

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DIANE ANDREW,

Petitioner,

vs.

Case No. 15-7041

SARASOTA COUNTY SCHOOL BOARD,

Respondent,

and

THE DEPARTMENT OF EDUCATION,

Intervenor.

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Sarasota and Tallahassee, Florida, on February 16, 2016, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Intervenor: David L. Jordan, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner, who is employed as an occupational therapist by a local school board, is considered a "teacher" eligible for the 2015 State of Florida Best and Brightest Scholarship Program.

PRELIMINARY STATEMENT

The 2015 session of the Florida Legislature adopted proviso language in the appropriations bill which created the "Florida Best and Brightest Scholarship Program (Scholarship)." See ch. 2015-232, § 2, item 99A, at 27, Laws of Fla. The sum of \$44,022,483 was appropriated to provide a financial award of \$10,000 to teachers who qualified for the Scholarship.

Petitioner, Diane Andrew, applied to her employer, the School Board of Sarasota County (Respondent), for an award under the Scholarship program. By email dated November 11, 2015, Respondent's representative notified Petitioner that it had been determined she was not eligible for the Scholarship.

Petitioner timely requested an administrative hearing to contest the denial of the Scholarship. On December 14, 2015, the

case was forwarded to the Division of Administrative Hearings (DOAH) for a disputed-fact hearing.

At the hearing, Petitioner testified on her own behalf. Respondent presented the testimony of Sonia Figaredo-Alberts, its executive director of pupil support services, and Al Harayda, its employee relations and equity administrator. Intervenor, Department of Education, presented the testimony of Brian Dassler, Department of Education's deputy chancellor of educator quality. Joint Exhibits A through Q were admitted into evidence.

A Transcript of the proceeding was filed with DOAH on March 8, 2016. By Order dated March 10, 2016, the undersigned granted Petitioner's Unopposed Motion for Extension of Time to File Proposed Recommended Orders. Each party filed a Proposed Recommended Order and the same were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The 2015 Florida Legislature Appropriations Act created the Best and Brightest Teacher Scholarship Program, chapter 2015-232, p. 27, Item 99A. The eligibility pre-requisites for applying to and being awarded the Scholarship (up to \$10,000) were established in the Scholarship.

2. The Scholarship provides as follows:

Funds in Specific Appropriation 99A are provided to implement Florida's Best and Brightest Teacher Scholarship Program. The

funds shall be used to award a maximum of 4,402 teachers with a \$10,000 scholarship based on high academic achievement on the SAT or ACT. To be eligible for a scholarship, a teacher must have scored at or above the 80th percentile on either the SAT or the ACT based upon the percentile ranks in effect when the teacher took the assessment and have been evaluated as highly effective pursuant to section 1012.34, Florida Statutes, or if the teacher is a first-year teacher who has not been evaluated pursuant to section 1012.34, Florida Statutes, must have scored at or above the 80th percentile on either the SAT or the ACT based upon the percentile ranks in effect when the teacher took the assessment. In order to demonstrate eligibility for an award, an eligible teacher must submit to the school district, no later than October 1, 2015, an official record of his or her SAT or ACT score demonstrating that the teacher scored at or above the 80th percentile based upon the percentile ranks in effect when the teacher took the assessment. By December 1, 2015, each school district, charter school governing board, and the Florida School for the Deaf and the Blind shall submit to the department the number of eligible teachers who qualify for the scholarship. By February 1, 2016, the department shall disburse scholarship funds to each school district for each eligible teacher to receive a scholarship. By April 1, 2016, each school district, charter school governing board, and the Florida School for the Deaf and the Blind shall provide payment of the scholarship to each eligible teacher. If the number of eligible teachers exceeds the total the department shall prorate the per teacher scholarship amount.

3. The Scholarship does not define the word "teacher."

Petitioner, who timely filed an application for the Scholarship, contends that she is a "teacher" and is therefore eligible for

the award. Respondent and Intervenor contend that Petitioner is an occupational therapist, and, as such, she is not considered a "classroom teacher," which is the target group that the Legislature intended for the teacher scholarship program to cover. Petitioner contends that even if the Scholarship is limited to "classroom teachers," she meets the statutory definition of a "classroom teacher" and is therefore eligible to receive the Scholarship.

4. It is undisputed that the 2015 Scholarship language is vague as to whether the Scholarship is limited to classroom teachers. In 2016, the Legislature made it clear that the award is intended to only cover "classroom teachers." Legislation enacted in subsequent legislative sessions may be examined to ascertain legislative intent. See Crews v. Fla. Pub. Emp'rs Council 79, AFSCME, 113 So. 3d 1063, 1073 (Fla. 1st DCA 2013) (citing Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 1216, 1230 (Fla. 2006)). Recently, the Governor signed chapter 2016-62, Laws of Florida. Section 25 of chapter 2016-62 enacts section 1012.731, Florida Statutes, the Florida Best and Brightest Teacher Scholarship Program.^{1/} Section 1012.731(2) provides that the "scholarship program shall provide categorical funding for scholarships to be awarded to classroom teachers, as defined in s. 1012.01(2)(a), who have demonstrated a high level of academic success." The Legislature's amendment of

the language, just a year after the first appropriation, confirms that the Legislature intended the award to go to "classroom teachers," as defined in chapter 1012.

