

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 09-2865E
)
██████████,)
)
 Respondent.)

)

FINAL ORDER

A final hearing was held in this case on October 13, 2009, before Administrative Law Judge Eleanor M. Hunter of the Division of Administrative Hearings, at video conference sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

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

For Respondent: ██████████
(Address of record)

STATEMENT OF THE ISSUE

Whether the Broward County School Board conducted an adequate and appropriate evaluation of ██████████. and, therefore, properly refused ██████████'s parents' request for an independent educational evaluation at public expense.

PRELIMINARY STATEMENT

Respondent was almost [REDACTED] [REDACTED] [REDACTED] when referred to Petitioner to determine whether Respondent was eligible to receive services and, if so, what services as Respondent transitioned from Part C to Part B of the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 et seq. On [REDACTED], [REDACTED] requested an independent educational evaluation of [REDACTED] at public expense based on [REDACTED] concern that Petitioner's evaluation of [REDACTED] did not include tests for auditory and language processing, intellectual potential and articulation. In a response, Petitioner asserted that the evaluation it conducted was appropriate and adequate. Petitioner refused the request and, on May 26, 2009, initiated a due process hearing at the Division of Administrative Hearings.

The case was assigned initially to a different administrative law judge who entered, on June 8, 2009, an Order Allowing [REDACTED]'s Mother To Appear As A Qualified Representative On Behalf of Respondent; on June 8, 2009, an Order Determining Sufficiency of Complaint (finding the complaint sufficient); a Notice of Hearing, setting the case for final hearing on July 8, 2009; and, at the request of the Petitioner, an Order that rescheduled the hearing for September 1, 2009. After Respondent filed a motion to disqualify him, that administrative law judge recused himself on July 6, 2009, and the case was transferred to the undersigned. During a telephone conference on July 8, 2009, the undersigned raised questions about

the case that the parties agreed to brief. In their responses, the parties (1) agreed that the appropriate remedy, if the Petitioner does not prevail in this proceeding, is an independent education at public expense, and not to have the Petitioner complete any omitted evaluations; but (2) disagreed whether, if Petitioner does not prevail, reimbursement must cover the expense of a comprehensive evaluation or should be limited to the expense for assessments that are not proven to have been adequate. The undersigned reserved ruling on the second issue, taking the briefs under advisement for consideration, if necessary, in this Final Order. At the request of Respondent, the final hearing was rescheduled for October 13, 2009.

At the final hearing, Petitioner presented the testimony of the following witnesses: Mary Stone, school psychologist; Maria Enlow, occupational therapist; Debbie Lipton, speech/language pathologist; Rachel Stern, speech/language pathologist; Sheri Silverman, Psy.D.; Carolina Bowman, speech/language pathologist; Michelle Roddy, exceptional student education preschool teacher; Nancy Lieberman, preschool director; and Matthew Zeis, school psychologist team leader. Petitioner's Exhibits 2-9, 13, 14, 16, 17, 19, 22-27, 30-39, 42, 43, 45-49, and 51-61 were admitted into evidence.

Respondent presented the testimony of Stephanie Schwartz and [REDACTED]. Respondent's Exhibits A, C, E, F, G, I,

M, N1-N4, N9, N12, N13, N19-N39, O, AND P were admitted into evidence.

The Transcript of the final hearing was received November 4, 2009. Proposed Final Orders were filed on December 4, 2009.

FINDINGS OF FACT

1. Respondent, [REDACTED] (Respondent or [REDACTED].) is a [REDACTED], who was born on October [REDACTED], [REDACTED]. [REDACTED] has autism spectrum disorder and has been receiving services from an early steps provider under Part C of the Individual with Disabilities Education Act (IDEA).

2. Petitioner, the Broward County School Board (Petitioner or the School Board), provided a multidisciplinary preschool assessment team to evaluate [REDACTED] for services that began on [REDACTED]'s [REDACTED] [REDACTED] when [REDACTED] transitioned to Part B of the IDEA. The team consisted of a school psychologist, an occupational therapist and a speech/language pathologist, who met with [REDACTED] and [REDACTED] for the evaluation on August 14, 2008. Prior to the meeting, the members of the team reviewed the Part C Individualized Family Support Plan (IFSP) and the Parent Information, with sections on social history and medical history, and other information from the early steps provider to determine what assessments to use in the evaluation, although that could have changed as the interactions with the child warrant.

