

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 10-5139E
)
 [REDACTED],)
)
 Respondent.)
 _____)

FINAL ORDER

Pursuant to notice, a due process hearing was conducted by audio/video conferencing (via telephone and internet webcast) in this case pursuant to section 1003.57, Florida Statutes,¹ and Florida Administrative Code Rule 6A-6.03311, before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on October 29, 2010, and November 30, 2010.

APPEARANCES

For Petitioner: Barbara J. Myrick Esquire
Office of the School Board Attorney
K. C. Wright Administration Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

For Respondent: [REDACTED] and [REDACTED] (Parents)
(address of record)

STATEMENT OF THE ISSUE

Whether the Psychological Evaluation of [REDACTED] conducted in the Spring of 2010 by Anne Rosen, a School Psychologist employed by the Broward County School Board, is "appropriate."

PRELIMINARY STATEMENT

On September 22, 2010, the Broward County School Board (School Board) filed a request for a due process hearing (Hearing Request) seeking a determination of the appropriateness of the Psychological Evaluation of [REDACTED] conducted in the Spring of 2010 by Anne Rosen, a School Board-employed School Psychologist. In its Hearing Request, the School Board stated that the Parents had "requested an Independent Educational Evaluation at public expense" based on their "disagreement with the results of a Psychological Evaluation dated April 20, 2010 conducted by Broward County Public Schools," and that it was "denying the [Parents'] request."

On that same day (September 22, 2010), the undersigned issued a Notice of Hearing by Video Teleconference scheduling the due process hearing requested by the School Board for October 11 and 12, 2010. Together with the Notice, the undersigned also issued a Pre-Hearing Order, which provided, in part, as follows:

5. The final order in this case shall be issued on or before November 8, 2010, unless the undersigned, at the request of either

party, grants a specific extension of time with respect to this or any other deadline in this case.

6. The parties are hereby notified that any request for extension of time shall be deemed to seek, and if granted shall effect, a like extension of the final order deadline.

7. Requests for specific extensions of time should ordinarily be made in writing and state with particularity the reasons for the relief sought. Before filing such a request, the requesting party shall confer with the other party to determine whether the latter objects to the desired extension. The requesting party shall state in its request whether the other party objects to the request.

On September 23, 2010, the undersigned issued an Order Changing Due Process Hearing Dates, which provided as follows:

On September 22, 2010, the undersigned issued a Notice of Due Process Hearing by Video Teleconference, scheduling the due process hearing in this case for October 11 and 12, 2010.

On September 23, 2010, Petitioner filed a Notice of Conflict, advising that its counsel of record "is unable to be present on October 11, 2010 for a hearing in the instant case" because she "has been previously scheduled for a due process hearing on October 11, 2010 in Division of Administrative Hearings Case 10-7162E, J. L. N. v. The School Board of Broward County Florida."

In view of the foregoing, the due process hearing in the instant case will start, not on October 11, 2010, as previously scheduled, but on October 12, 2010 (at 8:45 a.m., at the sites indicated in the

September 22, 2010, Notice of Due Process Hearing by Video Teleconference, and continue that day until no later than 5:00 **m. (with breaks, as appropriate)). The undersigned is hopeful, given the limited scope of the issue in the instant case (to wit: the appropriateness of Petitioner's Psychological Evaluation, dated April 20, 2010), that the hearing can be completed in a full day or less. If, however, the hearing does not conclude on October 12, 2010, and additional hearing time is necessary, the hearing will resume (by video teleconference at the same sites) 10 days later on October 22, 2010 (from 8:45 a.m. to no later than 5:00 **m.), and the final order deadline will be extended an additional 10 days. In all other respects, the undersigned's September 22, 2010, Notice of Due Process Hearing by Video Teleconference and his September 22, 2010, Pre-Hearing Order shall remain in full force and effect.

On the following day, September 24, 2010, the parties filed a motion requesting that the due process hearing in this case be rescheduled for October 28 and/or 29, 2010. Following a telephone conference call with the parties, the undersigned issued an Order rescheduling the due process hearing for October 29, 2010. The Order's final paragraph read as follows:

Pursuant to paragraph 6 of the Pre-Hearing Order, the final order deadline is extended an additional 17 days (the length of the continuance granted by this Order).

The due process hearing was held as scheduled, but not completed, on October 29, 2010. After seeking and obtaining input from the parties, the undersigned, on November 3, 2010,

issued a Notice of Resumption of Due Process Hearing, informing the parties that the due process hearing in this case would resume at 9:00 a.m. on November 30, 2010. The final paragraph of the Notice read as follows:

Pursuant to the agreement of the parties (expressed on the record during the first day of the due process hearing on October 29, 2010), the final order deadline is extended until three weeks after the date proposed final orders are due.

The due process hearing resumed, as scheduled, on November 30, 2010, and was completed on that date.

Over the two-day due process hearing, 11 witnesses testified (Sally Woods, Tammi Wilson, Latorria Powell, Anne Rosen, Hector Troche, Camille Arevalo, Patricia Davis, Corey Emert, Felicia Starke, [REDACTED], and [REDACTED].), and the following exhibits were offered and received into evidence: Joint Exhibit 1,² Petitioner's Exhibits 2 through 13, 14 (page 92 only), 15, and 16, and Respondent's Exhibits 3, 6, 7, 13 through 15,³ and 17 through 19.⁴ At the conclusion of the evidentiary portion of the due process hearing on November 30, 2010, the undersigned established the following deadline for the filing of proposed final orders: three weeks after the filing with DOAH of the complete transcript of the due process hearing.

On December 16, 2010, the third and final volume of the due process hearing was filed with DOAH. The following day

(December 17, 2010), the undersigned issued an Order Regarding Proposed Final Orders, which provided as follows:

The parties are hereby advised that the final volume (Volume III) of the transcript of the due process hearing in this case was filed with the Division of Administrative Hearings on December 16, 2010. Accordingly, proposed final orders shall be filed no later than January 6, 2011 (which is three weeks from December 16, 2010).

The School Board and the Parents timely filed their Proposed Final Orders on January 6, 2011.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, including the parties' Joint Statement of Undisputed Facts,⁵ the following findings of fact are made:

1. The School Board is a district school board responsible for the operation, control and supervision of all public schools (grades K through 12) in Broward County, Florida (including, among others, ██████████ Elementary School (██████████)), and for otherwise providing public instruction to school-aged children in the county.

2. ██████ is a ██████-year-old who has attended ██████████ since beginning kindergarten (and has not repeated any grades).

3. ██████ is currently a student in Tammi Wilson's ██████ grade general education class at ██████████.⁶

4. In addition to receiving instruction in Ms. Wilson's general education class, ■ also receives, on a "pull[] out" basis, the following School Board-provided special education and related services at ■■■■■: 90 minutes a week of Specialized Instruction in Language Arts (provided in three sessions); 45 minutes a day, five times a week, of Specialized Instruction in Reading; 90 minutes a week of Language Therapy (provided in three sessions); and 30 minutes a week of Occupational Therapy (provided in one session). ■'s eligibility to receive these services is based on ■'s having been determined to be a Student with an Other Health Impairment,⁷ a Student with a Specific Learning Disability, and a Student who Requires Occupational Therapy.

5. ■ was first determined to be eligible to receive special education and related services in second grade (on April 23, 2008).

6. A written Consent for Reevaluation/Reevaluation Plan for ■ (First Consent Form) was developed during ■'s fourth-grade year at a September 15, 2009, meeting attended by the Parents⁸ and School Board personnel. It provided for assessments to be conducted in the following areas: "Expressive-Receptive Language, Academic Achievement, [and] Psychological Process Functioning."

7. According to the First Consent Form, the "Question[] To Be Addressed" by the "Expressive-Receptive Language" assessment was: "What is [redacted]'s current written language ability?" This assessment was to be done by the "ESE Teacher/Provider."

