

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 12-1580E
)
 ██████████,)
)
 Respondent.)

)

FINAL ORDER

Pursuant to notice, a due process hearing was held in this case before Jessica E. Varn, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on June 7, 2012, in Lauderdale Lakes, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Respondent is entitled to a Functional Behavioral Assessment at public expense, as an Independent Educational Evaluation (IEE).

PRELIMINARY STATEMENT

On May 2, 2012, the Broward County School Board (School Board), requested a due process hearing, after having notified ██████ parents that it was denying the parents' request for an Independent Educational Evaluation (IEE) at public expense. On that same date, the School Board sent its request for a due process hearing to DOAH. The due process hearing was originally scheduled for May 17, 2012. The parties agreed to continue the case, and the hearing was rescheduled for June 7, 2012.

At the hearing, the School Board presented the testimony of Amy Cohen, a board certified behavioral analyst; Ines Negrón, a board certified assistant behavioral analyst; Michael Corva, an ESE specialist; Marye Restrepo, a teacher; and Keith Suranna, a teacher. School Board Exhibits 1-7 were admitted into the record. Respondent presented the testimony of ██████ mother, and Dana Miller, a board certified behavioral analyst. Respondent Exhibits 1, 3, 4, 6, and 7 were admitted into the record. A two-volume Transcript was filed with DOAH on June 26, 2012. The parties agreed to file Proposed Final Orders on July 6, 2012. The School Board timely filed a Proposed Final Order; Respondent

filed a Proposed Final Order one day late. Both Proposed Final Orders were considered in preparation of this Final Order.

For stylistic convenience, the undersigned will use masculine pronouns in this Final Order when referring to [REDACTED]. The masculine pronouns are not intended to denote [REDACTED] actual gender and should not be understood as doing so.

All citations to the Florida Statutes are to the 2011 version, unless otherwise indicated.

FINDINGS OF FACT

1. [REDACTED] is a [REDACTED]-[REDACTED] [REDACTED] student who attends [REDACTED] [REDACTED] [REDACTED] ([REDACTED]), a pre-k through 8th grade institution that opened in the Fall of 2010. [REDACTED] began attending [REDACTED] as a [REDACTED] [REDACTED] when the school opened.

2. In 2005, while [REDACTED] was in kindergarten, [REDACTED] was deemed eligible to receive exceptional student education (ESE) in the areas of Other Health Impaired (OHI), Orthopedically Impaired (OI), Speech Impaired (SI), and Occupational Therapy (OT). Currently, [REDACTED] maintains these same eligibilities.

3. In September 2011, a re-evaluation plan was developed for [REDACTED], with the parents' consent. [REDACTED] parents requested a Functional Behavioral Assessment (FBA), because [REDACTED] was rubbing [REDACTED] eyebrows frequently. [REDACTED] had been doing so for approximately four years while at home as well as at school. [REDACTED] rubs [REDACTED] eyebrows during various activities, including while watching

television, playing video games, and doing school work at home and school. By rubbing [REDACTED] eyebrows with much frequency, [REDACTED] has caused [REDACTED] brow hair to fall out, and has caused bleeding and calluses.

4. The FBA was initiated on September 1, 2011. The FBA team members were: [REDACTED] mother; Ines Negrón, a board certified assistant behavioral analyst; Michael Corva, an ESE specialist; Marye Restrepo, [REDACTED] science teacher; Keith Suranna, [REDACTED] reading teacher; and Susan Turner, [REDACTED] math teacher. Ines Negrón was inadvertently not listed on the FBA Report, but was a team member, and prepared the FBA.

5. [REDACTED] student profile on the FBA report states that [REDACTED] likes math more than reading, but performs better in reading. [REDACTED] also enjoys science, football, basketball, and video games. [REDACTED] seemed to experience stress when taking tests and quizzes, when presented with "down time," and when it was time for report cards and progress reports.

6. The target behavior for the FBA was "eyebrow rubbing." There was no accompanying definition of the behavior on the FBA, but each team member who testified described and demonstrated [REDACTED] eyebrow rubbing in the same manner during the hearing, leaving no doubt that all team members were looking for the same target behavior, defining it and demonstrating it at the hearing in identical manners.