3. The multidisciplinary team approach, with people from various disciplines sharing observations and information, is considered the "best practice" for efficiently getting integrated information about a child that is relevant to developing an appropriate Individual Education Plan (IEP). After the team met with [REDACTED] and [REDACTED] to conduct the evaluation, the team leader, the school psychologist, prepared a multidisciplinary report, incorporating sections from the reports prepared by the occupational therapist and the speech/language pathologist. The report, in part, was used to develop an IEP on September 5, 2008; an Interim IEP to develop a reevaluation plan on October 29, 2008; an Interim IEP to review the evaluation on December 18, 2008; an Interim IEP for extended school year services on March 5 and March 12, 2009; and an IEP for preschool on July 28, 2009. [REDACTED] disagreed with some of the findings in the original report that have been carried over into the IEPs. In general, [REDACTED] would like to have had higher goals set for [REDACTED] based on [REDACTED] belief that some of [REDACTED]'s abilities were underestimated by the team. For these reasons, the parents paid an independent evaluator to test [REDACTED], prepare a report and attend the IEP meeting on July 28, 2009, with [REDACTED]. [REDACTED] believes the team, which had written a draft IEP before the meeting, was inflexible about amending the content.

4. More specifically, [REDACTED] would have liked to have had the certain sentences changed for the following reasons: (1.) "[REDACTED]"

names basic colors and according to [REDACTED] [REDACTED] is beginning to identify them as well." [REDACTED]. said naming colors is the same as identifying them. (2.) "The first-then strategy is often effective in gaining and maintaining [REDACTED]'s participation as well as verbal praise and tangible reinforcers[.]" [REDACTED]. said the part about verbal praise and tangible reinforcers is accurate and, although, the therapist was working on first-then strategy but that it was not yet effective. (3.) "[*.*] descends into a tantrum . . . but is not overtly aggressive . . ." [REDACTED]. says [REDACTED] has never had a tantrum. (4.) "Reportedly, [REDACTED] is very sensitive to noises and needs to be removed from the room when the blender and mixer are in use, and [REDACTED] doesn't like the vacuum or the hair dryer." [REDACTED]. indicated that [REDACTED] is not sensitive to all of those noises, only the blender and when mommy is using the vacuum but it is ok if daddy is vacuuming. (5.) "[REDACTED] only uses about 15 words in spontaneous utterances." That is a significant under representation of nouns, verbs and descriptive concepts, according to [REDACTED]. In fact, [REDACTED] said [REDACTED] picked up a basket and said "empty" during the evaluation session. After the session, [REDACTED]. counted [REDACTED]'s spontaneous vocabulary at 105 words, and provided [REDACTED] list to [REDACTED]'s teacher. (6.) [REDACTED] "babble[s] in nonsense syllabic strings using inflection similar to adult speech [jargon]." [REDACTED] talks with no inflection, due to apraxia, and that is being addressed in therapy, according to [REDACTED], but does not "babble." (7.) "[REDACTED]'s] [REDACTED] indicated that

PECS has recently been used again." Rather than wanting [REDACTED] to continue to use PECS (communicating with picture cards) to make requests, [REDACTED]. thought they were no longer necessary because [REDACTED] could use words. (8.) "Articulation is not currently addressed due to extremely limited verbal output . . . and [REDACTED]'s] non-compliant behavior to participate with this activity." It is wrong to reach that conclusion without, at least, an attempt to test articulation, and because [REDACTED] has been cooperative with other evaluators and therapists. (9.) "[A]lthough [REDACTED]'s] beginning to express some of [REDACTED]'s] wants and needs verbally using single word utterances, many of [REDACTED]'s] vocalizations are made without clear communicative intent." [REDACTED]. disagreed, but that statement also was not changed.