8. According to the First Consent Form, the "Question[] To Be Addressed" by the " Academic Achievement" assessment was: "How is [redacted]'s disability currently impacting [redacted] academic achievement?" This assessment was to be done by the "ESE Teacher/Provider."

9. According to the First Consent Form, the "Question[] To Be Addressed" by the "Psychological Process Functioning" assessment was: "What is [redacted]'s current level of phonological processing?" This assessment was to be done by the "Psychologist."

10. The Parents signed the First Consent Form at the September 15, 2009, meeting, signifying that they were "giv[ing] [the School Board] permission for the Reevaluation specified [therein]."

11. The "Expressive-Receptive Language" assessment and the "Academic Achievement" assessment described in the First Consent Form were both completed (the former by Jodi Antonini, a Speech/Language Pathologist, and the latter by Eleanor Goldberg, an "ESE . . . curriculum development specialist for reading" with the School Board).⁹ The "Psychological Process Functioning"

assessment, however, was not completed because the Parents (by e-mail sent October 25, 2009) withdrew their consent to the School Board's performing such an assessment.

12. Another written Consent for Reevaluation/Reevaluation Plan for ■ (Second Consent Form) was developed at a follow-up meeting held on January 25, 2010, at which the Parents and School Board personnel were in attendance. It provided for assessments to be conducted in the following areas: "Academic Achievement, Intellectual Functioning, Personality/Emotional Functioning, Psychological Process Functioning, Adaptive Behavior/Behavior Functioning, [and] Physical Motor."

13. According to the Second Consent Form, the "Question[] To Be Addressed" by the "Academic Achievement" assessment was: "What are [■'s] current levels of academic achievement?" The "Psychologist" was identified as the "Evaluation Specialist Responsible" to conduct the "Academic Achievement" assessment.

14. According to the Second Consent Form, the "Question[] To Be Addressed" by the "Intellectual Functioning" assessment was: "What is [■'s] current level of intellectual functioning?" The "Psychologist" was identified as the "Evaluation Specialist Responsible" to conduct the "Intellectual Functioning" assessment.

15. According to the Second Consent Form, the "Question[] To Be Addressed" by the "Personality/Emotional Functioning"

assessment was: "What are [REDACTED]'s] current levels of personality/emotional functioning?" The "Psychologist" was identified as the "Evaluation Specialist Responsible" to conduct the "Personality/Emotional Functioning" assessment.

16. According to the Second Consent Form, the "Question[] To Be Addressed" by the "Psychological Process Functioning" assessment was: "What [are] [REDACTED]'s] current levels of psychological processing?" The "Psychologist" was identified as the "Evaluation Specialist Responsible" to conduct the "Psychological Process Functioning" assessment. The Second Consent Form also included the following statement of "Current Information" pertaining to this "Assessment Area" ("Psychological Process Functioning"):

According to the psychological evaluation dated 3/08/2008,¹⁰ [REDACTED] has deficits in visual-motor integration skills based on the VMI. According to an evaluation completed by Nova Southeastern University on August 5, 2008, [REDACTED]'s] VMI score improved to an age equivalent of 9 years.

17. According to the Second Consent Form, the "Question[] To Be Addressed" by the "Adaptive Behavior/Behavior Functioning" assessment was: "What are [REDACTED]'s] current levels of adaptive behavior?" The "Psychologist" was identified as the "Evaluation Specialist Responsible" to conduct the "Adaptive Behavior/Behavior Functioning" assessment.

18. The "Physical Motor" assessment was to be "in the area of vision." The "Question[] To Be Addressed" by this assessment was: "What is the impact of [■]'s Oculomotor Dysfunction on [■] academic progress?" The "Physician" was identified as the "Evaluation Specialist Responsible" to conduct the "Physical Motor" assessment. The Second Consent Form also included the following statement of "Current Information" pertaining to this "Assessment Area" ("Physical Motor"):

Age appropriate: [■] navigates campus without difficulty. [■] has been diagnosed with Attention Deficit Disorder (ADD) inattentive type. [■] takes Focalin at home. Parents provided a private report, which indicates that [■] has Oculomotor Dysfunction.

19. The "Physical Motor" assessment described in the Second Consent Form was done by Joshua Pasol, M.D., an Assistant Professor of Clinical Ophthalmology at the University of Miami's Bascom Palmer Eye Institute (which is located in Miami).

20. The following letter from Dr. Pasol, "electronically signed" by him on March 15, 2010, was sent to the School Board following the assessment:

Apparently I was asked to see [■] to see if [■] needed any therapy. [■] has a history of difficulty processing information, especially construction issues as well as copying, buttoning and dressing [■] is slightly below reading per history for [■]'s level.

[] has evidence of right parietal lobe dysfunction per the history provided. This is best served by providing visual therapy for the patient's difficulty with space orientation and difficulty with visual perception.

21. The "Academic Achievement, Intellectual Functioning, Personality/Emotional Functioning, Psychological Process Functioning, [and] Adaptive Behavior/Behavior Functioning" assessments described in the Second Consent Form (which, collectively, will be referred to hereinafter as the "Subject Psychological Evaluation") were done by Anne Rosen.

22. Ms. Rosen is a Florida-licensed School Psychologist, who has a Bachelor's degree in Psychology from Barry University and a specialist degree in School Psychology from Florida International University. She has been employed as a School Psychologist by the School Board for the past eight years. Before coming to work for the School Board, she worked for eight years as a School Psychologist for the Miami-Dade County School Board.

23. Ms. Rosen works out of the School Board's North Area Student Services office (North Area), under the supervision of Hector Troche, the North Area Coordinator of Student Services. [] is among the schools serviced by the North Area. Ms. Rosen is the North Area School Psychologist who handles referrals from []. She has had this assignment since the

beginning of the 2009-2010 school year. Ms. Rosen had attended the September 15, 2009, and January 25, 2010, reevaluation plan meetings (referred to above).¹¹ These were the only meetings concerning ■ in which she had participated prior to conducting the Subject Psychological Evaluation.

24. A Referral for Psychological Evaluation Services (Referral) requesting that the North Area School Psychologist assigned to ■ (Ms. Rosen) conduct the Subject Psychological Evaluation was completed by ■' ESE Specialist, Sally Woods, and signed by the school's principal on March 2, 2010. It was then sent to the North Area, accompanied by the Second Consent Form and "Screening Forms" (containing information about ■) that had been filled out by Ms. Wilson (on October 13, 2009)¹² and Latorria Powell, who provides ■ with Specialized Instruction in Language Arts and Specialized Instruction in Reading at ■ (and was ■'s general education classroom teacher when P was in second and third grades). Ordinarily, a referral requesting psychological evaluation services would also be accompanied by a Parent Information Form, filled out by the student's parent(s), containing information about the student's "social and developmental history"; however, the Parents had yet to submit a completed form and the decision was made, by School Board personnel, "to move forward with the psychological referral"

without it.¹³ The Parents subsequently, on April 15, 2010, submitted a completed Parent Information Form, signed by [REDACTED], which Ms. Rosen reviewed and considered before issuing her Psychological Report on April 20, 2010.

25. Ms. Rosen had met [REDACTED] in school prior to testing [REDACTED], so she was not a stranger to [REDACTED] at the time the tests were administered.

26. Because she "didn't want [REDACTED] to tire," Ms. Rosen tested [REDACTED] on three non-consecutive days: March 22, 2010, March 23, 2010, and April 12, 2010. The testing was divided evenly among the three days. [REDACTED] was allowed breaks between tests.

27. As Ms. Rosen reported in her April 20, 2010, Psychological Report:

[REDACTED] came readily to the testing situations and rapport was easy to establish and maintain throughout the evaluations. [REDACTED] was consistently motivated to achieve throughout the testing procedures. [REDACTED] worked slowly and methodically, and put forth maximum effort. As items increased in difficulty, [REDACTED] adjusted [REDACTED]'s level of effort appropriately. [REDACTED] occasionally needed encouragement to attempt items [REDACTED] perceived as too difficult. Overall, affect was within normal limits.