7. Frequency data, taken to establish a baseline estimate, was collected by [REDACTED] various teachers from August 31, 2011, through October 6, 2011. The teachers received training from the ESE Specialist on the team on how to collect the data. The data was taken, on the whole, in a consistent manner and yielded reliable results. It ultimately revealed that [REDACTED] rubbed [REDACTED] eyebrow on average two times per class. There was a scrivener's error on the FBA report, listing the frequency as two times a day, but it should have read two times during every class.

8. The records reviewed for the FBA revealed that [REDACTED] was a friendly, easy going student. [REDACTED] converses well with teachers and peers, takes responsibility for [REDACTED] actions, works cooperatively with [REDACTED] peers, and exercises appropriate self-control.

9. The FBA also noted a previous intervention which had been tried, which consisted of redirecting [REDACTED] to an activity when [REDACTED] was observed rubbing [REDACTED] eyebrows.

10. Indirect assessments were conducted for the FBA, which included interviewing [REDACTED], and receiving input from [REDACTED] parents and teachers. [REDACTED] indicated that [REDACTED] likes to play outside, likes [REDACTED] father best, likes science, and would like to play sports without worrying about [REDACTED] grades. [REDACTED] mother expressed her desire for [REDACTED] to be able to talk to the school counselor when [REDACTED] feels stressed, and that she hoped socially

appropriate behaviors would replace the eyebrow rubbing. [REDACTED] teachers reported that [REDACTED] loves playing sports, likes math, and loves going outside. The teachers also observed that [REDACTED] is more likely to rub [REDACTED] eyebrows when under stress.

11. Direct assessment included a direct observation on September 28, 2011; frequency data; and ABC (Antecedent, Behavior, Consequences) data. The data was taken by [REDACTED] teachers, and, on the whole, was taken consistently and following the same protocol. The data yielded reliable results, despite the fact that there were a few inconsistencies in how the ABC data was recorded by the various teachers. The data ultimately revealed that [REDACTED] rubbed [REDACTED] eyebrows on average two times per class.

12. The hypothesis of the FBA was recorded as: "When [REDACTED] is presented with a test/quiz/stressful situation/down time, [REDACTED] will rub [REDACTED] eyebrows as a reflex when anxious."

13. The outcomes of the FBA were the following:

Interventions will be implemented. A PBIP is not needed.

* [REDACTED] will learn coping skills for stressful situations. Positive affirmations [sic]

* [REDACTED] will be prompted before and during to use positive affirmation during stressful situations, and hold hands together.

* [REDACTED] will engage in self-monitoring, keeping a tally of how many times [REDACTED] rubs [REDACTED] eyebrows.

* [REDACTED] will have velcro placed underneath [REDACTED] desk.

14. The FBA was completed on November 1, 2011. Upon review of the FBA, the team determined that additional data should be taken by all of [REDACTED] teachers, rather than just a few, as had been done for the initial FBA.

15. Baseline data was again collected in November and December 2011, and January 2012. These data were collected in four classes, and revealed that [REDACTED] rubbed [REDACTED] eyebrows on average four times per class; it was also noted that there were some world history classes in which [REDACTED] never rubbed [REDACTED] eyebrows, and there was a higher frequency of eyebrow rubbing in some math classes.

16. Duration data was not taken by the school board because the team determined it was unnecessary to collect more data; both certified behavior analysts testified that duration data is generally not taken in cases where the behavior being studied is self-injurious.

17. Direct assessment included a direct observation on January 12, 2012. During the observed class, [REDACTED] was taking a test. During the first two minutes, [REDACTED] stretched and gazed at the board; [REDACTED] was redirected to focus on the test. During the first five minutes, [REDACTED] was also redirected three times from rubbing [REDACTED] eyebrows to focusing on the test. [REDACTED] then took

the test, was given extra time to complete it, and was not observed rubbing [REDACTED] eyebrows again.

