED].

17. In the fall semester of [REDACTED] grade, the student passed all her classes with average to above average grades, but she was tangled up in disputes with her peers, which originated on social media platforms. In October of [REDACTED], she was [REDACTED] for [REDACTED] due to a fight that took place at school.

18. At no point did any parent or teacher mention that the student might have a disability. The parent, who had [REDACTED] children with IEPs, never mentioned to anyone that the student might have a disability.²

² To the extent that the [REDACTED] testimony conflicts with the school staff's testimony, the undersigned finds the school staff's testimony more persuasive and consistent with the record as a whole.

Facts within relevant time period

19. The events that took place within the scope of this Complaint begin in November [REDACTED], [REDACTED] years prior to the filing of the Complaint.

20. In December of [REDACTED], when the fall semester of [REDACTED] grade was winding down, the student was disciplined for using obscene and abusive language in the classroom, and ignoring a teacher's directive.

21. From January [REDACTED] to March [REDACTED], the student was not referred for any discipline, and she was passing all her classes.

22. The global COVID-19 pandemic shut down brick and mortar schooling for the remainder of the spring semester. The student, now attending school virtually, passed all her [REDACTED]-grade classes with average grades.

23. From the start of [REDACTED] grade in the fall of [REDACTED] to mid-April [REDACTED], the student earned passing grades in her classes, and was not referred for discipline. During a large portion of the student's [REDACTED]-grade year, the student's [REDACTED] was extremely ill with COVID-19, was hospitalized for three months, and was in danger of losing [REDACTED] life. [REDACTED] children had to continue virtual schooling after the schools opened for in-person instruction due to the [REDACTED] delicate health.

24. On April [REDACTED], the student was virtually evaluated by a [REDACTED] [REDACTED], after being referred by the Florida Department of Education's Vocational Rehabilitation Services program. The student told the [REDACTED] that she had a learning disability, and the student's [REDACTED] reported that the student had once had an IEP in [REDACTED] school, but it had not been transferred when the student moved to a different school. The [REDACTED] found the student to have an average level of intelligence, and that her reading and math skills were at the [REDACTED]-grade level. As to her personality, mental, and emotional status, she was found to be a generally well-adjusted student. The [REDACTED] recommended that several accommodations be implemented in school. The [REDACTED] never provided this

██████████ to the school staff; in fact, the School Board received this report after the Complaint was filed in this case.

25. On April ██████████, the student was disciplined for ██████████ ██████████ in a school hallway. Later that ██████████, the student exchanged offensive language with a cafeteria worker.

26. At the end of ██████████ grade, in May of ██████████, the student and her ██████████ ██████████ were involved in a fight at school. The student was suspended from school for ██████████, and, at the suggestion of the school staff, the student completed the remainder of her schoolwork for the final weeks of ██████████ school at home, passing all of her classes with A's, B's, and C's. The school staff opted to manage the discipline in this manner, to avoid placing the student in an ██████████ for the remaining days of ██████████ school and the start of ██████████ school.

27. Despite all of these challenges, which resulted in excessive absenteeism, and the social media pressures, the student completed all her ██████████ school coursework with above average to average grades.

28. During all of ██████████ school, no parent, teacher, or administrator suspected that the student had a disability; and, if they did, no one ever mentioned it in meetings or in written communication.³

29. The student began ██████████ school in August of ██████████ at ██████████ School A.

30. Within the first two weeks of ██████████ school, according to the ██████████, the ██████████ reported that they were being bullied. The conflict between the students resulted in a fight that broke out at dismissal, at the bus loading loop. Several adults were involved in calming the situation, and once the parents were contacted, the student's ██████████ was given paperwork regarding

³ To the extent that the ██████████ testimony conflicts with the testimony provided by the school staff, the undersigned finds the school staff's testimony more persuasive and consistent with the record as a whole.

the HOPE Scholarship, which is a state scholarship offered to students for various reasons, including those students who report themselves as victims of bullying.

31. In early October [REDACTED], the student posted on [REDACTED] that she was going to fight some [REDACTED] at school. Unfortunately, the student kept that promise in a high-stakes moment—the morning of [REDACTED] and [REDACTED] [REDACTED]—the nature of the altercation caused a lengthy delay of the start of [REDACTED] and called upon several adults to manage the situation. Due to the severity of the disruption at school, the student was referred to [REDACTED] [REDACTED] for [REDACTED] days.

32. The matter was referred to a hearing officer, who on October [REDACTED], reviewed the investigation documented by the school staff. Finding that the documentation supported the referral to [REDACTED], the hearing officer indicated that the referral was for [REDACTED] days and that the student's [REDACTED] had chosen not to enroll the student at [REDACTED].

33. The next day, the student's [REDACTED] wrote a lengthy email to the school staff and administrators, expressing [REDACTED] disappointment with how the discipline matter had been handled. [REDACTED] wrote:

Greetings,

I'm writing to express some serious concerns regarding the actions or lack of actions from the administration and staff at [REDACTED] School A] as it relates to my [children] [sic] [**] & [**].