28. Before administering the first test, Ms. Rosen "looked at all of the protocols" and reviewed the Referral and accompanying materials, as well as the documents in [REDACTED]'s "cumulative file." According to her April 20, 2010,

Psychological Report, she gleaned the following Background Information from this pre-testing document review:

[■] was initially evaluated when [■] was a second grade student at [■] Elementary School (L. Lacerda, 2008). At that time, [■] had a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). Results from the Kaufman Battery for Children, Second Edition, indicated average overall intellectual functioning (Fluid-Crystallized Index=106). The Woodcock-Johnson Test of Achievement, Third Edition (WJ-III), was administered to assess [■'s] academic abilities. Overall math was within the Average range; reading and written language were within the Below Average range. The Written Language Composite from the Kaufman Test of Educational Achievement was administered; [■'s] overall results were consistent with those from the WJ-III. [■'s] visual-motor integration skills were assessed using the Developmental Test of Visual-Motor Integration (VMI). Results indicated deficits when compared to his measured cognitive abilities. Finally, results from rating scales, observation, and interviews were considered. [■] met the criteria for ESE services.

For more detailed information regarding [■], please refer to his school records.

Ms. Wilson, [■'s] current teacher,^[14] completed a screening form for Psychological Services (10/13/09). She noted that [■] ". . . puts forth effort in all academic areas. [■] actively participates in class discussions, listens with a strong intent to learn and promptly hands in assignments." However, Ms. Wilson indicated that [■] strives to complete class work before [■'s] classmates and has been somewhat resistant to checking [■'s] work or making improvements on [■'s] assignments. The only other specific

concerns noted by Ms. Wilson were that [] has difficulty putting []'s thoughts into words and copying accurately from the board and/or textbook.

Ms. Powell, a Varying Exceptionalities teacher who consults with Ms. Wilson regarding [], also completed a screening form for Psychological Services (undated). She noted that [] appears to be a happy student, wants to please, works well in small-group setting[s], and has a compliant attitude. At the time of the completion of the screening form, [] was working below grade level in reading and writing. While [] was doing well on spelling tests, [] had difficulty transferring those skills and spelling rules to []'s writing.

29. It was not until after she had finished her testing of [] that Ms. Rosen first received the Parent Information Form completed by []. Ms. Rosen's examination of this completed form revealed the following, according to Ms. Rosen's April 20, 2010, Psychological Report:

Mrs. [] completed a Parent Information Form (PIF) for Evaluation (4/15/10). [] reportedly lives with []'s parents and older sister. [] has two brothers who live outside the home. [] reportedly gets along "good" with []'s parents and "argues frequently" with []'s sister. Discipline is enforced by both parents, usually due to []'s not listening or doing what [] has been told, and is comprised of time-outs or loss of privileges. [] spends most of []'s free time alone or with same-age peers, and is interested in sports, trains, and Legos.

[] was born after nine and one-half months with a birth weight of five pounds, nine ounces. Mrs. [] had gestational diabetes

during the pregnancy and [] initially had digestive problems. Developmental milestones were reported as follows: sat up at two to three months, walked at ten months, was toilet trained at three years, spoke words at nine to ten months, and spoke sentences at two to three years. [] was plagued with high fevers and ear infections as a baby. [] used to have headaches, but their frequency has diminished. When [] was three years old, [] fell from a ladder on []'s bunk bed and had a slight concussion. [] was hospitalized at five years of age for one week due to an infection in []'s foot. There are no concerns in terms of []'s hearing, coordination, or speech (with the exception of speaking quickly). [] has been diagnosed with Oculomotor Dysfunction. [] also has a diagnosis of Attention Deficit Disorder (ADD), and is taking Focalin. [] has seasonal allergies as well. There is a family history of high blood pressure and eye disease ([]'s father).

Mrs. [] reported concerns regarding []'s eating, over activity, worrying, and inattention. [] also has had anxiety regarding any medical and/or dental treatment since []'s hospitalization. In December 2008, [] saw a neurologist due to frequent vomiting. A brain tumor was ruled out.

In terms of []'s educational history, [] attended Children's Paradise and Oxford preschool. [] has attended [] Elementary School since beginning kindergarten, and has not repeated any grades. Mrs. [] noted that [] says school is "boring." She is concerned that [] is not getting appropriate vision therapy. She noted, "[] always smiles. [] makes us laugh at home. [] gets along with others and genuinely cares about others. [] cheers [] teammates on. [] has difficulty getting things down on

papers. [] often needs directions repeated."

30. Ms. Rosen administered (in English, 's native language) the following standardized, norm-referenced tests to as part of the Subject Psychological Evaluation: the Kaufman Test of Educational Achievement - Second Edition (KETA-II); the Differential Ability Scales - Second Edition: School Age Form (DAS-2); the Comprehensive Test of Phonological Processing (CTOPP); the Test of Auditory Processing Skills - Third Edition (TAPS-3), selected subtests; the Bender Visual Motor Gestalt Test - Second Edition (Bender-2); the Developmental Test of Visual Motor Integration - Fifth Edition (VMI-5); and House-Tree-Person Drawings. In addition, she interviewed and evaluated 's behavior using the Behavior Assessment for Children (2) (BASC-2) rating scales.

31. Ms. Rosen is a very capable School Psychologist who possessed the necessary training and knowledge to administer these varied tests, which were technically sound and used for the purposes for which they are valid and reliable. She administered these tests in accordance with instructions provided by their producers and in a manner designed to obtain results accurately reflecting the skills, abilities, or other characteristics the tests purported to measure. There was no racial or cultural bias involved in either her selection or

administration of the test instruments. Her testing was sufficiently comprehensive to answer all of the questions posed in the Second Consent Form and to gather relevant functional, developmental, and academic information about ■ needed to assess ■'s educational needs.

32. The KETA-II is a test that measures academic achievement. It has reading, math, and written language components, each consisting of two subtests (none of which are timed). Standard Scores from 90 to 110 are generally considered to be average on the KETA-II.

33. ■ received the following scores on the KETA-II administered by Mr. Rosen:

Reading- Standard Score: 91; Percentile:
27

Letter & Word Recognition- Standard Score:
87; Percentile: 19

Reading Comprehension- Standard Score: 99;
Percentile: 47

Math- Standard Score: 99; Percentile: 47

Math Concepts & Applications- Standard
Score: 98; Percentile 45

Math Computation- Standard Score: 99;
Percentile: 47

Written Language- Standard Score: 83;
Percentile: 13

Written Expression- Standard Score: 82;
Percentile: 12

Spelling- Standard Score: 86; Percentile:
18

34. Ms. Rosen's April 20, 2010, Psychological Report

contained the following commentary about [REDACTED]'s performance on the KETA-II:

[REDACTED]'s reading and mathematical skills are within the Average range and consistent with measured cognitive abilities; [REDACTED]'s written language skills are within the upper end of the Below Average range and somewhat lower than expectancies.

The Reading subtests involve word identification and comprehension skills. Within this area, [REDACTED] was able to read words such as "meant," "ceremony," and "revolutionary." When faced with unfamiliar words, [REDACTED] either attempted to phonetically sound them out ("guss" for guess, "copely" for couple) or stated a known word with several letters in common with the target word ("quite" for quiet, "garden" for guarded). [REDACTED]'s reading comprehension skills were stronger than [REDACTED]'s decoding skills, most likely due to [REDACTED]'s using context clues. [REDACTED] looked back through the passage in order to answer questions, and was able to answer literal and inferential questions at a grade-appropriate level.

