

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 16-0686E

█,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, a final hearing was conducted in Fort Lauderdale, Florida, on █, before Administrative Law Judge Todd P. Resavage of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Barbara Joanne Myrick, Esquire
Office of the School Board

█, █
█, █

For Respondent: No Appearance

STATEMENT OF THE ISSUE

Whether Petitioner's █ of Respondent was appropriate.

PRELIMINARY STATEMENT

On February 9, 2016, Petitioner filed a Request for Due Process Hearing ("Complaint") that sought a determination of the

appropriateness of its [REDACTED] of Respondent.

Petitioner's Complaint was necessitated by its decision to deny the request of Respondent's parent to provide an independent education evaluation ("IEE") at public expense.

On [REDACTED], Petitioner filed a Motion for Partial Summary Judgment. The gravamen of said motion was that the instant proceedings should be limited to determining the appropriateness of a [REDACTED] that was conducted in [REDACTED]. Petitioner averred that the balance of the evaluations that Respondent disagrees with occurred considerably more than two years prior to the requested IEEs, and, therefore, run afoul of the Individuals with Disabilities Education Act's ("IDEA") two-year statute of limitations.

On [REDACTED], the undersigned issued an Order to Show Cause, in writing, on or before [REDACTED], why the two-year statute of limitations should not apply to those evaluations conducted by Petitioner allegedly more than two years prior to Respondent's instant requests for IEEs. Respondent failed to comply with the Order to Show Cause. Accordingly, the scope of the hearing was limited to the appropriateness of the [REDACTED] [REDACTED] conducted within the IDEA two-year statute of limitations.

The final hearing was conducted, as scheduled, on [REDACTED] [REDACTED]. Despite proper notice, Respondent did not appear at the

final hearing. At the final hearing, Petitioner stipulated to the undersigned issuing this final order within ten days of the filing of the transcript. The final hearing Transcript was filed on [REDACTED]. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript. Neither party filed a proposed final order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time Petitioner performed the evaluation at issue. For stylistic convenience, the undersigned will use [REDACTED] pronouns in the Final Order when referring to Respondent. The [REDACTED] pronouns are neither intended, nor should be interpreted, as a reference to Respondent's actual gender.

FINDINGS OF FACT

Background

1. Respondent is a [REDACTED]-year-old child who, at all times relevant to this proceeding, resided with [REDACTED] parent within the jurisdiction of Petitioner.

2. Respondent enrolled at [REDACTED] school in Broward County in [REDACTED]. Since that time, Respondent has been eligible to receive exceptional student education ("ESE") services in the eligibility categories of [REDACTED].

3. On [REDACTED], Respondent's parent was notified of a meeting scheduled, initially, for [REDACTED], to develop a new Individual Education Plan ("IEP") and develop a reevaluation plan for Respondent. The meeting was rescheduled for [REDACTED].

4. On [REDACTED], the IEP meeting proceeded as scheduled, with the relevant members of the IEP team, including Respondent's parent. At the meeting, Petitioner developed, and the parent signed consent for, a reevaluation plan. The purpose of the reevaluation was to determine Respondent's present level of performance and educational needs, and whether any additions or modifications were needed to enable Respondent to meet [REDACTED] annual goals set out in [REDACTED] IEP, and to participate, as appropriate, in the general curriculum. Petitioner proposed, and Respondent's parent agreed to, assessments in the areas of "[REDACTED], " and "[REDACTED]."

5. On [REDACTED], Petitioner administered an assessment of Respondent's [REDACTED]. The results of the same were compiled in a report and addressed with Respondent's parent at a subsequent IEP meeting held on [REDACTED]. At that time, Respondent's parent raised no objection to the language assessment or the language services provided to Respondent.

6. On [REDACTED], Respondent's parent made a comprehensive IEE request to be paid for at public expense in the following areas: [REDACTED]

[REDACTED]

7. On [REDACTED], Petitioner issued a Notice of Proposal/Refusal to Respondent, wherein Petitioner offered to hold a reevaluation plan meeting with the parent to discuss all evaluation areas requested because the Student had not been evaluated in those areas in more than two years. Petitioner, however, refused to grant the request for an IEE in the area of communication because Petitioner believed the [REDACTED], [REDACTED] assessment was appropriate. Petitioner further refused the balance of the requested IEEs due to the IDEA statute of limitations discussed above.

8. As indicated above, Petitioner's Complaint was necessitated by its decision to deny the request of Respondent's parent to provide the requested IEEs.

Language Assessment

9. On [REDACTED], [REDACTED], Petitioner's [REDACTED] [REDACTED] assigned to the [REDACTED] school's [REDACTED] [REDACTED], administered the [REDACTED] [REDACTED]. Said assessment contains three subtests which measure Respondent's [REDACTED]

[REDACTED]

[REDACTED]. [REDACTED] provided unrefuted testimony that the [REDACTED] complied with and was administered in all material respects with Florida Administrative Code Rule 6A-6.0331(5).