18. Another direct observation was written as follows:

New data collected between 12/1/11-1/23/12 also shows a correlation between behavior and attention; i.e. when I entered the room, [REDACTED] walked in front of me twice and rubbed [REDACTED] eyebrows, I looked at a different direction, [REDACTED] sat and worked on [REDACTED] group [sic] without displaying behavior for the next hour.

19. The hypothesis on the revised FBA was the following:

"When [REDACTED] is presented with a test/quiz/stressful situation/down time, [REDACTED] will rub [REDACTED] eyebrows as a reflex when anxious/attention."

20. The outcomes of the revised FBA were as follows:

Interventions will be implemented. A PBIP is not needed.

- * [REDACTED] will learn coping skills for stressful situations. Positive affirmations [sic]

- * [REDACTED] will be prompted before and during to use positive affirmation during stressful situations. If teachers observe precursor of target behavior, teachers will redirect [REDACTED] to the current task and/or mention [REDACTED] name. Teachers will select universal cue to redirect [REDACTED] behavior.

- * [REDACTED] will have velcro placed underneath [REDACTED] desk.

- * [REDACTED] Math, World History, Science, and Language Arts teachers will collect frequency data once per week to monitor the interventions. Teachers will specify the activity taking place when target behavior is observed.

21. The FBA was conducted by Ines Negron, a board certified assistant behavioral analyst, who was supervised by Amy Cohen, a board certified behavioral analyst.

22. From September 2011, when [REDACTED] parents requested assessments, to February 2012, when the FBA was completed, [REDACTED] mother met approximately five times with the school to discuss [REDACTED] behavior.

23. [REDACTED] eyebrow rubbing has not affected [REDACTED] ability to learn or access [REDACTED] education, [REDACTED] is doing well socially, is well liked by [REDACTED] peers, loves public speaking, and strives to do [REDACTED] best academically.

24. The FBA was finalized on February 3, 2012. Having concluded the FBA, the School Board decided not to create a Positive Behavior Intervention Plan for [REDACTED], because the target behavior is not affecting [REDACTED] education.

25. At a meeting on March 28, 2012, [REDACTED] parents requested an FBA as an Independent Educational Evaluation at public expense.

26. The greater weight of the evidence establishes that the FBA conducted by the School Board was commenced without undue delay, was sufficiently comprehensive, and was appropriate.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of

the parties thereto pursuant to sections 1003.57(1)(b) and 120.57(1), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

28. 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.

29. The Florida K-20 Education Code imposes a requirement that exceptional students receive special education and related services, in compliance with the Individuals with Disabilities Education Act ("IDEA"), which mandates 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); 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.'").

30. 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:

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.

31. Florida Administrative Code 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 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.

32. Thus, a 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, by a preponderance of the evidence, that its own evaluation is appropriate. See Serpas v. Dist. of Columbia, 2005 U.S. Dist. LEXIS 44536, *16 (D.D.C. Oct. 28, 2005) ("Once Serpas requested an independent educational evaluation at public expense, as both parties acknowledge she did, it was DCPS's burden to demonstrate . . . that the evaluations performed by DCPS were appropriate"). If the district 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 independent educational evaluation.

33. Florida law contains a definition of "functional behavioral assessment," which is found in Florida Administrative Code Rule 6A-6.03411(1)(q):

Functional behavioral assessment (FBA). A FBA is a systematic process for defining a student's specific behavior and determining the reason why (function or purpose) the behavior is occurring. The FBA process includes examination of the contextual variables (antecedents and consequences) of the behavior, environmental components, and other information related to the behavior. The purpose of conducting an FBA is to determine whether a behavioral intervention plan should be developed.

34. To meet its burden of proof, Petitioner must demonstrate that it complied with Florida Administrative Code Rule 6A-6.0331(5), which 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, 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.

35. Based on the findings of fact stated above, the School Board has demonstrated that its FBA complies with rule 6A-6.0331(5). Respondent is therefore not entitled to an independent FBA at public expense.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Respondent is not entitled to an independent Functional Behavioral Assessment at public expense.

DONE AND ORDERED this 20th day of July, 2012, in
Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the
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this 20th day of July, 2012.

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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)(b), Florida Statutes (2011), 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).