The Written Language subtests include spelling, punctuation, capitalization, and grammatical usage skills. [REDACTED] was able to spell such word as dressing, spoken, and she's. For words that [REDACTED] did not know how to spell, [REDACTED] used phonetic skills ("beter" for better, "peopel" for people, "whaded" for waited). Writing samples were generated as well, including filling [in] missing word(s) and punctuation in sentences, creating sentences, and writing an essay. [REDACTED] generally used correct beginning capitalization but no ending punctuation on either self-generated or pre-printed, incorrect sentences. [REDACTED] capitalized both instances of "I" within a paragraph, but did

not separate the two sentences within that paragraph. While [■] was able to generate a correct word to place in the middle of a sentence ("Finding the dragon will save us all" and "Which of the paths is the shortest"), [■] was unable to correctly generate a word to begin a sentence ("Is the cave is dark, Kyra can still see something strange"). [■] was asked to retell the story in [■]'s own words, and, while the content was accurate, the essay consisted on one long run-on sentence.

35. The DAS-2 is a test that measures intellectual ability. It yields three separate "cluster" scores (Verbal, Nonverbal Reasoning, and Spatial Abilities), as well as an overall General Conceptual Ability Score (GCA) (which is an index of general intellectual functioning) and a Special Nonverbal Composite Score (SNC) (which is an index of nonverbal reasoning and visual-spatial abilities). Standard Scores on the DAS-II have a mean of 100 and a standard deviation of 15. T-Scores from 40 to 60 on the DAS-II are generally considered to be average.

36. The DAS-2's Verbal, Nonverbal Reasoning, and Spatial Abilities "clusters" each consist of two subtests. The Verbal "cluster" consists of the Word Definitions and Verbal Similarities subtests. The Nonverbal Reasoning "cluster" consists of the Matrices and Sequential and Quantitative Reasoning subtests. The Spatial Abilities "cluster" consists of the Recall of Designs and the Pattern Construction subtests.

37. The Recall of Designs subtest measures visual memory. On this subtest, the student is shown a picture of a geometric shape for five seconds and, after the picture is taken away, the student has to draw the picture onto a sheet of blank paper.

38. On the Pattern Construction subtest, the student has to manipulate three-dimensional blocks to make them look exactly like the blocks that appear in pictures the student is shown. The student can continue to look at the pictures while manipulating the blocks. This is the only subtest on the DAS-2 that is timed.¹⁵

39. ■ received the following scores on the DAS-2 administered by Ms. Rosen:

Clusters:

General Conceptual Ability (GCA)- Standard
Score: 99; Percentile: 47

Special Nonverbal Composite- Standard
Score: 93; Percentile: 32

Verbal- Standard Score: 109; Percentile:
73

Nonverbal Reasoning- Standard Score: 97;
Percentile: 42

Spatial Abilities- Standard Score: 90;
Percentile: 25

Verbal Cluster

Word Definitions- T-Score: 55;
Percentile: 69
Verbal Similarities- T-Score: 56;
Percentile: 73

Nonverbal Reasoning Cluster

Matrices- T-Score: 46; Percentile:
34
Sequential and Quantitative Reasoning:
T-Score: 51; Percentile: 54

Spatial Abilities Cluster

Recall of Designs- T-Score: 38;
Percentile: 12
Pattern Construction- T-Score: 51;
Percentile: 54.

40. Ms. Rosen's April 20, 2010, Psychological Report contained the following commentary about ■■■'s performance on the DAS-2:

[■■■'s] performance on the DAS-2 indicated Average overall intellectual ability. [■■■'s] GCA score of 90 corresponds to the 47th percentile statistically. A comparison of the cluster scores indicates that [■■■] performed equally as well on tasks requiring verbal ability, nonverbal reasoning ability, and visual-spatial skills.

The Verbal cluster measured [■■■'s] acquisition of verbal knowledge, [■■■'s] ability to process complex verbal information, and inductive reasoning ability. The cluster required [■■■] to precisely define words (Word Definitions) and to identify the relationship among three concepts (Similarities). [■■■'s] scores on the two subtests suggest that [■■■'s] abilities in this area are evenly developed and within the Average range.

The Nonverbal Reasoning cluster measured [█'s] ability to integrate visual information in performing complex operations. These tasks involve logical analysis and inductive reasoning. [█'s] scores on the two subtests indicate that [█'s] ability to detect sequential patterns in figures an[d] numbers is slightly better developed than [█'s] ability to perceive and apply relationships among abstract figures.

. . . . [█'s] scores on the two [Spatial Abilities Cluster] subtests indicate that [█'s] visual perceptual matching ability, especially of spatial orientation, is significantly better developed than [█'s] short-term recall of visual and spatial relationships through the reproduction of abstract figures.

41. The CTOPP is designed to assess three types of phonological processing that directly impact the mastery of the reading of written language (phonological awareness, phonological memory, and rapid naming). Standard Scores on the CTOPP have a mean of 10 and a standard deviation of 3. Scores between 8-12 are generally considered average.

42. The CTOPP's Phonological Awareness Composite measures a student's ability to understand how sounds make up words. It consists of the Elision and Blending Words subtests. The Elision subtest tests the student's proficiency in removing parts of the word to make new words, whereas the Blending Words subtest tests the student's proficiency in combining sounds to make words. █ received a Standard Score of 5 (placing █ in

the 5th percentile) on the Elision subtest and a Standard Score of 9 (placing ■ in the 37th percentile) on the Blending Words subtest.¹⁶

43. The CTOPP's Phonological Memory Composite tests a student's short-term auditory memory. It consists of the Memory for Digits and Nonword Repetition subtests. On the Memory for Digits subtest, the test administrator recites numbers and the student has to repeat them back. On the Nonword Repetition subtest, the test administrator recites "nonsense words" and the student has to repeat them back. ■ received a Standard Score of 5 (placing ■ in the 5th percentile) on the Memory for Digits subtest and a Standard Score of 5 (placing ■ in the 5th percentile) on the Nonword Repetition subtest.

44. The CTOPP's Rapid Naming Composite consists of the Rapid Digit Naming and Rapid Letter Naming subtests. On these subtests, the student is presented with a sheet of paper containing either numbers (in the case of the Rapid Digit Naming subtest) or letters (in the case of the Rapid Letter Naming subtest) that are in random order and asked to say them quickly. The quicker the student does that, the more points the student gets, and the higher the student's score will be. ■ received a Standard Score of 13 (placing ■ in the 84th percentile) on the Rapid Digit Naming subtest and a Standard Score of 13 (placing ■ in the 84th percentile) on the Rapid Letter Naming subtest.

45. Ms. Rosen's April 20, 2010, Psychological Report contained the following commentary about [REDACTED]'s performance on the CTOPP:

[REDACTED]'s performance is within the Above Average range on the Rapid Naming Composite, within the Below Average range on the Phonological Awareness Composite, and within the Poor range on the Phonological Memory Composite when compared to average children of the same age. The Phonological Awareness composite measures awareness of and access to the phonological (sound) structure of oral language. [REDACTED] demonstrated average ability when blending sounds together, however, [REDACTED] had significant difficulty when adding and deleting sounds within words. The Phonological Memory composite measures ability to code information for storage in short-term and working memory. Results suggest that [REDACTED] has significant difficulty when learning new phonological skills. The Rapid Naming Composite measures ability to quickly retrieve information from long-term memory for application to new situations. [REDACTED] demonstrated above average ability when retrieving previously learned information.

46. The TAPS-3 assesses the processing of auditory information that pertains to the cognitive and communicative aspects of language. It has an Auditory Memory Composite and a Cohesion Composite. The Auditory Memory Composite consists of the Number Memory Forward, the Number Memory Reversed, the Word Memory, and Sentence Memory subtests. The Cohesion Composite consists of the Auditory Comprehension and the Auditory Reasoning subtests. Standard Scores on the TAPS-3 have a mean

of 100 and a standard deviation of 15. Scaled scores have a mean of 10 and a standard deviation of 3.

