

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SCHOOL BOARD OF DADE COUNTY,        )  
  )  
                  Petitioner,            )  
  )  
vs.                                        )     CASE NO. 93-2598  
  )  
MIGUEL AGUERO LOPEZ,                )  
  )  
                  Respondent.           )  
\_\_\_\_\_                                  )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on July 13, 1993, in Miami, Florida, before Stuart M. Lerner, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: James C. Bovell, Esquire  
3211 Ponce de Leon Boulevard  
Miami, Florida 33134

For Respondent: Rosa Lopez  
11336 Northwest Second Avenue  
Miami, Florida 33172

STATEMENT OF THE ISSUE

The ultimate issue in the instant case is whether Respondent should be reassigned from the Dade County School Board's Students at Risk Program at Riviera Middle School to its disciplinary program at J.R.E. Lee Opportunity School.

PRELIMINARY STATEMENT

By letter dated March 23, 1993, the Dade County School Board (hereinafter referred to as the "School Board") notified Respondent's mother, Rosa Lopez, that a decision had been made to reassign Respondent from Riviera Middle School to the School Board's disciplinary program at J.R.E. Lee Opportunity School because of Respondent's "disruptive behavior and failure to adjust to the regular school program." The letter further advised Lopez that she had a right to request an administrative hearing regarding this reassignment. Lopez requested a hearing, and on May 10, 1993, the matter was referred to the Division of Administrative Hearings for the assignment of a hearing officer to conduct the hearing Lopez had requested.

At the final hearing held in this matter, the School Board presented the testimony of four witnesses: Charles Kavalier, an Assistant Principal at Riviera Middle School; George Davis, Jr., Respondent's civics teacher at Riviera Middle School; Julio Forte, the director of the Students at Risk

Program at Riviera Middle School and Respondent's math teacher at the school; and Thomas Wild, Respondent's physical education teacher at Riviera Middle School. Only one witness, Respondent's mother, testified on his behalf. In addition to the testimony of these witnesses, a total of 16 exhibits (Petitioner's Exhibits 1 through 11 and Respondent's Exhibits 1 through 4 and 6 ) were received into evidence.

At the conclusion of the evidentiary portion of the hearing on July 13, 1993, the Hearing Officer, on the record, advised that the parties had the right to file post-hearing submittals and established a deadline, August 3, 1993, for the filing of such submittals. On August 3, 1993, the School Board timely filed a proposed recommended order. The School's Board's proposed recommended order contains what are labelled as proposed "findings of fact." These proposed "findings of fact" have been carefully considered and are specifically addressed in the Appendix to this Recommended Order.

On the same day that the School Board filed its proposed recommended order, Respondent, by and through his mother, filed a motion requesting that the evidentiary record in the instant case be reopened for purposes of receiving into evidence a written psychological report and evaluation of Respondent. A copy of the report was appended to the motion. By order issued August 4, 1993, the Hearing Officer directed the School Board to file a response to the motion no later than August 19, 1993. The School Board has not yet responded to the motion. Inasmuch as the written psychological report and evaluation that Respondent seeks to add to the evidentiary record in the instant case would have no impact on the outcome of the case if it were received into evidence, Respondent's motion to reopen the evidentiary record for purposes of admitting this report is hereby DENIED. See *Cluett v. Department of Professional Regulation*, 530 So.2d 351 (Fla. 1st DCA 1988). To date, Respondent has not filed any post-hearing submittal other than the motion to reopen the evidentiary record in this case.

#### FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. Respondent is 14 years old.
2. He was born in Cuba.
3. Since his arrival in the United States he has lived in Dade County and attended public school.
4. From the middle of December of 1992, until the reassignment that is the subject of the instant controversy, Respondent was a seventh grade student at Riviera Middle School (hereinafter referred to as "Riviera"), a public school operated by the School Board.
5. Prior to enrolling as a student at Riviera, Respondent attended another School Board-operated middle school.
6. His academic performance at this other school was woeful.
7. During the 1991-92 school year, he received a failing grade in every one of his seventh grade classes, except one, his chorus class, in which he received a D.

8. He thus had to repeat the seventh grade the following school year.
9. Respondent's academic performance failed to improve during the first part of the 1992-93 school year.
10. Riviera has a special program for students who are deemed to be at risk of dropping out of school. The program is called the Students at Risk Program or "SARP." The 85 to 100 students in "SARP" are given more individualized instruction and attention in a smaller class setting than are students at the school who are not in the program.
11. Upon enrolling at Riviera, Respondent was assigned to "SARP."
12. Despite the efforts of the administration at Riviera and his "SARP" teachers, Respondent's poor academic performance continued.
13. Respondent was absent from school a considerable amount of time.
14. When he did attend class, he often came unprepared, did little or no work and slept during the lesson.
15. When he was awake, he frequently disrupted the class by doing such things as tapping on his desk or talking to his classmates.
16. On one occasion, Respondent caused a commotion in class by drawing on his shirt.
17. On another occasion, during a math lesson, he used white out to write on the floor near his desk.
18. Still another time, when students in his math class were being tutored, Respondent pounded on the classroom door and continued to do so despite being told to stop by the teacher tutoring the students.
19. In his physical education class, Respondent bullied smaller students. There was at least one instance where such bullying led to a fistfight during class between Respondent and another student, who was bloodied during the altercation.
20. Respondent's disruptive classroom behavior interfered with his teachers' ability to provide instruction to Respondent and to the other students in the class.
21. Valuable classroom time was wasted in attempting to deal with Respondent's misconduct.
22. Respondent's disruptive conduct was the subject of various written referrals his teachers sent to the school administration.
23. The discipline that Respondent received in response to these referrals included in-school suspension. Respondent, however, refused to meet the requirements of the in-school suspension program and therefore was sent home on outdoor suspension. This occurred on two separate occasions.

