

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 10-0529E
)
 ██████████,)
)
 Respondent.)
 _____)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on April 19 and 20, 2010, at video teleconferencing sites in Miami and Tallahassee, Florida, before June C. McKinney, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary Lawson, Esquire
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For Respondent: Dr. Suzanne Diamond
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STATEMENT OF THE ISSUE

The issue is whether [REDACTED] ("Respondent") is entitled to an Independent Educational Evaluation (IEE) at public expense because the parent disagreed with the psycho-educational evaluation conducted by Dr. Angel Velez-Diaz.

PRELIMINARY STATEMENT

The parent of the Respondent requested an independent Psycho-educational Reevaluation ("reevaluation") at public expense because she disagreed with the reevaluation report prepared and implemented by Miami-Dade County School Board ("School Board" or "Petitioner"). The School Board considered the request for an independent educational evaluation at public expense and rejected it, contending that the reevaluation prepared by School Board personnel was appropriate. The School Board requested a due process hearing on February 4, 2010, and the matter was forwarded to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice, the due process hearing was held on April 19 and April 20, 2010.

At the hearing, the Petitioner presented the testimony of Carmen Arroyo, Glendina Saunders, Bari Aronson, Gail Pacheco, Dr. Angel Velez-Diaz, Jessica Valladares, and Josefina Derby. Petitioner's Exhibits 1 through 10 were offered and received into evidence. Respondent presented the testimony of Arlene

Exelbert, Gail Pacheco, Dr. Angel Velez-Diaz, Dr. Sue Buslinger-Clifford, Zenia Talavera, Will Gordillo, and Imandra Arias. Respondent's Exhibits 1 through 12 were offered and received into evidence. Respondent's proposed Exhibits 13 and 14 were offered into evidence but were rejected as a result of an objection by counsel for the School Board.

Due to the parent's unavailability when the School Board filed the due process request, the undersigned started the timeline for the 45-day order deadline on the parent's first available date, March, 9, 2010, which made the final order deadline April 23, 2010. At the conclusion of the hearing, it was estimated that the transcript of the proceedings would be filed with the Division of Administrative Hearings and available to the parties on May 4, 2010, eleven days after the end of the 45-day period within which the final order in this case was to be filed. The parties requested that they be allowed to file proposed final orders on May 6, 2010, and, at the request of the parties, the Administrative Law Judge extended the 45-day time period within which the final order was to be entered 13 days to May 19, 2010.

The two-volume Transcript of the record was not completed until May 5, 2010, due to the court reporter running into a problem preparing the Transcript. The parties stipulated and requested that the undersigned extend the final order deadline

by another four days or until May 24, 2010, to provide the parties the opportunity to submit proposed final orders by May 10, 2010. The two-volume Transcript of the record was filed with the Division of Administrative Hearings on May 11, 2010. Both parties filed timely Proposed Final Orders. The proposed findings of fact and conclusions of law filed by the parties have been considered in the preparation of the Final Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. [REDACTED] is a [REDACTED]-year-old student at an elementary school in Miami-Dade County.
2. The Respondent receives exceptional student education ("ESE") services for the exceptionalities of autism spectrum disorder and language impaired.
3. During most of the 2008-2009 school year, when [REDACTED] was in [REDACTED] grade, [REDACTED] was taught in a special education classroom with a low student-to-teacher ratio. [REDACTED] has a one-to-one paraprofessional who provides assistance with all daily activities.
4. [REDACTED] required daily specialized instruction in the areas of written language, task completion, and expressive/receptive language. Respondent also needed constant

redirection and prompting due to inability to focus or maintain attention on a specific task or object for more than a few minutes. At the time of the reevaluation, [REDACTED] listened to the one-to-one paraprofessional and followed her instructions.

5. [REDACTED] also received 60 minutes per week of occupational therapy during the time of the reevaluation.

6. On September 3, 2009, a Reevaluation Team convened and recommended that Respondent receive a formal reevaluation. Respondent's mother attended the meeting and her input was considered.

7. The Reevaluation Team recommended that a complete full evaluation be conducted with additional assessment areas being speech, language, OT evaluation, vision screening, social history and adaptive scale.