47. ■ received the following scores on the TAPS-3 administered by Ms. Rosen:

Auditory Memory- Standard/Scaled Score:
83; Percentile: 13

Number Memory Forward- Standard/Scaled
Score: 4; Percentile: 2
Number Memory Reversed- Standard/Scaled
Score: 11; Percentile: 63
Word Memory- Standard/Scaled Score: 4;
Percentile: 2
Sentence Memory- Standard/Scaled Score:
7; Percentile 16

Cohesion- Standard/Scaled Score: 100;
Percentile: 50

Auditory Comprehension- Standard/Scaled
Score: 11; Percentile 63
Auditory Reasoning- Standard/Scaled
Score: 9; Percentile: 37

48. Ms. Rosen's April 20, 2010, Psychological Report contained the following commentary about ■'s performance on the TAPS-3:

The Auditory Memory Composite measures basic memory processes, including sequencing index. [■'s] ability to remember and recall numbers in reverse order was significantly better developed than [■'s] ability to remember and recall numbers and words in the same order [■] heard them, and much better developed than [■'s] ability to remember and recall full sentences. [■'s] general difficulties retaining what [■] has heard and maintaining it in correct sequence makes it difficult for [■] to process that information accurately. [■'s] difficulties

with memory likely impact [█'s] ability to apply basic rules to writing with regard to grammar, punctuation and capitalization.

The Cohesion Composite measures higher order linguistic skills that require not only understanding what is being said, but also the ability to use inferences, deductions, and abstractions to understand the meaning of a passage. Within this area, [█'s] ability to process increasingly complicated sentences in order to answer literal questions was generally as well developed as [█'s] ability to answer questions requiring [█ to make] inferences, draw conclusions, and demonstrate understanding of idiomatic expressions.

49. The Bender-2 and the VMI-5 measure visual-motor integration ability. They do so as well as any other standardized, norm-referenced test available on the market. The VMI-5 is more structured than the Bender-2. Results from both these tests can help to predict a student's success at copying from the chalkboard or from a book, provided the tests have been administered appropriately. Among the precautions that must be taken in administering these tests is to make sure that if the student needs glasses he or she has them on. Neither test is designed to assess artistic talent.

50. On the Bender-2 (which was last updated about three or four years ago), the student is shown geometric shapes and has to copy them all onto one blank sheet of paper. The student is allowed to look at the shapes while he or she is copying. Erasures are allowed, and there is no time limit. The student

can take however long he or she needs to do the drawings. ■ received a Standard Score of 115, within the High Average range,¹⁷ on the Bender-2 administered by Ms. Rosen.

51. On the VMI-5 (which was last updated a couple of years ago) the student is given a picture of a geometric shape to look at, and the student then must copy the shape in a box directly below the picture. The shapes start out basic and they get increasingly more intricate as the test progresses. The student is not allowed to erase. The instructions provided by the producer of the VMI-5 warn against administering this test to a student more than once a year. There is no limit, however, on the total number of times a student (in the student's lifetime) may be administered the VMI-5 for the test to be valid. On the VMI-5 administered by Ms. Rosen, ■ (who, prior to Ms. Rosen's testing, had last taken the VMI more than a year earlier, in 2008¹⁸) received a Standard Score of 106, which converted to an age-equivalent score of 11 years, two months,¹⁹ and placed ■ in the 65th percentile. This score was within the Average range.²⁰

52. The BASC-2 "is an integrated system that was designed to assist in diagnosing and classifying emotional and behavioral disorders in children, and to aid in the design of treatment plans."

53. Ms. Rosen's review of the teacher and parent BASC-2 rating forms filled out by Ms. Wilson and [REDACTED], respectively, yielded the following scores:

CLINICAL SCALES

Hyperactivity- T[eacher]: 52; P[arent]:
67
Aggression- T: 46; P: 48
Conduct Problems- T: 42; P: 46
Anxiety- T: 52; P: 69
Depression- T: 48; P: 57
Somatization- T: 50; P: 67
Atypicality- T: 59; P: 60
Withdrawal- T: 49; P: 53
Attention Problems: T: 51; P: 61

CLINICAL COMPOSITES

Externalizing Problems- T: 46; P: 54
Internalizing Problems- T: 50; P: 68
Behavioral Symptoms Index- T: 51; P: 60

ADAPTIVE SCALES

Adaptability- T: 43; P: 39
Social Skills: T: 36; P: 44
Leadership- T: 42; P: 42
Study Skills- T: 49; P: -
Activities of Daily Living- T: -; P: 31
Functional Communication- T: 37; P: 40

ADAPTIVE COMPOSITE

Adaptive Skills- T: 40; P: 37

Clinical Scale and Composite scores between 60 and 69 are "At-Risk," while scores above 70 are "Clinically Significant."

Adaptive Scale and Composite scores between 30 and 40 are "At-Risk," while scores below 30 are "Clinically Significant."

54. Ms. Rosen also reviewed the BASC-2 Self-Report form that [REDACTED] filled out (on March 22, 2010). In her April 20, 2010, Psychological Report, she wrote the following regarding this review:

This instrument is comprised of five normative groups: School Problems, Internalizing Problems, Inattention/Hyperactivity, Personal Adjustment, and an overall composite, the Emotional Symptoms Index.

The School Problems Composite is comprised of the Attitude to School and Attitude to Teachers scales. This index is a broad measure of adaptation to school. [REDACTED]'s responses indicate that [REDACTED] does not see [REDACTED] as having any problems adapting to teachers, but is at risk for developing problems with school overall; [REDACTED] noted that [REDACTED] neither likes thinking about nor cares about school.

In terms of Internalizing Problems, [REDACTED] sees [REDACTED] at risk for developing problems in terms of Locus of Control. [REDACTED] endorsed the following items as true: My parents are always telling me what to do, I am almost always blamed for things I don't do, and Things go wrong for me, even when I try hard.

The Inattention/Hyperactivity Composite includes the Attention Problems and Hyperactivity scales. [REDACTED] does not see [REDACTED] as having any difficulties within this area.

The Personal Adjustment Composite includes the Relations with Parents, Interpersonal Relations, Self-Esteem, and Self-Reliance Scales. [REDACTED]'s responses were within the Average range overall, indicating positive levels of adjustment.

The Emotional Symptoms Index, the most global indicator of emotional disturbance, particularly internalized disorders, is comprised of four scales from the Internalizing Problems Composite (Social Stress, Anxiety, Depression, and Sense of Inadequacy) and two scales from the Personal Adjustment Composite (Self-Esteem and Self Reliance). [█]'s scores were within the Average range within this index.

55. The House-Tree-Person drawing test is a projective, personality test. Ms. Rosen did not see anything significant in █'s drawings suggesting any emotional issues.

56. At a May 28, 2010, IEP meeting, Ms. Rosen discussed and answered questions from the Parents and other members of █'s IEP team about the Subject Psychological Evaluation and her April 20, 2010, Psychological Report. When the Parents asked, at the meeting, to see the protocols of the tests that Ms. Rosen had administered, they were told by Felicia Starke, a School Board Due Process Coordinator,²¹ that the meeting was not the appropriate "place" for them to conduct such an examination, but "that they could meet with Ms. Rosen separately and [at that later time] review . . . [the] protocols." The Parents did meet "separately" with Ms. Rosen on or about June 16, 2010, at which time Ms. Rosen went over the test protocols with them.

57. In developing █'s IEP at the May 28, 2010, IEP meeting,²² the IEP team considered the information that Ms. Rosen had provided, as well as other information, including, but not

limited to, that contained in Dr. Pasol's March 15, 2010 letter.²³

58. By letter dated September 3, 2010, the Parents advised Ms. Woods that they "would like to request an independent educational evaluation of [REDACTED]" because they "believe[d] the psychological test dated 4/20/10 [was] incorrect and not an accurate picture of [REDACTED]." Nineteen days later, Ms. Starke, on behalf of the School Board, initiated the instant due process proceeding by filing the Hearing Request with DOAH.