5. The assessment began when [REDACTED] was greeted in a waiting area, then escorted into a play area to get comfortable, while team members took turns observing and assessing [REDACTED], getting additional information from [REDACTED]'s mother, and making notes. After that [REDACTED] was taken into another room and asked to sit at a table for more formal testing. [REDACTED] did not want to move from the play area to the assessment area, which is typical of children [REDACTED]'s age. [REDACTED] cried at first, refused to sit at the table and was allowed to stand. As suggested by [REDACTED]., [REDACTED] was calmed after being given some milk to drink. [REDACTED] also responded positively to intrinsic rewards, praise and "high fives," and the evaluation continued.

6. The school psychologist, Mary Stone, assessed cognitive and social/emotional skills by administering the Developmental Assessment of Young Children (DAYC); the Autism Behavior Checklist, with the parent's assistance; and the Childhood Autism Rating Scale (CARS), with the assistance of the other professionals.

7. The DAYC measures five cognitive developmental areas, thinking, problem solving, pre-academic, play, and social interaction skills. The DAYC also has a physical domain to assess fine and gross motor skills, and a adaptive behavior section to evaluate daily living and self-help skills.

8. The mean score on the DAYC is 100, meaning 68 percent of students score between 85 and 115. A score below 85 indicates a developmental delay. ■■■■■'s scores showed that, at 88, ■■■■■ was within an acceptable range on motor skills; at 60, social/emotional skills are significantly delayed; and, at 76, cognitive skills are developmentally delayed.

9. The CARS total score of 38 placed ■■■■■ just slightly into the wide range of severely autistic as compared to the narrow range for mildly/moderately autistic. ■■■■■'s score and functioning resulted in a classification, by Mary Stone, of moderately autistic.

10. On the Autism Behavior Checklist summary profile, ■■■■■ had the following raw scores: sensory 6, relating 14, body and object 16,

language 11, social and self help 13, and an overall score of 60 that is indicative of autism.

11. Ms. Stone observed that [REDACTED] had a sensory reaction to toys, with greater interest in their feel than their purpose, that [REDACTED]'s play was motor driven, and that [REDACTED] was aware of others but lacked interest in interacting with them.

12. The evaluation materials used during the evaluation do not discriminate based on race or culture, are appropriate for English speakers, were appropriately administered by a trained person in standard conditions for young children, tailored to [REDACTED]'s areas of need. The one exception is, that although [REDACTED]. indicated that [REDACTED] had been diagnosed with apraxia, no test for articulation of speech was administered.

13. Unless mental retardation or other significant mental impairment is suspected, intelligence quotient (IQ) tests are no longer routinely given to young children. The "best practice" is to administer developmental assessments until they are older because IQ will change with age.

14. In the evaluation by the occupational therapist, [REDACTED] was shown to have a delay in self-help skills and sensory processing difficulties. Because [REDACTED]. reported that [REDACTED] has an aversion to touching certain materials and because the occupational therapist determined that [REDACTED]'s reactions could interfere with [REDACTED]'s

education, IEP goals included having [REDACTED] manipulate playdoh, sand, rice and shaving cream.

15. With [REDACTED]., the speech/language pathologist on the multidisciplinary team, Debbie Lipton, completed a Preschool Language Scale, Fourth Edition (PLS4), to measure auditory comprehension, receptive language or, in other words, what a child understands, and expressive communication skills. Each of them filled out a Checklist of Skills. [REDACTED] **was also given an Interactive Language Sample to record what spontaneous language.,**

16. [REDACTED]'s PLS4 showed a typical profile for a child with autism, with a total language standard score of 61, well below a passing score of 85 and an average score of 100. [REDACTED]'s auditory comprehension score was 57, and the expressive communication score was 73.