5. Petitioner was hired by Respondent as an occupational therapist. She has worked as an occupational therapist for Respondent for approximately 17 years. Petitioner does not hold a Florida teaching certificate and her position as an occupational therapist does not require a Florida teaching certificate. Instead, Petitioner is licensed by the Florida Department of Health, which has jurisdiction over ethical violations committed by occupational therapists licensed in Florida.

6. In her position as an occupational therapist, Petitioner reports to Respondent's director of Pupil Support Services, who supervises all therapists within Sarasota County Public Schools.

7. Petitioner's stated job goal is "[t]o facilitate the handicapped student's independent functioning in the school setting." Petitioner's performance responsibilities, as set forth in her job description, are to:

- 1) Conduct appropriate evaluation of students referred for possible exceptional student education needs and prepare reports of the evaluation and findings.
- 2) Plan intervention and service delivery programs to meet student's individual needs.

3) Implement and direct interventions essential to meeting targeted students' needs.

4) Provide information and consultative services to appropriate personnel in support of students with disabilities.

* * *

6) Establish schedules for meeting with students, conferencing with parents and assisting in rehabilitation techniques.

7) Provide resources to all stakeholders involved in the evaluation, identification of student needs and rehabilitation of students.

8. Petitioner delivers therapeutic services individually or in a small group setting, in a room assigned to her, or in a classroom, usually at the same time a teacher is delivering instruction to the entire class.

9. Petitioner completes "lesson plans," which are referred to in the therapy setting as "plans of care." Plans of care differ in substance from lesson plans prepared by teachers because lesson plans set out a teaching plan for the entire class, whereas plans of care set out therapeutic goals and activities directed to one student that complies with the goals set forth in a student's Individualized Education Plan (IEP).

10. As an occupational therapist, Petitioner is responsible for maintaining a "class roster," which is referred to in the therapy setting as a "caseload." Occupational therapists

maintain a caseload for student accountability purposes and for Medicaid billing purposes.

11. Petitioner's therapy sessions are assigned a "700" course code, which correlates in the Florida Department of Education's course directory to "related services."

12. Joint Exhibit O is an example of courses offered to students by Respondent. The course list includes math, language arts, physical education, science, social studies, art, Chinese, music, and occupational therapy. Petitioner is listed as the "teacher" for the occupational therapy course. Unlike the other listed "teachers," Petitioner is not instructing students in a subject area; she is delivering a service. See § 468.203(4)(b), Fla. Stat. (2015). Succinctly stated, the difference, in this context, between "occupational therapy" and the other listed "courses," is that occupational therapy is not a subject area that a student learns about; it is a service that a student receives to help them to achieve independent functioning. Although listed as "course" by Respondent, occupational therapy, as compared to the other listed "courses," is not a "course" within the meaning of section 1012.01(2)(a).

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015).^{2/}

14. Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the award. Dep't of Transp. v. J. W. C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat. A preponderance of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

15. Section 468.203, Florida Statutes, provides, in part, as follows:

(3) "Occupational therapist" means a person licensed to practice occupational therapy as defined in this act and whose license is in good standing.

(4) "Occupational therapy" means the use of purposeful activity or interventions to achieve functional outcomes.

(a) For the purposes of this subsection:

1. "Achieving functional outcomes" means to maximize the independence and the maintenance of health of any individual who is limited by a physical injury or illness, a cognitive impairment, a psychosocial dysfunction, a mental illness, a developmental or a learning disability, or an adverse environmental condition.

2. "Assessment" means the use of skilled observation or the administration and interpretation of standardized or nonstandardized tests and measurements to identify areas for occupational therapy services.

(b) Occupational therapy services include, but are not limited to:

1. The assessment, treatment, and education of or consultation with the individual, family, or other persons.
2. Interventions directed toward developing daily living skills, work readiness or work performance, play skills or leisure capacities, or enhancing educational performance skills.
3. Providing for the development of: sensory-motor, perceptual, or neuromuscular functioning; range of motion; or emotional, motivational, cognitive, or psychosocial components of performance.

These services may require assessment of the need for use of interventions such as the design, development, adaptation, application, or training in the use of assistive technology devices; the design, fabrication, or application of rehabilitative technology such as selected orthotic devices; training in the use of assistive technology; orthotic or prosthetic devices; the application of physical agent modalities as an adjunct to or in preparation for purposeful activity; the use of ergonomic principles; the adaptation of environments and processes to enhance functional performance; or the promotion of health and wellness.

16. Section 1002.66, Florida Statutes, which is part of the K-20 Education Code, is titled "Specialized instructional services for children with disabilities." Subsection (2) of section 1002.66 provides as follows:

- (2) The parent of a child who is eligible for the prekindergarten program for children with disabilities may select one or more specialized instructional services that are

consistent with the child's individual educational plan. These specialized instructional services may include, but are not limited to:

(a) Applied behavior analysis as defined in ss. 627.6686 and 641.31098.