CONCLUSIONS OF LAW

59. District school boards are required by the "Florida K-20 Education Code"²⁴ to "[p]rovide 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) and 1003.57, Fla. Stat.

60. "Exceptional students," as that term is used in the "Florida K-20 Education Code," are students who have "been determined eligible for a special program in accordance with rules of the State Board of Education. The term includes students who are gifted and students with disabilities who have an intellectual disability; autism spectrum disorder; a speech impairment; a language impairment; an orthopedic impairment; an other health impairment; traumatic brain injury; a visual impairment; an emotional or behavioral disability; or a specific

learning disability, including, but not limited to, dyslexia, dyscalculia, or developmental aphasia; students who are deaf or hard of hearing or dual sensory impaired; students who are hospitalized or homebound; children with developmental delays ages birth through 5 years, or children, ages birth through 2 years, with established conditions that are identified in State Board of Education rules pursuant to s. 1003.21(1)(e)." § 1003.01(3)(a), Fla. Stat. It is undisputed that ■ is now, and has been at all times material to the instant case, an "exceptional student," as that term is used in the "Florida K-20 Education Code."

61. An "initial evaluation" is required before a student is determined to be an "exceptional student" eligible to receive ESE. 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":

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. In circumstances where the student's medical care is provided by a physician licensed in another state, at the

discretion of the district administrator for exceptional student education, a report of a physician licensed in another state may be accepted for the purpose of evaluation and consideration of eligibility as a student with a disability. Educational evaluators not otherwise covered by a license or certificate to practice a profession in Florida shall either hold a valid Florida teacher's certificate or be employed under the provisions of Rule 6A-1.0502, **A.C.

1. Tests of intellectual functioning shall be administered and interpreted by a professional person qualified in accordance with Rule 6A-4.0311, **A.C.,^[25] or licensed under Chapter 490, **S.

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

62. Once a student has been determined to be eligible to receive ESE, the following "reevaluation requirements," set out in Florida Administrative Code Rule 6A-6.0331(7), must be met:

(a) A school district must ensure that a reevaluation of each student with a disability is conducted in accordance with Rules 6A-6.03011 through 6A-6.0361, **A.C., if the school district determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reevaluation or if the student's parent or teacher requests a reevaluation.

(b) A reevaluation may occur not more than once a year, unless the parent and the school district agree otherwise and must occur at least once every three (3) years, unless the parent and the school district agree that a reevaluation is unnecessary.

(c) Each school district must obtain informed parental consent prior to conducting any reevaluation of a student with a disability.

(d) If the parent refuses to consent to the reevaluation, the school district may, but is not required to, pursue the reevaluation by using the consent override provisions of mediation or due process. The school district does not violate its child find, evaluation or reevaluation obligations if it declines to pursue the evaluation or reevaluation.

(e) The informed parental consent for reevaluation need not be obtained if the school district can demonstrate that it made reasonable efforts to obtain such consent and the student's parent has failed to respond.

63. Florida Administrative Code Rule 6A-6.0331(5) prescribes the following "[e]valuation procedures" governing "initial evaluations" and "reevaluations," as appropriate:

(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.

64. 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, 20 U.S.C. §§ 1400 et seq., as most recently amended (IDEA),²⁶ 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, inclusive, including

children with disabilities who have been suspended or expelled from school."²⁷ 20 U.S.C. § 1412(a)(1); see also Forest Grove School Dist. v. T. A., 129 S. Ct. 2484, 2488 (2009) ("The Individuals with Disabilities Education Act (IDEA or Act), 84 Stat. 175, as amended, 20 U.S.C. § 1400 et seq., requires States receiving federal funding to make a 'free appropriate public education' (FAPE) available to all children with disabilities residing in the State."); J. ** v. Cnty. Sch. Bd. of Hanover Cnty., 516 **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' ('FAPE')."); and Shore Reg'l High Sch. Bd. of Educ. v. ** S., 381 **3d 194, 198 (3d Cir. 2004) ("All states receiving federal education funding under the IDEA must comply with federal requirements designed to provide a 'free appropriate public education' ('FAPE') for all disabled children."); c** Agency for Health Care Admin. v. Estabrook, 711 So. 2d 161, 163 (Fla. 4th DCA 1998) ("[A] state that has elected to participate [in the Medicaid program], like Florida, must comply with the federal Medicaid statutes and regulations."); Pub. Health Trust of Dade Cnty., Fla. v. Dade Cnty. Sch. Bd., 693 So. 2d 562, 564 (Fla. 3d DCA 1996) ("The State of Florida elected to participate in the Medicaid program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (1994), which provides federal funds to

states for the purpose of providing medical assistance to needy persons. However, once the State of Florida elected to participate in the Medicaid program, its medical assistance plan must comply with the federal Medicaid statutes and regulations"; held that where a Florida administrative rule is in direct conflict with federal Medicaid statutes and regulations, the federal Medicaid law governs); and State of Fla. v. Mathews, 526 **2d 319, 326 (5th Cir. 1976) ("Once a state chooses to participate in a federally funded program, it must comply with federal standards.").

65. Under 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.**R. § 300.502(b), which provides as follows:

Parent right to evaluation at public expense.^[28]

(1) A parent has the right to an independent educational evaluation^[29] 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.

66. Florida law, specifically Florida Administrative Code Rule 6A-6.03311(6) (a), (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^[30] at public expense^[31] 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.

67. 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. It has the option, when presented with such a parental request, to file a request that DOAH conduct a due process hearing on the appropriateness of the school board-conducted evaluation with which the parent disagrees³² (Due Process Hearing Option).³³

68. At any such hearing, the district school board has the burden of proving, by a preponderance of the evidence, that its evaluation is "appropriate." See Serpas v. Dist. of Columbia, Case No. 02-02227 (HHK), 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."); and Flagler Cnty. Sch. Bd. v. E. B., Case No. 97-1500E, 1998 Fla. Div. Adm. Hear. LEXIS 5893 *7 (Fla. DOAH May 6, 1998) (Final Order) ("[T]he Board carries the burden of proving by a preponderance of the evidence that its evaluation of the student was 'appropriate.'"). If the district school board is able to meet its burden and establish the appropriateness of its evaluation, it is relieved of the obligation it would otherwise have had, had it not exercised its Due Process Hearing Option,

to provide the requested independent educational evaluation at public expense.

69. To take advantage of the Due Process Hearing Option, a district school board must file its hearing request with DOAH "without unnecessary delay." If the district school board waits unnecessarily before filing its request, the request will be subject to dismissal. If the request is dismissed, the district school board will have no option but to "[e]nsure that an independent educational evaluation is provided at public expense," as the parent has requested, provided the matter has not become moot.

70. The instant due process proceeding was initiated by the School Board on September 22, 2010, pursuant to 34 C.**R. § 300.502(b)(2)(i) and Florida Administrative Code Rule 6A-6.03311(6)(g), after the Parents, by letter dated September 3, 2010, expressed their disagreement with Subject Psychological Evaluation and "request[ed] an independent educational evaluation of [REDACTED]." The School Board exercised this Due Process Hearing Option in the hopes of having the opportunity to show that the Subject Psychological Evaluation was appropriately done and to thereby free itself of the obligation it would otherwise have, under federal and state law, to provide the independent Psychological Evaluation requested by the Parents. In taking such action, the School Board acted "without

unnecessary delay" (and the Parents, in this proceeding, have not claimed otherwise). C** J. ** v. Ripon Unified Sch. Dist., Case No. 2:07-cv-02084-MCE-DAD, 2009 U.S. Dist. LEXIS 32035 **20-21 (E.D. Cal. Apr. 14, 2009) ("[E]ven after Plaintiffs' IEE request was tendered, the parties continued to discuss provision of an IEE through a series of letters. The evidence shows that the parties did not come to a final impasse in that regard until February 7, 2007, less than three weeks before the District's due process report was filed. . . . Whether or not unwarranted delay has occurred must be determined given the facts of each particular case. Given the circumstances present here, the Court cannot say that "unnecessary delay" was present so as to invalidate the underlying due process request made by the District in this matter."). Accordingly, the issue of the appropriateness of the Subject Psychological Evaluation is properly before the undersigned.