There have been some significant events that have not received the proper attention as stated by [the] student code of conduct and policies and procedures outlined. When my [children] had the first altercation with the other [children] involved, I asked for a meeting with the parents, my [children] informed personal [sic] of the events that were taken place and asked for adult support and intervention in the matter. Several phone calls were made and conversations took place however at

no point did administration attempt to properly remedy the situation by addressing all parties together or individual. My [children] were simply given a suspension with no further explanation.

We continued to request a meeting and after an incident in which several students were given a 5-day suspension due to a teacher shortage issue that resulted in students being unsupervised. Then when students were directed by a substitute teacher to enter and wait in her room to prevent further chaos students were punished. My [child] was given a 5-day suspension. When I arrived to pick [her] up there was conflicting stories and the principal was unavailable. [REDACTED] was Tol [sic] that [she] had a three-day suspension for running [her] mouth and [**] received 5 days. On Thursday Sept [REDACTED] several phone calls were made we finally spoke with [REDACTED] and [REDACTED] stated that [**] days were pending parent teacher conference. I contacted the regional office and spoke with [REDACTED].

At the meeting we repeated our concerns as it related to the continued threats from the other [children] and informed [REDACTED] and the [REDACTED] that the original matter is unresolved and need their attention. It was evident that there was a lack of communication with the five-day suspension. [REDACTED] was not aware that any meeting with parents had been requested and we reiterated our concerns to have such meeting. A second altercation between my [children] and the same [children] takes place and I was told yet again that other parents were uncooperative and not reachable, another suspension was issued and again we were met with contention yet again and no resolve. [REDACTED] called and explain what transpired we were informed that that [sic] the [children] handled themselves accordingly. [REDACTED] called and contradicted [REDACTED] and issued a suspension. I requested a meeting again to get to the bottom of this matter. I was met

with contention and conflicting review of facts and evidence.

Prior to my [children's] date to return we attempted to inform admin that threats had been made against my [children] yet again. Upon [my children]'s arrival at school they were informed that they would be jumped by the [other children]. It is my understanding that admin along with the security guard knew of the threats. However, it appears that no precautions were made. My [children] were jumped and injured. [REDACTED] sustained a black eye, kidney damage and head trauma. We informed admin that we were concerned something like this would happen and due to [REDACTED] health condition we were concerned for [REDACTED] safety. Yet you all did nothing but suspend and turned your head to all warnings.

Yes, this is a lot of information that she [sic] be discussed before school officials, regional officials, school board personnel and conduct hearing officers. However, since my [children] have not received proper due process and the hearing officer called me to inform me of his decision alone I saw fit to pin a letter. The policy states the following:

1. That a disciplinary conference should take place between the parent and principal regarding the matter.
2. If the principal has selected to turn everything over to the School Board Hearing Officer ~it shall be done in writing.
3. Parent and child shall be given prior notice of meeting and allowed to speak and provide evidence on their behalf.

This situation is by far not a cookie cutter situation. I've had the opportunity to speak with other parents on the day of the last event; all of which has [sic] stated that they have also requested a meeting. I have some major concerns:

- * The hearing officer informed me that he has final say and there is no such thing as an appeal.
- * The lack of effective communication between administrators.
- * Student safety.
- * Ineffective security measures.
- * The inability to establish protocol when informed of student ps [sic] intention to harm others.
- * Teachers inappropriate language towards students.

I would like to request a formal meeting with all parties.

34. Nowhere in this email does the [REDACTED] express any concern that [REDACTED] daughter had a suspected disability, and nowhere in this email does [REDACTED] request an evaluation. This is particularly telling in light of the fact that the [REDACTED] is a concerned, involved parent with [REDACTED] children who have IEPs.

35. Every staff member who interacted with the student persuasively testified that they never suspected that the student had a disability like [REDACTED] siblings. The student's grades in the first quarter of [REDACTED] school were all A's, B's, and C's.

36. The documentary evidence corroborates the staff's testimony, as it demonstrates the student's academic progress, even in the face of extremely challenging family circumstances and distracting social media pressures.

37. Petitioner presented no credible or persuasive evidence establishing that the student had a disability, or that the School Board, prior to the filing of the Complaint, had any reason to suspect that the student had a disability.⁴

CONCLUSIONS OF LAW

⁴ The [REDACTED] evaluation, conducted in April of [REDACTED], and not provided to the School Board until after the Complaint was filed, should be considered by the School Board. At the due process hearing, the School Board stated that the student is going to be evaluated for eligibility for a 504 Plan and for ESE services pursuant to the IDEA.

38. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. *See* §§ 120.65(6) and 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

39. Petitioner bears the burden of proof with respect to each of the issues raised herein. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

40. In enacting the IDEA, Congress sought to “ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A); *Phillip C. v. Jefferson Cnty. Bd. of Educ.*, 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to students with disabilities and to combat the exclusion of such students from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on each agency’s compliance with the IDEA’s procedural and substantive requirements. *Doe v. Ala. State Dep’t of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

41. Parents and students with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child's records and participate in meetings concerning their child's education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint “with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of a free appropriate public education to such child.” 20 U.S.C. § 1415(b)(1), (b)(3), and (b)(6).