10. [REDACTED], Petitioner's [REDACTED], [REDACTED], reviewed [REDACTED] evaluation, report, and protocols. [REDACTED] provided unrefuted testimony that the [REDACTED] and [REDACTED] administration of the same complied in all material respects with rule 6A-6.0331(5).

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties pursuant to section 1003.57(1)(b), Florida Statutes, and Florida Administrative Code Rule 6A-6.0331(9)(u).

12. District school boards are required by the Florida K-20 Education Code to provide for "appropriate program of special instruction, facilities, and services for exceptional students [ESE] as prescribed by the State Board of Education as acceptable." §§ 1001.42(4)(1) & 1003.57, Fla. Stat.

13. The Florida K-20 Education Code's imposition of the requirement that exceptional students receive special education and related services is necessary in order for the State of Florida to be eligible to receive federal funding under the IDEA,

which mandates, among other things, that participating states ensure, with limited exceptions, that a "free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C.

§ 1412(a)(1)(A); Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th Cir. 2012); see also J.P. ex rel. Peterson v. Cnty. Sch. Bd. of Hanover Cnty., Va., 516 F.3d 254, 257 (4th Cir. 2008) ("Under the IDEA, all states receiving federal funds for education must provide disabled schoolchildren with a 'free appropriate public education.'").

14. Under the IDEA and its implementing regulations, a parent of a child with a disability is entitled, under certain circumstances, to obtain an IEE of the child at public expense. Said circumstances are set forth in 34 C.F.R. § 300.502(b), which provides as follows:

Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

15. Rule 6A-6.03311(6), similarly provides as follows:

Independent educational evaluations.

(a) A parent of a student with a disability has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district.

* * *

(g) If a parent requests an independent educational evaluation at public expense, the

school district must, without unnecessary delay either:

1. Ensure that an independent educational evaluation is provided at public expense; or
2. Initiate a due process hearing under this rule to show that its evaluation is appropriate or that the evaluation obtained by the parent did not meet the school district's criteria. If the school district initiates a hearing and the final decision from the hearing is that the district's evaluation is appropriate, then the parent still has a right to an independent educational evaluation, but not at public expense.

(h) If a parent requests an independent educational evaluation, the school district may ask the parent to give a reason why he or she objects to the school district's evaluation. However, the explanation by the parent may not be required and the school district may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the school district's evaluation.

(i) A parent is entitled to only one (1) independent educational evaluation at public expense each time the school district conducts an evaluation with which the parent disagrees.

16. Petitioner here, when confronted with the request for an IEE, opted to timely initiate a due process hearing to demonstrate, by a preponderance of the evidence, that its own evaluation was appropriate. If Petitioner is able to meet its burden and establish the appropriateness of its evaluation, it is relieved of any obligation to provide the requested IEE.

17. To meet its burden of proof, Petitioner must demonstrate that the [REDACTED] evaluation complied with rule 6A-6.0331(5), which sets forth the elements of an appropriate assessment. Palm Beach Cnty. Sch. Bd. v. **, 66 IDELR 29 (Fla. DOAH July 2, 2015). Rule 6A-6.0331(5) provides as follows:

Evaluation procedures.

(a) In conducting an evaluation, the school district:

1. Must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining whether the student is eligible for ESE and the content of the student's IEP or EP, including information related to enabling the student with a disability to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities), or for a gifted student's needs beyond the general curriculum;

2. Must not use any single measure or assessment as the sole criterion for determining whether a student is eligible for ESE and for determining an appropriate educational program for the student; and

3. Must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(b) Each school district must ensure that assessments and other evaluation materials used to assess a student are:

1. Selected and administered so as not to be discriminatory on a racial or cultural basis;

2. Provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to do so;

3. Used for the purposes for which the assessments or measures are valid and reliable; and

4. Administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments.

(c) Assessments and other evaluation materials shall include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(d) Assessments shall be selected and administered so as to best ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's sensory, manual, or speaking skills, unless those are the factors the test purports to measure.

(e) The school district shall use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the student.

(f) A student shall be assessed in all areas related to a suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(g) An evaluation shall be sufficiently comprehensive to identify all of a student's ESE needs, whether or not commonly linked to the disability category in which the student is classified.

18. Pursuant to the above findings of fact, Petitioner has demonstrated that its evaluation of Respondent complies with rule 6A-6.0331(5), and, therefore, has met its burden of proof that the [REDACTED] evaluation was appropriate.

19. Although Respondent is not entitled to an independent psychological evaluation at public expense, Respondent's parent may obtain an IEE at [REDACTED] own expense, the results of which Petitioner would be required to consider. See Fla. Admin. Code R. 6A-6.0331(6)(j)1.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's [REDACTED] evaluation of Respondent was appropriate.

DONE AND ORDERED this 29th day of March, 2016, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
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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)(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).