71. An evaluation's appropriateness must be measured against what the law requires, not simply what some expert or other individual may opine is desirable or best practice. See Holmes ex rel. Holmes v. Millcreek Tw** Sch. Dist., 205 **3d 583, 591 (3d Cir. 2000) ("Although the Holmeses contend that the School District's evaluation was inappropriate because of the lack of expertise of the individuals who conducted it, they base their position not on statutory or regulatory language but on

expert opinions which do not have the force of law. The Holmeses argue that the Pennsylvania Department of Education's 1995 Guidelines on the 'Education of Students with Hearing Loss' supports their position. The Holmeses are correct that these guidelines recommend the use of a psychologist fluent in sign language or in another form of communication preferred by the student, in evaluating hearing disabled students. These guidelines do not, however, establish law. As the Appeals Review Panel noted, these Guidelines suggest an optimum level of educational services and were made for purposes of advocacy. They were not binding on the School District at any time relevant to this suit.") (citation omitted).³⁴ That the evaluation has yielded results with which others (including the parents) may disagree or that are inconsistent with other available information concerning the student is not a bar to finding the evaluation to be "appropriate."³⁵ If the applicable "evaluation procedures" required by Florida law (which substantially mirror the requirements of the IDEA and its implementing regulations on the subject³⁶) have been followed, the evaluation will nonetheless be deemed "appropriate" for purposes of determining whether the district school board must provide an independent educational evaluation free-of-charge to a requesting parent. See L.S. v. Abington Sch. Dist., Case No. 06-5172, 2007 U.S. Dist. LEXIS 73047 *36, 40 (E.D. Pa. Sept. 28,

2007) ("The IDEIA [IDEA] speaks only to the reliable methodology and personnel with which the District must conduct its evaluations. . . . The parents here cannot simply argue that the evaluation was inappropriate because they disagree with its findings. The key is in the methodology. The conclusions, or lack thereof, cannot be inadequate unless the methodology is inadequate, because that is the only provision in the law.").

72. As is reflected in the Findings of Fact set forth in this Final Order, the School Board, in the instant case, met its burden of proving, by a preponderance of the evidence, that the applicable requirements imposed by state and federal law (set out above) were met in conducting the Subject Psychological Evaluation and that therefore the Subject Psychological Evaluation is "appropriate."

ORDER

In view of the foregoing, the undersigned finds that the Subject Psychological Evaluation is "appropriate," within the meaning of 34 C.**R. § 300.502(b) and Florida Administrative Code Rule 6A-6.03311(6). The Parents may obtain an independent Psychological Evaluation, but not at public expense.

DONE AND ORDERED this 11th day of January, 2011, in
Tallahassee, Leon County, Florida.

S

STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of January, 2011.

ENDNOTES

¹ Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2010).

² Joint Exhibit 1 is the transcript of the October 25, 2010, deposition of Eleanor Goldberg. Pursuant to the stipulation of the parties, it was received into evidence in lieu of Ms. Goldberg's live testimony.

³ Respondent's Exhibit 14 was offered into evidence by the School Board.

⁴ At the final hearing, the undersigned indicated that he would also receive Petitioner's Exhibit 17 and Respondent's Exhibit 2 into evidence, but only if "fully signed copies of those exhibits" were filed on or before December 10, 2010. A "fully signed cop[y]" of neither Petitioner's Exhibit 17, nor Respondent's Exhibit 2, was timely filed, however.

⁵ The parties filed their Joint Statement of Undisputed Facts on October 21, 2010.

⁶ Ms. Wilson was also [REDACTED]'s fourth grade general education teacher.

⁷ [REDACTED] has been diagnosed as having Attention Deficit Disorder.

⁸ Both Parents are teachers. [REDACTED]. teaches at the elementary school level. She has 17 years of teaching experience. [REDACTED]. is a high school art teacher, who has been teaching for 35 years. He is also an adjunct professor at Florida Atlantic University.

⁹ Ms. Antonini and Ms. Goldberg both tested [REDACTED] in October 2009 (in the first semester of [REDACTED]'s fourth grade year). Ms. Goldberg's testing yielded the following "conclusions," according to the written report she prepared:

Testing results indicate that [REDACTED] is able to orally decode words on a third grade level and accurately read a passage on a second grade level. [REDACTED] has difficulty retelling a story on a second grade level that [REDACTED] has read silently and has difficulty retelling a story that [REDACTED] has listened to. [REDACTED]'s comprehension difficulties are not unique to reading since they are evident when listening as well. [REDACTED] is able to spell one-syllable words on a second half of first grade level. [REDACTED] is able to give meanings to words on a fourth grade level. According to the Test of Silent Word Reading Fluency (TOSWRF) [REDACTED] is able to decode words on a 2.2 level. [REDACTED] is able to silently comprehend text on a fourth grade level using a cloze procedure.

The Core Reading Maze Comprehension Assessment (which Ms. Goldberg used to measure [REDACTED]'s ability to "silently comprehend text") was described elsewhere in Ms. Goldberg's report as follows:

Core Reading Maze Comprehension Assessment

This assessment measures how well students understand text that they read silently.

The maze task differs from traditional comprehension in that it is based completely on the text. After the first sentence, every seventh word in the passage is replaced with the correct word and two detractors. Students choose from among the three choices that fits best with the rest of the passage. According to results of the assessment, the student was above a Benchmark score for grades two and three. [The student] scored at the Benchmark for winter on a grade four passage.

¹⁰ This was last such evaluation conducted by the School Board.

¹¹ Prior to the September 15, 2009, meeting, Ms. Rosen had not been familiar with ■■■

¹² On her completed form (Screening Form "A"), Ms. Wilson gave ■■■ a 3 (which signified "very often" and was the worst rating possible) in the following two categories: "does not copy accurately from chalkboard/textbook" (category 41) and "has difficulty putting thoughts into words" (category 47).

¹³ The Parents had been provided at the January 25, 2010, reevaluation plan meeting with a copy of the Parent Information Form to fill out and return.

¹⁴ Although ■■■ has since advanced to the fifth grade, Ms. Wilson is still [■■■'s] "current teacher."

¹⁵ Had ■■■ been given additional time to complete this subtest, the subtest results would not have been valid.

¹⁶ It is "not uncommon" for a child who has a learning disability to do better on the Blending Words subtest than the Elision subtest.

¹⁷ On the Bender-2, 100 is average.

¹⁸ The North Area School Psychologist who evaluated ■■■ in 2008 administered only the VMI, and not the Bender, to test ■■■'s visual-motor integration ability.

¹⁹ At the time of the testing, ■■■ was just shy of ten years of age.

²⁰ In their Proposed Final Order, the Parents have urged the undersigned to find, based upon ██████'s testimony, that neither the Bender-2 nor the VMI-5 tested ██████'s ability to "copy." The undersigned, however, relying on the testimony of other witnesses more knowledgeable than ██████. about these tests (specifically, Ms. Rosen, Mr. Troche, and Corey Emert (an Occupational Therapist who, in January 2009, assessed ██████ to determine if he needed Occupational Therapy)), has rejected the Parents' invitation and found otherwise.