8. [REDACTED] Informed Notice of Reevaluation Review and/or Consent for Reevaluation stated that a formal assessment of the following areas be completed: "Psycho-Educational: To assess intellectual academic, perceptual, behavioral, social or language skills" in addition to developmental, vision, speech, language, social, and motor/physical areas.

9. With the informed consent of Respondent's mother, a psychologist in the Autism Support Department of Miami-Dade County Public Schools, Dr. Velez-Diaz, conducted the

reevaluation of Respondent on or about November 3, 2009, and December 8, 2009.

10. Dr. Velez-Diaz is qualified by education and experience to conduct reevaluations of children with autism.

11. On or about November 3, 2009, Dr. Velez-Diaz visited Auburndale Elementary and attempted to take [REDACTED] to the testing room. Respondent was quite agitated, screamed a lot and failed to attend to the test items. [REDACTED] also made little eye contact even though Dr. Velez-Diaz spoke in both English and Spanish; a sign language interpreter was there as well. After conferring with Respondent's teacher, it was determined that Respondent was upset about missing art class. So, Dr. Velez-Diaz sent [REDACTED] to art class and decided to try the test again later.

12. Dr. Velez-Diaz waited for [REDACTED] to return to class and observed [REDACTED] upon the return. Respondent was calmer upon returning to class. However, [REDACTED] still would not orient with Dr. Velez-Diaz when the doctor again greeted Respondent. So Dr Velez-Diaz decided to perform an in-class observation of [REDACTED]

13. Dr. Velez-Diaz observed the following: [REDACTED] did not interact with the other children; [REDACTED] did follow some of the teacher's instructions, such as putting a name card in the "circle of friends"; [REDACTED] received help from a one-to-one assistant to help with classroom tasks; [REDACTED] matched the days

of week on the board; [REDACTED] got up and did what the teacher asked, such as touching the alphabets in order with the ABC song and touching the numbers in order with a musical prompt.

14. During the observation, Dr. Velez-Diaz attempted to test [REDACTED] again with a one-to-one assistant, but [REDACTED] ignored Dr. Velez-Diaz. Dr. Velez-Diaz was not able to determine Respondent's choices when he asked the student to point to items. After a while, [REDACTED] started screaming again.

15. Dr. Velez-Diaz ended his interaction with Respondent and decided that he would contact the mother to get her to attend and assist Respondent with the next test.

16. Dr. Velez-Diaz attempted to contact the mother many times to get her to come to the next evaluation. However, she did not respond.

17. On or about December 8, 2009, Dr. Velez-Diaz attempted to test [REDACTED] again with the assistance of Ms. Jessica Valladares, a sign language interpreter, and Respondent's one-to-one paraprofessional, Ms. Glendina Saunders.

18. At the December reevaluation, Respondent was calmer than before but lacked attention to what was going on. Respondent ignored the sign-language interpreter and Dr. Velez-Diaz's attempts to get [REDACTED] to pay attention. [REDACTED] was off task, not focused, fidgeted a lot, and ultimately became

frustrated. Dr. Velez-Diaz's interactions with Respondent caused [REDACTED] to cover his ears and become upset.

19. Dr. Velez-Diaz got Respondent to perform only one test consistently during the reevaluation. [REDACTED] performed the developmental test of visual motor integration test with consistency during the reevaluation.

20. [REDACTED] would not perform tasks that previously had been accomplished such as writing [REDACTED] name. Instead, when [REDACTED] was given the writing assignment to write [REDACTED]'s name, [REDACTED] threw a tantrum and scribbled.

21. During the reevaluation, Dr. Velez-Diaz was never able to establish a rapport with [REDACTED] Respondent's uncooperative behaviors prevented Dr. Velez-Diaz from completely assessing [REDACTED]

22. Dr. Velez-Diaz attempted but was unable to do the K-Seals assessment, which tests language and math, vocabulary and math, language and math.

