

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE SCHOOL BOARD OF BROWARD)
COUNTY, FLORIDA,)
)
Petitioner,)
)
vs.) Case No. 12-4108E
)
)
)
Respondent.)
)
_____)

FINAL ORDER

Pursuant to notice, a final hearing was conducted on January 11, 2013, in Fort Lauderdale, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Barbara J. Myrick, Esquire
Broward County School Board
11th Floor
600 Southeast 3rd Avenue
Fort Lauderdale, Florida 33301

For Respondent: Rhonda Ward
Qualified Representative
3935 Northwest 75 Terrace
Lauderhill, Florida 33319

STATEMENT OF THE ISSUE

Whether Respondent is entitled to an independent educational evaluation in the form of a neuropsychological evaluation (Neuropsychological IEE), at public expense.^{1/}

PRELIMINARY STATEMENT

The Student is referred to in this Final Order by the Student's initials to protect the Student's privacy. This Final Order has been written in compliance with the standing request of the Florida Department of Education that DOAH ALJs write orders involving the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., (IDEA) in a gender-neutral fashion without naming the Student's school. All state statutory references are to Florida Statutes (2012).

At the times relevant to this proceeding, the Student was enrolled in a public elementary school in Broward County, Florida. At all time relevant to this proceeding, the Student was receiving services from Respondent's exceptional student education program (ESE program) pursuant to an Individual Education Plan (IEP).

At the final hearing, Petitioner presented the testimony of Mary B. Stone (the school psychologist who participated in the Student's challenged evaluation) and Rhonda Said (Petitioner's District Coordinator for Psychological Services). Petitioner presented pre-marked Exhibits 1-5 and 7, each of which was admitted into evidence.

Respondent called the Student's mother as the Respondent's only witness and offered no exhibits.

The Transcript, consisting of one volume, was filed

January 15, 2013. Petitioner timely filed its proposed final order, which has been duly considered by the undersigned in the drafting of this Final Order. Respondent filed its Proposed Final Order after the deadline set by the undersigned. Notwithstanding that late filing, the Proposed Final Order submitted by Respondent has been considered by the undersigned in the drafting of this Final Order.

FINDINGS OF FACT

1. The Student was born in [REDACTED].
2. On February 9, 2009, a multidisciplinary team (M-Team) evaluated the Student. The Student's mother consented to the M-Team evaluation and received a copy of the Procedural Safeguards.
3. At the time of the evaluation, the Student was [REDACTED] years and [REDACTED] old.
4. The evaluators were Mary B. Stone, a school psychologist; Zulma Martinez, a speech/language pathologist; and Kathleen Lopes, an occupational therapist.
5. Ms. Stone's testimony established that the evaluation tools utilized by the M-Team were appropriate to comprehensively identify the Student's educational needs and were appropriately administered.
6. The following assessment procedures were used to evaluate the student:

- a. Battelle Developmental Inventory II is a standardized assessment and provides an overall developmental scale. It assesses five developmental areas: cognitive functioning, communications skills, fine and gross motor skills, self-help skills, and independent functioning through social and behavioral functioning.
- b. Preschool Language Scale-4 is a standardized assessment that measures receptive and expressive language.
- c. Childhood Autism Rating Scale is a standardized assessment that is used to determine if the child is presenting with characteristics of a child with autism spectrum disorder.
- d. Autism Screening Instrument for Educational Planning- Third Edition utilizes an Autism Behavior Checklist Form that is completed with input from the parent to determine behaviors the child is presenting.
- e. Checklist of Pragmatic Language Skills evaluates pragmatic language or the social use of language. The checklist has one part to be completed by the evaluators and another part to be completed by the parent.
- f. Language Sample is the documentation of all language that the evaluators hear. It could include utterances, sounds, words, gestures, and other means the child used to communicate.
- g. Occupational Therapy of Functional Skills in the Educational Environment is completed by the occupational therapist during the assessment of the child's functional skills.
- h. Observation of the child by all evaluators during the course of the evaluation.

i. Parent Conference to obtain input from the parent as to the child's level of functioning.

7. The M-Team used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the Student.

8. The tools and strategies used in the M-Team assessment assisted in determining whether the Student was eligible for ESE program services and the content of the Student's IEP.

9. No single measure of assessment was used as the sole criterion for determining whether the Student was eligible for ESE program services or for determining the Student's appropriate educational program.

10. The evaluation instruments used by the M-Team were technically sound to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors regarding the Student.

11. The assessment tools and strategies used by the M-Team were selected and administered so as not to be discriminatory on a racial or cultural basis.

12. The assessment tools and strategies used by the M-Team were administered in the Student's native language or another mode of communication and in a form most likely to yield accurate information on what the Student knew and could do academically, developmentally, and functionally.

13. The assessment tools and strategies used by the M-Team were used for the purpose for which they are valid and reliable.

14. The assessment tools and strategies used by the M-Team were administered by trained and knowledgeable persons in accordance with any instructions provided by the producer of the assessments.

15. The assessment tools and strategies used by the M-Team included those tailored to assess specific areas of educational needs for the Student and not merely those that are designed to provide a single general intellectual quotient.

16. The assessment tools and strategies used by the M-Team provided relevant information that directly assisted the IEP team in determining the educational needs of the Student.

17. The Student was assessed in all areas of suspected disability.

18. The assessment by the M-Team was sufficiently comprehensive to identify all of the Student's educational needs as of the date of the assessment.