²¹ Ms. Starke had also been present at the January 25, 2010, reevaluation plan meeting, which (as noted above) Ms. Rosen had also attended. It was not until the May 28, 2010, IEP meeting, that Ms. Starke next had occasion to communicate with Ms. Rosen. While the Parents, at hearing, indicated that they "th[ought] [Ms. Starke] had input in [Ms. Rosen's April 20, 2010, Psychological] [R]eport," the record evidence establishes otherwise.

²² As did the IEP it replaced, ██████'s May 28, 2010, IEP provided, among other things, for ██████ to receive Occupational Therapy; for "written notes, outlines, [and] study guides" to be given to ██████; for ██████ to have "[p]referential seating"; for the teacher or other service provider to be in "[c]lose proximity when giving [████] directions or lessons"; for the "[o]ral presentation of test directions" and "test prompts" to **; for "[m]aterials on [the] bulletin board [to] be copied for [████] to keep in [████'s] personal notebook"; and for ██████ to "[w]rite in [████'s] textbook" or, alternatively, to be "provide[d] a copy of the page . . . to write on directly."

According to the May 28, 2010, IEP, ██████ has "delayed visual motor and motor planning skills as demonstrated by bottom to top letter formation and retracing of letters, which affect [████'s] ability to keep up with the writing demands of the classroom." The provision of Occupational Therapy was intended to help "improve [████'s] fine motor, visual motor and motor planning skills" sufficiently to enable ██████ to achieve the following Annual Measurable Goal: "By May 2011, when given a teacher directed activity, [████] will copy 2-3 sentences from near point with proper letter formation with faded verbal prompts 4 out of 5 trials."

²³ The IEP team discussed the recommendation made by Dr. Pasol (who was not at the IEP meeting) that ██████ be "provid[ed] visual

therapy," but the team did not make any provision for "visual therapy" in the IEP it crafted for ■. Whether the IEP team should have included "vision therapy" as a service in ■'s IEP is not an issue before the undersigned in the instant case; neither is the question of the appropriateness or completeness of Dr. Pasol's evaluation.

²⁴ Chapters 1000 through 1013, Florida Statutes, are known as the "Florida K-20 Education Code." § 1000.01(1), Fla. Stat.

²⁵ Florida Administrative Code Rule 6A-4.0311 sets forth the "Specialization Requirements for Certification" as a School Psychologist.

²⁶ "The IDEA was [most] recently amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004)," effective July 1, 2005. M. T. V. v. Dekalb Cnty. Sch. Dist., 446 **3d 1153, 1157 n.2 (11th Cir. 2006); see also Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist., 518 **3d 18, 21 n.1 (1st Cir. 2008) ("The IDEA was amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, but the relevant amendments did not take effect until July 1, 2005.").

²⁷ In section 1003.571, Florida Statutes, which took effect on July 1, 2009, the Florida Legislature has directed that:

(1) The State Board of Education shall comply with the Individuals with Disabilities Education Act (IDEA), as amended, and its implementing regulations after evaluating and determining that the IDEA, as amended, and its implementing regulations are consistent with the following principles:

(a) Ensuring that all children who have disabilities are afforded a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

- (b) Ensuring that the rights of children who have disabilities and their parents are protected; and
- (c) Assessing and ensuring the effectiveness of efforts to educate children who have disabilities.

(2) The State Board of Education shall adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this section.

²⁸ "Public expense" as that term is used in 34 C.**R. § 300.502, "means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.103." 34 C.**R. § 300.502(a)(3)(ii).

²⁹ "Independent educational evaluation," as that term is used in 34 C.**R. § 300.502, "means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.**R. § 300.502(a)(3)(i).

³⁰ "Independent educational evaluation," as that term is used in Florida Administrative Code Rule 6A-6.03311(6), "mean[s] 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." Fla. Admin. Code R. 6A-6.03311(6)(c).

³¹ "Public expense," as that term is used in Florida Administrative Code Rule 6A-6.03311(6), "mean[s] 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." Fla. Admin. Code R. 6A-6.03311(6)(d).

³² "There is no Federal requirement that a parent notify the public agency in writing or in an IEP meeting that the parent will be requesting an IEE at public expense." Letter to Anonymous, 110 LRP 52283 (OSEP January 4, 2010). A verbal request, even one made outside of an IEP meeting, is sufficient to trigger the district school board's duty to act, provided that the request adequately identifies the district school board evaluation with which the parent disagrees and conveys the parent's desire to have another evaluation done at public expense. See, e.g., Sch. Bd. of Lee Cnty. v. E. S., 561 **

Sup** 2d 1282, 1289 (M.D. Fla. 2008) ("The Court agrees with the magistrate judge that E.S.'s initial request for 'independent evaluations' was too vague to trigger any obligation concerning an IEE by the School Board.").

³³ If there has been no school board-conducted evaluation with which the parent can disagree, there can be no parental entitlement to a publicly funded independent educational evaluation. See Hiram C. v. Manteca Unified Sch. Dist., Case No. CIV. S-03-2568 WBS KJM, 2004 U.S. Dist. LEXIS 29175 *9 (E.D. Cal. Aug, 26, 2004) ("[I]n order to obtain reimbursement, the parents must disagree with an evaluation that the public agency has already 'obtained.'").

³⁴ Further supporting this view is the long-standing caselaw holding that the term "appropriate," as used in the IDEA to describe the special education and related services a district school board must provide its disabled students, does not mean optimal. E.g., C. G. v. Five Town Cmty. Sch. Dist., 513 **3d 279, 284 (1st Cir. 2008) ("At bottom, this obligation [to ensure that every disabled school-age child receives a FAPE] is an obligation to provide an adequate and appropriate education. The IDEA does not place school systems under a compulsion to afford a disabled child an ideal or an optimal education."); Lenn v. Portland Sch. Comm., 998 **2d 1083, 1086 (1st Cir. 1993) ("The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IE** Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential."); Barnett v. Fairfax Cnty. Sch. Bd., 927 **2d 146, 154 (4th Cir. 1991) ("Although we agree with plaintiffs that the Board should not make placement decisions on the basis of financial considerations alone, 'appropriate' does not mean the best possible education that a school could provide if given access to unlimited funds."); Jenkins v. Squillacote, 935 **2d 303, 305 (D.C. Cir. 1991) ("[I]f there is an 'appropriate' public school program available, i.e., one 'reasonably calculated to enable the child to receive educational benefits,' the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child,."); and Anderson

v. Dist. of Columbia, 606 ** Sup** 2d 86, 93 (D. D.C. 2009) ("Jenny Waelder Hall may well be a better environment for J. A., but DCPS has made available a free appropriate public education to this child, and, in such circumstances, DCPS cannot be required to pay for the education his parents would prefer.").

³⁵ This would be true even if the IEP team, in fashioning the student's IEP, were to rely on this "other available information" because it considered it to be more reliable than the results of the district school board's evaluation.

³⁶ See 20 U.S.C. § 1414(b)(2) and (3), and 34 C.**R. § 300.304(b) and (c), which provide as follows:

20 U.S.C. § 1414(b)

(2) Conduct of evaluation. In conducting the evaluation, the local educational agency shall--

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining--

(i) whether the child is a child with a disability; and

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of

cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Additional requirements. Each local educational agency shall ensure that--

(A) assessments and other evaluation materials used to assess a child under this section--

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;

(iii) are used for purposes for which the assessments or measures are valid and reliable;

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from one school district to another school district in the same academic year are coordinated with such

children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

34 C.** R. § 300.304(b) and (c)

(b) Conduct of evaluation. In conducting the evaluation, the public agency must--

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining--

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

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

(c) Other evaluation procedures. Each public agency must ensure that--

(1) Assessments and other evaluation materials used to assess a child under this part--

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

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

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test

purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed in all areas

related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

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)(b), Florida Statutes, 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) and Florida Administrative Code Rule 6A-6.03311(9)(w).