42. Similarly, Section 504 forbids organizations that receive federal funding, including public schools, from discriminating against people with

disabilities. 29 U.S.C. § 794(b)(2)(B). In relevant part, Section 504 provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” receiving Federal financial assistance. 29 U.S.C. § 794(a); *see also* 34 C.F.R. § 104.4. An organization that receives federal funds violates Section 504 if it denies a qualified individual with a disability a reasonable accommodation that is necessary for the disabled individual to enjoy meaningful access to the benefits of public services. *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097 (9th Cir. 2010); *AP v. Anoka-Hennepin Indep. Sch. Dist. No 11*, 538 F. Supp. 2d 1125, 1141 (D. Minn. 2008)(holding that school districts are required to make “reasonable and necessary” accommodations for *disabled* students).

43. Turning first to eligibility under the IDEA, it confers the right to a FAPE only upon students with disabilities. One of the most essential purposes, if not the most essential purpose, of the IDEA is "to ensure that all *children with disabilities* have available to them a free appropriate public education," 20 U.S.C. § 1400(d)(1)(A) (emphasis added), meaning "special education and related services," *id.* at § 1401(9). Conversely, if a student is not a "child with a disability," then the student is not entitled to a FAPE under the IDEA.

44. In *Durbrow v. Cobb County School District*, 887 F.3d 1182, 1184 (11th Cir. 2018), the Eleventh Circuit held that to trigger a Child Find obligation and potential determination of eligibility, a student with a disability must show: (1) that the disability adversely affects the student’s academic performance; and (2) "by reason thereof," the student needs special education. 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(c)(9); *see also Alvin Indep. Sch. Dist. v. Patricia F.*, 503 F.3d 378, 383-84 (5th Cir. 2007).

45. In making this determination, the *Durbrow* Court explained that a school district must draw upon information from a variety of sources,

including aptitude and achievement tests, parent input, and teacher recommendations, pursuant to 34 C.F.R. § 300.306(c). A student is, therefore, unlikely to need special education if: (1) the student meets academic standards; (2) teachers do not recommend special education for the student; (3) the student does not exhibit unusual or alarming conduct warranting special education; and (4) the student demonstrates the capacity to comprehend course material. *Id.*; *see also Alvin Indep.*, 503 F.3d at 383; *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 313-14 (6th Cir. 2007); *McMullen Cnty. Indep. Sch. Dist.*, 49 IDELR 118 (Tex. SEA 2007) (“The IDEA requires a two-prong analysis for determining whether a child should be identified and referred for special education services. First, the student must have a specific physical or mental impairment identified through an appropriate evaluation. Identifying an impairment does not alone satisfy the eligibility test under Part B of the IDEA. Second, the district must have reason to suspect the student is in need of special education services. This is usually determined by the student’s inability to progress in a regular education program.”); *see also Fla. Admin. Code R. 6A-6.0331(2)* (requiring school districts to attempt to address any areas of concern in the general education environment before evaluating the student for a disability).

46. Similarly, Section 504 provides, in pertinent part, “[n]o otherwise qualified individual with a disability in the United States ... shall, *solely by reason of her or his disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a) (emphasis added). The elements of a claim under Section 504 are, therefore: “(1) that [the student] *is a ‘handicapped individual’* under the Act, (2) that [she] is ‘otherwise qualified’ for the [benefit] sought, (3) that [she] was [discriminated against] solely by reason of [her] handicap, and (4) that the program or activity in question receives federal financial assistance.” (emphasis added) *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161, 1165-66 (M.D. Fla.

2005), quoting *Grzan v. Charter Hosp. of Nw. Ind.*, 104 F.3d 116, 119 (7th Cir.1997).

47. The Section 504 regulations expressly require evaluation for students who, by reason of an impairment that substantially limits a major life activity, need, or are believed to need, special education or related services. 34 C.F.R. § 104.35. In establishing a Section 504 claim, Petitioner must demonstrate that the School Board knew or should have known about the student's disability. *See, e.g., J.P.M. v. Palm Beach Cnty. Sch. Bd.*, 916 F. Supp. 2d 1314, 1320 (S.D. Fla. 2013); *D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 496 (D.N.J. 2008).

48. In this case, Petitioner failed to present persuasive evidence establishing that the student has a disability, or that at any point before the Complaint was filed, the School Board knew or should have known that the student had a disability. The threshold qualification of having a disability was not established by persuasive record evidence; therefore, the School Board did not fail in its IDEA or Section 504 child find obligations.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Complaint is DISMISSED in its entirety.

DONE AND ORDERED this 7th day of April, 2022, in Tallahassee, Leon County, Florida.

A large, bold, black stylized letter 'S' that serves as a signature or initial for the judge.

JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of April, 2022.

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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)(c), Florida Statutes (2014), 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).