23. Dr. Velez-Diaz also attempted but was unable to do Peabody Picture Vocabulary Test during Respondent's reevaluation.

24. Dr. Velez-Diaz testified that, "I at least attempted to use a variety of methods."

25. Dr. Velez-Diaz determined that it was extremely difficult to get much out of [REDACTED] and stopped the formal

testing. Instead, Dr. Velez-Diaz decided to present [REDACTED]'s behaviors without formal numbers for the reevaluation in order to provide some guidance to the individuals who work with Respondent.

26. Dr. Velez-Diaz's goal was to provide the behaviors so there would be an idea of [REDACTED]'s behaviors that needed work, behaviors that needed improvement, and behaviors that needed specific focus

27. He testified, "So even though you perhaps are not going getting numbers, exact numbers, you're getting information that is useful to the teachers."

28. Dr. Velez-Diaz's observation of Respondent's behavior led him to conclude that Respondent had autistic behaviors that would fall in the Gilliam Autism Rating Scale-Second, Edition. However, he chose not to re-diagnose Respondent regarding autism because he didn't believe that autism was a question.

Dr. Velez-Diaz concluded that many of [REDACTED]'s behaviors were consistent with what was found in an evaluation completed at Miami Children's Hospital in 2002.

28. When finalizing his Reevaluation Report, Dr. Velez-Diaz utilized the Scale of Independent Behavior-Revised test performed by social worker Georgette M. Collins and made recommendations based on his interpretations of the various reports provided to him included in [REDACTED]'s file.

29. Dr. Velez-Diaz concluded that [REDACTED] "failed to orient socially to me." His reevaluation report stated the test results as:

Even though [Respondent] at least attempted to copy the VMI designs, [REDACTED] evidenced a limited degree of coordination between . . . visual perception and finger-hand movements. [REDACTED] was able to copy lines, although not straightly. More complex designs, such as crossing lines, squares, or triangles, proved to be quite difficult . . .

I tried to get a measure of [REDACTED]'s receptive verbal language by means of the PPVT, but [the student] did not cooperate. Testing of [REDACTED]'s intellectual skills and academic achievement levels proved to be unfeasible at this time.

30. At the January 28, 2010, IEP meeting, the reevaluation conducted by Dr. Velez-Diaz was rejected by the mother on the basis that the assessment was invalid. The mother requested an independent educational evaluation at public expense.

31. Petitioner refused the request and, on February 4, 2010, initiated a due process hearing.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to §§ 120.57(1) and 1003.57(1)(b), Fla. Stats. (2009), and Fla. Admin. Code Rule 6A-6.03311(9)(u).

33. 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).

34. 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.

35. 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).

36. 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.)

37. In addition to federal regulations, Florida Administrative Code Rule 6A-6.0331(5) 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).

38. As the parent of a child with a disability who disagreed with an evaluation obtained by a public agency,

██████'s mother has the right to obtain an IEE at public expense, but 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)).

39. In this matter, the School Board did not meet its burden to demonstrate that its reevaluation was appropriate. The record shows that ██████ was capable of being tested. ██████ followed both the teacher and a one-to-one paraprofessional's instructions by staying on task and focusing. ██████ pointed to both numbers and letters when asked and participated in the circle of friends. However, during the reevaluation, Dr. Velez-Diaz failed to orient with ██████ and therefore, he was not able to build a rapport to properly test ██████

40. Subsequently, ██████'s reevaluation failed to satisfy the evaluation procedures pursuant to Florida Administrative Code Rule 6A-6.0031(5) since the reevaluation was incomplete. Dr. Velez-Diaz failed to test ██████ in numerous areas including receptive verbal language, intellectual skills, and academic achievement levels. Also, the reevaluation failed to assess all areas of ██████'s known disabilities. Furthermore, no evidence was presented that the reevaluation was tailored to ██████'s

needs. Therefore, the School Board must provide [REDACTED] an IEE at public expense.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the Psycho-educational Reevaluation completed by the Miami-Dade County School Board and finalized on December 8, 2009, is not appropriate, and that the parents of the Respondent are entitled to an independent Psycho-educational Reevaluation at public expense.

DONE AND ORDERED this 24th day of May, 2010, in Tallahassee, Leon County, Florida.

S

JUNE C. MCKINNEY
Administrative Law Judge
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Filed with the Clerk of the
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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.