

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 17-5949E

** ,

Respondent.

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FINAL ORDER

Pursuant to notice, a final hearing was conducted by video-teleconference with sites in Lauderdale Lakes and Tallahassee, Florida, on November 20, 2017, before Administrative Law Judge Jessica Enciso Varn of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Susan Jane Hofstetter, Esquire
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For Respondent: Respondent, pro se
(Address of Record)

STATEMENT OF THE ISSUE

Whether the School Board's occupational therapy assessment of the student was appropriate.

PRELIMINARY STATEMENT

From November 2016 to January 2017, Petitioner School Board of Broward County (School Board) conducted an assessment in the area of occupational therapy. On October 17, 2017, the student's father requested independent educational evaluations (IEEs) in the areas of [REDACTED], occupational therapy, and [REDACTED] [REDACTED]; the student's father also requested an independent [REDACTED] [REDACTED] ([REDACTED]). On October 31, 2017, the School Board filed a Request for a Due Process Hearing (Complaint), alleging that its occupational therapy evaluation was appropriate and that the parent's other requests should be stricken. After several motions were filed by both parties, and after a pre-hearing conference was held with the parties, the undersigned narrowed the scope of the due process hearing to one issue: the appropriateness of the School Board's occupational therapy assessment.^{1/}

The due process hearing was held on November 20, 2017, during which testimony was heard from two witnesses: [REDACTED] [REDACTED] and the student's father. In addition, the following exhibits were received in evidence: School Board Exhibits 2, 3, and 6 through 8.

The final hearing Transcript was filed on December 6, 2017. The School Board thereafter submitted a Proposed Final Order, which the undersigned considered.

For stylistic convenience, the undersigned will use [REDACTED] pronouns in this Final Order when referring to the student. The [REDACTED] pronouns are neither intended, nor should be interpreted, as a reference to the student's actual gender.

Unless otherwise noted, all statutory and rule citations are to the versions in effect at the time the School Board performed the occupational therapy assessment at issue.

FINDINGS OF FACT

1. The student is a [REDACTED]-year-old child who is authorized to receive special education services pursuant to the [REDACTED] [REDACTED] [REDACTED], [REDACTED] [REDACTED], and [REDACTED] [REDACTED] eligibility categories.

2. In the area of occupational therapy, the student was evaluated in April 2016 by Occupational Therapist [REDACTED] [REDACTED]. The student's father requested that the student be re-evaluated using quantitative data.

3. The School Board agreed to provide a re-evaluation, and asked [REDACTED] [REDACTED] to conduct the re-evaluation. [REDACTED]. [REDACTED] was familiar with the student because [REDACTED] had been the student's treating occupational therapist when [REDACTED] was in [REDACTED] school.

4. [REDACTED] is a licensed occupational therapist who has performed hundreds of evaluations during [REDACTED] 15-year career. [REDACTED] has earned a Bachelor of Science degree and a Master of Science degree in occupational therapy, and [REDACTED] is currently working toward earning a doctorate level degree in [REDACTED] field.

5. Prior to evaluating the student, [REDACTED] reviewed the parental consent form and met with the student's father for approximately two and a half hours to discuss the quantitative data the father was seeking, the type of assessments that would be administered and the information that could be gathered from each one, and to gather information as to the student's performance at home.

6. [REDACTED] observed the student four times, for approximately seven hours. [REDACTED] observed the student in all [REDACTED] academic settings, while [REDACTED] was in transition, and while [REDACTED] was in non-academic settings, such as the cafeteria.

7. [REDACTED] utilized a variety of assessment tools and strategies to gather information, including the [REDACTED]
[REDACTED]
[REDACTED]; [REDACTED];
the [REDACTED]
([REDACTED]); the [REDACTED],
[REDACTED] ([REDACTED]); the [REDACTED];
the [REDACTED] ([REDACTED]); [REDACTED]
observation; [REDACTED] interview; and [REDACTED] interview.

8. All of the assessments utilized were valid, reliable standardized measures and technically sound. They were administered in the student's native language, [REDACTED], and they

were not discriminatory in nature. [REDACTED] is trained and qualified to administer the assessments.

9. The [REDACTED] revealed [REDACTED] skills in the visual motor subtest, [REDACTED] skills in the visual spatial subtest, and [REDACTED] skills in the fine motor subtest. The [REDACTED] revealed a [REDACTED] score, which [REDACTED] hypothesized was due to [REDACTED] with [REDACTED].