17. Although, as reported by [REDACTED]'s [REDACTED], [REDACTED] had an expressive vocabulary of 60 words outside the test environment, [REDACTED] spontaneously used 15 words during the evaluation. The limited use of spontaneous language was one reason why Ms. Lipton informally, but not formally, assessed articulation or speech production. On the PLS4, [REDACTED] was asked to name objects in pictures, but did not name at least five of ten to get credit for that test. [REDACTED] was unwilling to imitate words during testing. [REDACTED]'s standard scores translated to age equivalency scores of 17 months for auditory comprehension, 22 months for expressive language, and the overall equivalent of

19 months. As a part of [REDACTED] Part C services, [REDACTED] received speech therapy and that has continued under Part B.

18. [REDACTED] was also given an Interactive Language Sample (ILS) to record what [REDACTED] was saying, or spontaneous language, while doing various things with toys, blocks and puzzles as test materials. The only vocalization recorded by Ms. Lipton on the ILS occurred while [REDACTED] was playing with [REDACTED], who said, "I'm going to" and [REDACTED] completed the sentence with "get you." [REDACTED] also said "mama," "buzz-buzz," and "no" but did not name pictures or put two to four words together.

19. [REDACTED] disagreed with the results of the PLS4 and the ILS, but there is no evidence that the assessments were not appropriate and properly administered and scored by a trained person.

20. Prior to the evaluation, the team was aware that [REDACTED] has apraxia of speech and that a test for articulation was appropriate. Based on [REDACTED]'s performance on the PLS4 and ILS, however, Ms. Lipton could not elicit 77 sounds by showing [REDACTED] 50 pictures to test articulation. Instead, the team decided to wait to do additional testing after [REDACTED] started a school program and got comfortable, based on the limited spontaneous language and because a higher level of cooperation is necessary to assess articulation.

21. Ms. Stone thought that [REDACTED] agreed with that decision and, in the report, wrote the following: "[REDACTED] is concerned about clarity of speech and would like this to be addressed once [REDACTED] is

comfortable in [redacted]'s] new environment." [redacted]. denied that [redacted] ever agreed to postpone a test for articulation citing the fact that [redacted] had informed the team of the apraxia diagnosis.

22. Rachel Stern is the speech/language pathologist who diagnosed [redacted] with developmental apraxia of speech (DAS) while providing [redacted] services under Part C of IDEA. She saw [redacted] in two weekly half-hour sessions beginning in September 2007, then later in three weekly 45-minute sessions. At first, [redacted] was communicating with gestures. In the first months, her efforts to get [redacted] to produce speech were unsuccessful.

23. After observing [redacted] and working with [redacted] over time, Ms. Stern made the diagnosis of apraxia in March 2008, as a result of having ruled out other possible causes of [redacted]'s speech difficulties. After the diagnosis, [redacted]'s IFSP was changed and [redacted]'s services increased. By the time, Ms. Stern stopped working with [redacted] in September 2008, [redacted] was spontaneously producing 30 words with [redacted], although she was aware that [redacted]. disagreed and believed [redacted] was producing 60 words spontaneously at that time. [redacted] was following a limited number of one step directions. Ms. Stern informally administered, the Goldman Fristoe Test of Articulation, Second Edition, a simple quick test to see if [redacted] was able to sit and take a test, not to measure articulation. It is her practice, like that of Ms. Lipton, to discontinue an attempt to evaluate articulation when a child has insufficient expressive language. [redacted] was able to

do 75 percent of the Goldman Fristoe, and was mostly compliant and easily redirected but, had she been giving the test formally to measure articulation, Ms. Stern would have wanted 80 to 90 percent of the test completed.

24. At the request of [REDACTED]'s parents, Dr. Sheri Silverman, a psychologist, conducted a full psychological evaluation of [REDACTED] in three sessions, June 30, July 2, and July 6, 2009, as summarized in her report dated July 15, 2009. Dr. Silverman was more comfortable with her results when she tested [REDACTED] the third time. The purpose of the report was to recommend appropriate educational goals and placement. Although [REDACTED]'s IQ would be expected to change because of how young [REDACTED] is, to get a baseline, Dr. Silverman administered an IQ test, the Wechsler Preschool and Primary Scale of Intelligence, Third Edition (WPPSI-III). She also administered the Peabody Picture Vocabulary Test, Fourth Edition (PPVT-IV); the Expressive Vocabulary Test, Second Edition (EVT-II); the Beery VMI Developmental Test of Visual Perception, Fifth Edition; the Beery VMI Developmental Test of Motor Coordination, Fifth Edition; the Beery-Buktenica Developmental Test of Visual Motor Integration, Fifth Edition; a Developmental Neuropsychological Assessment (NEPSY-II); Bracken Basic Concept Scale - Expressive; Bracken Basic Concept Scale - Receptive; the Behavior Assessment System for Children - Parent rating (BASC); and the Developmental Profile, Third Edition.