19. The M-Team prepared a report that reflected its findings. The M-Team report was used by an ESE Eligibility Committee on February 24, 2009, to find that the Student was eligible for ESE program services for Autism Spectrum Disorder and Occupational Therapy.^{2/}

20. The M-Team report was used by an IEP team on

February 24, 2009, to prepare an IEP for the Student. The Student's mother participated in the IEP meeting and signed the IEP.^{3/}

CONCLUSIONS OF LAW

21. DOAH has jurisdiction over the subject matter and parties to this case pursuant to sections 120.569, 120.57(1), and 1003.57(5), Florida Statutes. See also Fla. Admin. Code R. 6A-6.03311(11).

22. Petitioner has the burden of proving by a preponderance of the evidence that it appropriately evaluated the Student on February 9, 2009. See Dep't of Transp. v. J. W. C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981) and Schaffer v. Weast, 126 S. Ct. 528 (2005). Pursuant to section 120.57(1)(j), Petitioner must prove the elements of its case by a preponderance of the evidence.

23. Section 1003.01(3) defines the terms "exceptional student" and "special education services." There is no dispute that the Student is an exceptional student and is entitled to special education services. There is no dispute that the Student is entitled to ESE program services under the categories autism spectrum disorder and occupational therapy.

24. An "initial evaluation" is required before a student is determined to be an "exceptional student" eligible to receive ESE services. Fla. Admin. Code R. 6A-6.0331(3). Florida

Administrative Code Rule 6A-6.0331(3)(c) provides as follows with respect to such "initial evaluations":

(3) Initial evaluation. Each school district must conduct a full and individual initial evaluation before the initial provision of ESE. Either a parent of a student or a school district may initiate a request for initial evaluation to determine if the student is a student with a disability or is gifted.

* * *

(c) The school district shall be responsible for conducting all initial evaluations necessary to determine if the student is eligible for ESE and to determine the educational needs of the student. Such evaluations must be conducted by examiners, including physicians, school psychologists, psychologists, speech-language pathologists, teachers, audiologists, and social workers who are qualified in the professional's field as evidenced by a valid license or certificate to practice such a profession in Florida. . . .

1. Tests of intellectual functioning shall be administered and interpreted by a professional person qualified in accordance with Rule 6A-4.0311, F.A.C., or licensed under Chapter 490, F.S.

2. Standardized assessment of adaptive behavior shall include parental input regarding their student's adaptive behavior.

25. Florida Administrative Code Rule 6A-6.0331(5) prescribes the following "[e]valuation procedures" governing "initial evaluations":

(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, 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.

26. Pursuant to the IDEA and its implementing regulations, a parent of a child with a disability is entitled, under certain circumstances, to obtain an independent educational evaluation of the child at public expense. The circumstances under which a parent has a right to an independent educational evaluation at public expense are set forth in 34 C.F.R. § 300.502(b), which provides as follows:

(b) 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.

27. The provisions of Florida Administrative Code Rule 6A-6.03311(6) (a), (c), (d), (g), (h), and (i), similarly provides 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.

* * *

(c) For purposes of this section, independent educational evaluation is defined to mean an evaluation conducted by a qualified evaluation specialist who is not an employee of the school district responsible for the education of the student in question.

(d) Public expense is defined to mean that the school district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

(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.

28. These provisions make clear that a district school board in Florida is not automatically required to provide a publicly funded independent educational evaluation whenever a parent asks for one. A school board has the option, when presented with such a parental request, to initiate -- without unnecessary delay -- a due process hearing to demonstrate that its own evaluation is appropriate.

29. In this proceeding, the Petitioner has met its burden of proof. Petitioner appropriately evaluated the Student on February 9, 2009. The Student is not entitled to a Neurological IEE at public expense.^{4/}

Based on the foregoing, it is ORDERED that the request for an independent educational evaluation in the form of a neuropsychological evaluation is DENIED.

DONE AND ORDERED this 31st day of January, 2013, in
Tallahassee, Leon County, Florida.

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CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of January, 2013.

ENDNOTES

^{1/} The Student's parent attempted to litigate matters not at issue in this proceeding. While those issues may be litigated in some other proceeding(s), the issue in this proceeding is limited. The only evaluation of the Student prepared by School Board staff was completed February 9, 2009. Counsel for Petitioner represented at hearing that the School Board is in the process of reevaluating the Student. Florida Administrative Code Rule 6A-6.0331(7)(b) requires that a student who has been determined eligible for ESE services be reevaluated every three years "unless the parent and the school district agree that a reevaluation is unnecessary." It appears that Petitioner should have reevaluated the Student on or before February 9, 2012. The issues of whether Petitioner failed to timely reevaluate the Student and whether that failure denied the Student a free, appropriate public education have not been raised by the due process request filed by Petitioner, and no further findings will be made as to those issues. Similarly, no issue has been raised as to whether the Student's IEP is appropriate or whether the Student should have a behavioral intervention plan. Consequently, no findings will be made as to those issues.

^{2/} As reflected above, no challenge to that eligibility determination has been raised by the pleadings.

^{3/} As reflected above, no challenge to the contents of the IEP has been raised by the pleadings.

^{4/} The denial of the parent's request for a Neuropsychological IEE should not be construed as a determination that the Student need not be promptly and comprehensively reevaluated by Petitioner as required by Florida Administrative Code Rule 6A-6.0331(7)(b).

COPIES FURNISHED:

Barbara J. Myrick, Esquire
Broward County School Board
11th Floor
600 Southeast 3rd Avenue
Fort Lauderdale, Florida 33301

Lindsey Granger, Program Director
Bureau of Exceptional Education
and Student Services
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

S. L.
(Address of record)

Rhonda Ward
Qualified Representative
3935 Northwest 75 Terrace
Lauderhill, Florida 33319

Lois Tepper, Interim General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Robert Runcie, Superintendent
Broward County School District
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.