24. Respondent's teachers counseled Respondent numerous times. They also met with his mother, who indicated that she would do whatever she could to help modify Respondent's behavior in school.

25. The measures taken, however, were to no avail.

26. Respondent's disruptive classroom conduct persisted.

27. The resources available at Riviera to help modify Respondent's behavior having been exhausted, a decision was made to reassign Respondent to the School Board's disciplinary program at J.R.E. Lee Opportunity School (hereinafter referred to as "Lee").

28. Lee is better equipped than Riviera to deal with problem students such as Respondent. It has on staff more teachers and counselors per student than does even Riviera's "SARP."

29. Furthermore, unlike Riviera, it has a full-time psychologist on staff.

30. Respondent attended Lee for only approximately 12 or 13 days.

31. His mother refused to allow him to return to the school because she was concerned about his safety. She had information that led her to believe that, in the short time that he had been at the school, he had been assaulted on three separate occasions.

#### CONCLUSIONS OF LAW

32. "Disciplinary programs are programs that are longer than ten (10) days in duration and are designed to serve students who are disruptive in the traditional school environment." Rule 6A-6.0527(1), Fla. Admin. Code; Section 230.2316(3)(e), Fla. Stat.

33. A Florida public school student may be assigned to such a disciplinary program in lieu of assignment to a traditional or regular school program under any of the following circumstances: the "[s]tudent has a history of disruptive behavior which interferes with his own or others' educational program(s) or results in frequent conflicts of a disruptive nature in or out of the classroom while the student is under the jurisdiction of the school;" the "[s]tudent severely threatens the general welfare of others;" the "[s]tudent requires assistance in behavior modification beyond that which can be provided in the traditional class;" and the "[s]tudent has committed an offense which would warrant suspension or expulsion." Rule 6A-6.0527(2), Fla. Admin. Code; Section 230.2316(4)(d)1., Fla. Stat.

34. "Prior to assigning the student to a disciplinary program, the [school] district [must] attempt a continuum of education and student services unless the student has committed an offense which would warrant expulsion." Rule 6A-6.0527(4), Fla. Admin. Code; Section 230.2316(4)(d)5., Fla. Stat.

35. In the instant case, the evidence demonstrates that, during the time that he was enrolled as a student at Riviera, Respondent had a history of disruptive behavior that interfered with his own learning as well as that of his classmates.

36. The evidence further establishes that the administration and teachers at Riviera, despite using all of the resources at their disposal at the school, were unsuccessful in their efforts to help modify Respondent's behavior.

37. A sufficient showing therefore has been made that, at the time of his reassignment to Lee, Respondent was eligible for placement in a "disciplinary program," as that term is defined in Section 230.2316(3)(e), Florida Statutes, and Rule 6A-6.0527(1), Florida Administrative Code, and that all statutory and rule prerequisites for his placement in such a program had been met.

38. Accordingly, his reassignment to the disciplinary program at Lee should be upheld.

#### RECOMMENDATION

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

RECOMMENDED that the Dade County School Board enter a final order approving and upholding Miguel Aguero Lopez's reassignment to the disciplinary program at J.R.E. Lee Opportunity School.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 23rd day of August, 1993.

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STUART M. LERNER  
Hearing Officer  
Division of Administrative Hearings  
The Oakland Building  
2009 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of August, 1993.

#### ENDNOTES

1/ Respondent's Exhibit 5 was offered into evidence, but rejected by the Hearing Officer.

2/ The issue in the instant case is whether Respondent should be reassigned to the disciplinary program at J.R.E. Lee Opportunity School, not whether he is entitled to receive exceptional student education services.

3/ These efforts included giving Respondent the opportunity to receive individual tutoring before and after school. Respondent, however, never took advantage of the opportunity.

4/ Respondent was absent 83 of the 180 school days in the 1992-93 school year. Of these 83 absences, 34 were unexcused.

5/ Respondent may also be entitled to exceptional student education services, however, the issue of his entitlement to these services is beyond the scope of this proceeding. Respondent's mother has exercised her right under Rule 6A-6.0527(8), Florida Administrative Code, to "request an evaluation to determine [Respondent's] eligibility" for such services. If an adverse determination on the matter is made, she will have the further right to a separate, due process hearing pursuant to Rule 6A-6.03311, Florida Administrative Code, at which she will have the opportunity to litigate the issue of her son's entitlement to these services. Pending resolution of this issue, however, "unless [the School Board and Respondent's mother] agree otherwise, [Respondent] must remain in [his] present educational assignment" at Lee. Rule 6A-6.03311(5)(1), Fla. Admin. Code. The School Board should make every reasonable effort to ensure Respondent's physical safety and well-being while he is attending classes at Lee.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 93-2598

The following are the Hearing Officer's specific rulings on the "findings of fact" proposed by the School Board in its post-hearing submittal:

1-2. Accepted as true and incorporated in substance, although not necessarily repeated verbatim, in this Recommended Order.

3. Fourth sentence: Rejected because it is more in the nature of a summary of testimony than a finding of fact based upon such testimony; Remaining sentences: Accepted as true and incorporated in substance.

4-7. Accepted as true and incorporated in substance.

8. First sentence: Rejected because it is more in the nature of a summary of testimony than a finding of fact based upon such testimony; Second sentence: Accepted as true and incorporated in substance.

9. Last sentence: Rejected because it is more in the nature of a summary of testimony than a finding of fact based upon such testimony; Remaining sentences: Accepted as true and incorporated in substance.

10. First sentence: Rejected because it is more in the nature of a summary of testimony than a finding of fact based upon such testimony; Second sentence: Not incorporated in this Recommended Order because, even if true and taken into consideration, it would not alter the outcome of the instant case.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period of time within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.