(b) Speech-language pathology as defined in s. 468.1125.

(c) Occupational therapy as defined in s. 468.203.

(d) Physical therapy as defined in s. 486.021.

(e) Listening and spoken language specialists and an appropriate acoustical environment for a child who is deaf or hard of hearing who has received an implant or assistive hearing device.

17. Section 1002.66 makes it clear that occupational therapy provided in the K-20 setting falls within the category of "specialized instructional services." Consequently, occupational therapists providing occupational therapy in the K-20 setting are instructional personnel who are providing specialty services. Such individuals are, without question, "specialists" with respect to the job duties that they perform.

18. Section 1003.01(3)(b), Florida Statutes, defines services provided by occupational therapists as "related services." Florida Administrative Code Rule 6A-6.03411(1)(dd)3.f. provides that occupational therapy services are related services "that include improving, developing or

restoring functions impaired or lost through illness, injury, or deprivation; improving ability to perform tasks for independent functioning if functions are impaired or lost; and preventing, through early intervention, initial or further impairment or loss of function."

19. Section 1012.01(2), of the K-20 Education Code, provides as follows:

(2) Instructional personnel. — "Instructional personnel" means any K-12 staff member whose function includes the provision of direct instructional services to students. Instructional personnel also includes K-12 personnel whose functions provide direct support in the learning process of students. Included in the classification of instructional personnel are the following K-12 personnel:

(a) Classroom teachers. — Classroom teachers are staff members assigned the professional activity of instructing students in courses in classroom situations, including basic instruction, exceptional student education, career education, and adult education, including substitute teachers.

(b) Student personnel services. — Student personnel services include staff members responsible for: advising students with regard to their abilities and aptitudes, educational and occupational opportunities, and personal and social adjustments; providing placement services; performing educational evaluations; and similar functions. Included in this classification are certified school counselors, social workers, career specialists, and school psychologists.

(c) Librarians/media specialists. – Librarians/media specialists are staff members responsible for providing school library media services. These employees are responsible for evaluating, selecting, organizing, and managing media and technology resources, equipment, and related systems; facilitating access to information resources beyond the school; working with teachers to make resources available in the instructional programs; assisting teachers and students in media productions; and instructing students in the location and use of information resources.

(d) Other instructional staff. – Other instructional staff are staff members who are part of the instructional staff but are not classified in one of the categories specified in paragraphs (a)-(c). Included in this classification are primary specialists, learning resource specialists, instructional trainers, adjunct educators certified pursuant to s. 1012.57, and similar positions.

(e) Education paraprofessionals. – Education paraprofessionals are individuals who are under the direct supervision of an instructional staff member, aiding the instructional process. Included in this classification are classroom paraprofessionals in regular instruction, exceptional education paraprofessionals, career education paraprofessionals, adult education paraprofessionals, library paraprofessionals, physical education and playground paraprofessionals, and other school-level paraprofessionals.

20. In looking at Petitioner's job description, her only "JOB GOAL" is to "facilitate the handicapped student's independent functioning in the school setting." In meeting her job goal, Petitioner's first stated performance responsibility is

to "conduct appropriate evaluation of students referred for possible exceptional student education needs and prepare reports of the evaluation and findings."

21. Section 1012.01(2)(b) provides that staff members designated as "student personnel services" are included, like classroom teachers, librarians and others, in the general classification of instructional personnel. Student personnel services staff members, among other things, are responsible for "performing educational evaluations." Given that a considerable portion of Petitioner's job involves the "appropriate evaluation of students for possible exception student education," it seems that the classification of "student personnel services" is a classification that could reasonably include occupational therapists.

22. Similarly, section 1012.01(2)(d) includes "other instructional staff" within the general classification of instructional personnel. Included within this classification are "primary specialists, learning resource specialists . . . and similar positions." Given that section 1002.66 provides that occupational therapists, who work in the K-20 setting, provide specialty services, it is likewise plausible that "other instructional staff" is a classification that could also include occupational therapists.

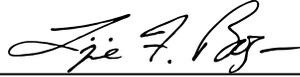
23. Section 1012.01(2)(a) includes "classroom teachers" within the general classification of Instructional personnel. Classroom teachers "are staff members assigned the professional activity of instructing students in courses in classroom situations."

24. Because Petitioner was not assigned the "professional activity of instructing students in a course," but was instead hired to deliver a service to students, she is not a "classroom teacher" as defined by section 1012.01(2)(a). Petitioner has therefore, not met her burden of proving that her position as an occupational therapist is included within the definition of "classroom teachers" and, therefore, she is ineligible for the Best and Brightest Teacher Scholarship Program.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of Sarasota County enter a final order finding Petitioner ineligible for the Best and Brightest Teacher Scholarship Program.

DONE AND ENTERED this 8th day of April, 2016, in
Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of April, 2016.

ENDNOTES

^{1/} The effective date of section 1012.731 is July 1, 2016.

^{2/} All subsequent references to Florida Statutes will be to 2015,
unless otherwise indicated.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.