25. Dr. Silverman's testing confirmed that [REDACTED] clearly has autism, verbal and non-verbal domain delays, a good vocabulary to label or identify objects, but not to process language or respond to questions, above-average school readiness, and difficulty with visually reproducing block patterns and puzzles. She noted significant delays in [REDACTED]'s fine motor skills and visual motor integration. Dr. Silverman found [REDACTED]'s eye contact "poorly modulated" throughout the testing, which was, in her opinion, an appropriate description than team's report that "eye contact varied."

26. Dr. Silverman attended the July 28, 2009, meeting to develop [REDACTED]'s IEP, had ample opportunity to participate and to have input into goals. Unlike [REDACTED], who felt that the team already had the report written and was inflexible, Dr. Silverman remembered that goals were amended, some made more discrete as she suggested during the meeting. She suggested other minor changes that were incorporated. She recommended that [REDACTED] have the opportunity to be with typically developing peers and various options were discussed, but [REDACTED]'s placement was not changed. She agreed that the IEP was appropriate. [REDACTED] paid Dr. Silverman \$1600 for her services.

27. Once [REDACTED] received the Part B placement, Carolina Bowman, a speech/language pathologist at [REDACTED]'s school, [REDACTED] Preschool, worked with [REDACTED] to help [REDACTED] communicate wants and needs to teachers and peers. She evaluated articulation by administering the Goldman Fristoe Test of Articulation, Second Edition (GFTA) and the Kaufman

Speech Praxis Test (KSRT). She assessed [REDACTED]'s voice informally. [REDACTED] was soft-spoken, but able to raise [REDACTED]'s voice when asked to repeat, and was fluent (did not stutter). [REDACTED] ranked in the severe range in terms of speech disability. On the KSPT, [REDACTED] was in the bottom 5 percent on the initial test and the bottom 7 percent on retest.

28. [REDACTED]'s IEP was amended as a result of Ms. Bowman's evaluation. Two new goals were added: following two-step directions, and maintaining consistency of consonant and vowel production in bi-syllabic words.

29. [REDACTED]'s preschool teacher, [REDACTED] [REDACTED], assessed [REDACTED]'s progress three times during the school year. Based on the progress noted, she adjusted his "STAR" pre-academic lesson plans to improve kindergarten readiness accordingly. In a classroom with one teacher and three aides for eight children, or a one-to-two ratio, [REDACTED] improved, throughout the year, in receptive and expressive language, moved from visual and gestural prompts, to more visual, then to more verbal.

30. Mrs. R. sent Dr. Silverman's report to Ms. Roddy almost two days before the July 28, 2009, IEP meeting. Mrs. R. was concerned that a school psychologist had not approved the report for inclusion of the IEP, because the psychologist was on vacation. With

Dr. Silverman present at the meeting, however, her report and her input were considered.

31. The report was a fair assessment of █████, but only confirmed what Ms. Roddy already knew and was not useful in writing the IEP. She was already aware of █████'s above-average ability to identify colors.

32. According to Ms. Roddy, the goals in the IEP developed on September 5, 2008, in various domains, i.e., social/emotional, curriculum/instruction, independent functioning, and following five one-step directions and using two to three words to make requests were adequate. There is no evidence to the contrary.

33. Nancy Lieberman, a speech/language pathologist and the Director of █████ Preschool, participated in the IEP meeting on July 28, 2009. She considered Dr. Silverman's report as validation of the school staff's findings with regard to █████'s disabilities and needs.