10. The [REDACTED] was utilized to obtain insight about how a student processes [REDACTED] information. The student presented with "[REDACTED]" in the areas of [REDACTED], [REDACTED], and [REDACTED]. Students with [REDACTED] scores in the area of [REDACTED] are [REDACTED] aware of their environment and the sensory stimuli occurring around them. Alternatively, students with [REDACTED] scores in [REDACTED] do not [REDACTED] stimuli that may be distracting to others and will be more [REDACTED] within varying sensory environments. Out of four school factors analyzed, the student obtained [REDACTED] scores in [REDACTED] categories, [REDACTED] "[REDACTED]" score in the areas of [REDACTED] and [REDACTED], indicating a profile of a student who appears [REDACTED] and [REDACTED] for learning throughout the day. The student exhibited the most difficulty [REDACTED] [REDACTED].

11. [REDACTED] recommended the following intervention strategies to address low registration: use of scented products,

new flavors/new foods, rocking chair, covering or blocking out visual stimuli, organizing materials, eliminating background visual stimuli, frequent breaks, breaking down tasks into smaller steps, writing out steps to complete in sequential order, and limiting the amount of auditory stimuli.

12. [REDACTED] observed [REDACTED] behaviors which included: [REDACTED]/[REDACTED], [REDACTED], [REDACTED], and [REDACTED] [REDACTED]. The behaviors presented when the student was idle, when [REDACTED] was unsure of a question, or when [REDACTED] was unsure of the steps to complete a task.

13. [REDACTED]. [REDACTED] summarized [REDACTED] evaluation stating:

[REDACTED] is independent with all school related skills. [REDACTED] has functional skills and demonstrates [REDACTED] skills and [REDACTED]. [REDACTED] requires strategies to assist with on-task behaviors for successful task initiation and completion. The school's IEP committee will use the results of this evaluation along with other pertinent information to make appropriate educational recommendations to address identified needs and assist with educational planning.

14. [REDACTED]. [REDACTED] also recommended that the student, who has been diagnosed with [REDACTED], have adult supervision while [REDACTED], based on a report that the student was [REDACTED].

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to section 1003.57(1)(b), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

16. School boards are required by the Florida K-20 Education Code to provide for an "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.

17. 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 Individuals with Disabilities Education Act (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).

18. 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. The circumstances under which a parent has a right to an IEE at

public expense 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 [REDACTED] or [REDACTED] 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.

19. Florida law, specifically rule 6A-6.03311(6), provides similarly as follows:

(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 ■ or ■ 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.

20. These provisions make clear that a school board in Florida is not automatically required to provide a publicly funded IEE whenever a parent asks for one. A school board has the option, when presented with such a parental request, to initiate a due process hearing to demonstrate, by a preponderance of the evidence, that its own evaluation is appropriate. T.P. v. Bryan Cnty. Sch. Dist., 792 F.3d 1284, 1287 n.5 (11th Cir. 2015). If the school board is able to meet its burden and establish the appropriateness of its evaluation, it is relieved of any obligation to provide the requested IEE.

21. To satisfy its burden of proof, the School Board must demonstrate that the assessment at issue complied with rule 6A-6.0331(5), which sets forth the elements of an appropriate evaluation. Rule 6A-6.0331(5) provides as follows:

(5) 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 within a data-based problem solving process, including information about the student's response to evidence-based interventions as applicable, and information provided by the parent. This evaluation data may assist in determining whether the student is eligible for ESE and the content of the student's individual educational plan (IEP) or educational plan (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 and procedures 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 and procedures 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 suspected disability.

22. Pursuant to the findings of fact as detailed above, the School Board has proven that the occupational therapy assessment conducted by [REDACTED] fully complied with rule 6A-6.0331(5).

In particular, the assessment was conducted by a trained and knowledgeable professional who utilized—and properly administered—a variety of valid instruments that yielded reliable and comprehensive information concerning the student's educational needs.

23. While the student is not entitled to an IEE at public expense, the father is free to obtain an independent evaluation at ■■■ own expense, whose results the School Board would be required to consider. See Fla. Admin. Code R. 6A-6.03311(6)(j)1. (providing that if a parent "shares with the school district an evaluation obtained at private expense . . . [t]he school district shall consider the results of such evaluation in any decision regarding the provision of FAPE to the student, if it meets appropriate district criteria").

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the student is not entitled to an IEE at public expense.

DONE AND ORDERED this 29th day of December, 2017, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of December, 2017.

ENDNOTE

^{1/} The request for a [REDACTED] IEE was stricken because the School Board has never conducted an initial [REDACTED] evaluation with which to disagree; the request for an [REDACTED] [REDACTED] IEE was stricken because the School Board agreed to provide the IEE; and the request for an independent [REDACTED] was stricken because the School Board had also agreed to conduct an [REDACTED], and was in the process of conducting one during the course of this proceeding.

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).