34. On July 1, 7, and 9, 2009, █████ was a willing participant in testing by speech/language pathologist, Stephanie Schwartz, the director of rehabilitation and integrated services at the Child Center for Development and Behavior. █████ did have some issues with attention that caused Ms. Schwartz to repeat attempts at testing as they developed a better rapport. Her assessments over the three sessions confirmed that █████ has severe receptive and expressive

language delays and numerous articulation errors, and that it takes more than one session to test █████ adequately.

35. To help with █████'s motor planning disorder, Ms. Schwartz used strategies to increase lip strength, jaw strength and stability, tongue control, and breath support. Her language and articulation assessments were not sufficient for Ms. Schwartz to make a diagnosis of apraxia.

ULTIMATE FINDINGS OF FACT

36. The cognitive evaluation of █████ was an appropriate alternative to administering an IQ test considering █████'s age.

37. The cognitive, social/emotional and speech/language evaluations included the necessary assessments of █████'s auditory and language processing.

38. The decision to postpone an articulation test until █████ was comfortable and capable of producing more sounds was appropriate.

39. The multi-disciplinary report as written provided adequate information to incorporate in the IEPs to provide █████ with FAPE.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.57(1) and 1003.57(5), Fla. Stat.

41. The IDEA requires state and local educational agencies to provide disabled children with a "free appropriate public education" ("FAPE"). 20 U.S.C. § 1400(c).

42. Federal and state regulations promulgated pursuant to the IDEA impose extensive evaluative obligations upon school systems for the determination of FAPE for all children with disabilities. 34 C.F.R. §§ 300.17 and § 1003.57(1)(b), Fla. Stat. (2007).

43. Evaluations must be conducted using a variety of tools and assessments, but the material used must be used for the purposes for which the assessments are valid and reliable, and in accordance with the instructions provided by the producer of the assessments. 34 C.F.R. § 300.304(b)(1), (c)(1)(iii), and (c)(1)(v).

44. The rights of parents are, as set forth in the Code of Federal Regulations, in relevant part, as follows:

§ 300.502 Independent educational evaluation.

(a) General. (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational

evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this subpart--

(i) Independent educational evaluation 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; and

(ii) Public expense 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.

(b) Parent right to evaluation at public expense.

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

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

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

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

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the

parent still has the right to an independent educational evaluation, but not at public expense.

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

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

(c) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation--

(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child. (Emphasis added.)

45. In addition to federal regulations, Florida Administrative Code Rule 6A-6.0331 also provides, in relevant part:

(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. (Emphasis added).

46. As the parents of a child with a disability who disagreed with an evaluation obtained by a public agency, ██████'s

parents had the right to obtain an IEE at public expense, only if the School Board fails to demonstrate by a preponderance of the evidence that its evaluation was appropriate. 34 C.F.R. § 300.502; K.C.-N. v. Highlands County School Board, DOAH Case Nos. 02-3627E and 03-0323E (F.O. 4/4/03)).

47. The School Board demonstrated by a preponderance of the evidence that its assessment tools for were valid, reliable, appropriate for █████, and properly administered and interpreted by qualified personnel. The evaluation was comprehensive by assessing all areas of █████'s known disabilities, except apraxia of speech, which necessitated a test of articulation.

48. The School Board demonstrated by a preponderance of the evidence that it was appropriate to delay administering a standardized test for articulation to █████.

49. The parents are not entitled to an IEE at public expense. Having used a qualified independent examiner who met the School Board's criteria and followed appropriate testing procedures, the parents are entitled to have the IEE considered in the formulation of an IEP, as it was in this case.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law it is ORDERED that:

█████ is not entitled to an Independent Educational Evaluation at public expense.

DONE AND ORDERED this 8th day of February, 2010, in
Tallahassee, Leon County, Florida.

S

ELEANOR M. HUNTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of February, 2010.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 90 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 90 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(b), Florida Statutes; or
- c) only if the student is identified as "gifted", files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(b) and 120.68, Florida Statutes.