

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,            )  
  )  
      Petitioner,                            )  
  )  
vs.    )     Case No. 10-1496E  
  )  
██████████,                                 )  
  )  
      Respondent.                         )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on April 15, 2010, in Fort Lauderdale, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: ██████████, parent, pro se  
(Address of record)

STATEMENT OF THE ISSUE

Whether the Functional Behavioral Assessment conducted by personnel of the Broward County School Board is adequate.

PRELIMINARY STATEMENT

On March 1, 2010, the parents of the Respondent requested an independent Functional Behavioral Assessment at public

expense because they disagreed with the Functional Behavioral Assessment/Positive Behavior Intervention Plan prepared and implemented by School Board personnel. The Broward County School Board considered the request for an independent educational evaluation at public expense and rejected it, contending that the Functional Behavioral Assessment prepared by School Board personnel was appropriate. The School Board requested a due process hearing on March 18, 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 15, 2010.

At the hearing, the parties presented the testimony of Kimberly Gracia, Lindsey Wahlbrink, Amy Cohen, Sally Nardi, Sandra Kayyali, Jull Davis, Ruth Gober, Lisa Taormina, and the Respondent's parent. Petitioner's Exhibits 1, 2, 7, 16, 20, 22, 24, 25, 27, and 32 were offered and received into evidence. Respondent's Exhibits 1, 6, and 9 were offered and received into evidence; Respondent's proposed exhibit 7 was offered into evidence but was rejected as a result of an objection by counsel for the School Board. The Respondent proffered the exhibit, and it will be included in the record as a proffer.

The two-volume transcript of the record was filed with the Division of Administrative Hearings on April 30, 2010. It was estimated at the conclusion of the hearing that the transcript

of the proceedings would be filed with the Division of Administrative Hearings and available to the parties on May 3, 2010, 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 5, 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 from May 3, 2010, to May 7, 2010. 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. The Respondent is a [REDACTED]-grade student in an elementary school in the Broward County School District, where the Respondent also attended pre-kindergarten, kindergarten, and first grade.

2. The Respondent receives exceptional student education ("ESE") services for the exceptionalities of autism spectrum disorder and language impaired. The Respondent also receives occupational therapy.

3. During most of the 2008-2009 school year, when the Respondent was in [REDACTED] grade, the Respondent was taught in a

self-contained ESE cluster classroom. There were six students and three adults in the classroom, including one teacher and two paraprofessionals. The Respondent also participated with students in the general education program in elective courses, such as art, music, library, and computer classes, and in physical education/recess. The Respondent was described as a very compliant student who rarely displayed any defiant behavior, and the Respondent was making progress in achieving the goals set forth in the Individualized Educational Program ("IEP").

4. A school psychologist employed by the School Board completed a psychological evaluation of the Respondent and prepared a report of the evaluation dated February 3, 2009. The purpose of the evaluation was to assess the Respondent's academic achievement. The report, together with data collected by the Respondent's teachers, indicated that the Respondent was working close to grade level at the time.

5. The Respondent's IEP team met in February 2009 to consider, among other things, the results of the report of the psychological evaluation and of teacher observations. A second meeting of the IEP team was held on March 6, 2009, and the Respondent's IEP was finalized. The IEP called for the Respondent to begin a transition from the ESE cluster classroom

to a general education classroom where ■■■ could access the general education curriculum.

6. On March 7, 2009, the Respondent's schedule was changed to place the Respondent in the ESE cluster classroom for one-half day and in a general education classroom for one-half day. On May 1, 2009, the Respondent was placed in the general education classroom for the entire school day, except for the periods in which ■■■ received occupational and speech therapy. There were approximately 20 students in the general education classroom, with one teacher assigned to the class and a paraprofessional assigned to assist the Respondent throughout the school day.

7. When the Respondent began the transition to the general education classroom in March 2009, an inclusion specialist employed by the School Board was brought in at the parent's request to assist the Respondent with the transition from the cluster classroom. The inclusion specialist, the school's autism cluster coach, who is certified in ESE and works exclusively with children receiving ESE services under the autism exceptionality, and the CORE behavior team developed several strategies and interventions for use by the general education teacher and the paraprofessional to assist the Respondent in making the transition to the general education classroom. The Respondent's teacher and the paraprofessional

assigned to the Respondent were trained in the strategies and interventions and implemented them in the general education classroom during the spring of 2009.

8. The strategies and interventions developed to assist the Respondent in the transition to the general education classroom were carried over to the 2009-2010 school year. Although the strategies and interventions were implemented by the Respondent's [REDACTED]-grade teacher and the paraprofessional, the Respondent's behavior in the general education classroom became a cause for concern.

9. The behaviors exhibited by the Respondent included getting up from the desk, walking around the classroom, calling out, being distractible, requiring multiple prompts to stay on task, and refusing to perform assigned tasks. The Respondent's second-grade teacher and paraprofessional regularly consulted with other school personnel about ways to modify the strategies and interventions as the Respondent's behavior changed in response to the strategies and interventions, but the Respondent's behavior in the general education classroom continued to deteriorate.

10. In August 2009, the school personnel began collecting data on the Respondent's behavior, which, at the time, they considered primarily off-task behavior. Data was collected by the school's autism cluster coach, the Respondent's [REDACTED]-grade

general education teacher, the Respondent's paraprofessional, and a behavior specialist employed by the School Board at the regional level.

11. The autism cluster coach and the behavior specialist recorded narratives of their observations of the Respondent's behavior in the general education classroom. The Respondent's teacher and paraprofessional prepared charts recording the frequency and type of prompts the Respondent required to keep the Respondent on-task during activities such as morning work, reading group, journal, class work, writing, mathematics, social studies, special classes; projects, reading by the teacher, and pack-up for dismissal. The type of prompt used, whether it was a physical prompt, a verbal prompt, or a gestural prompt, was recorded on the charts, together with marks indicating whether the Respondent responded to the prompts. The teacher and paraprofessional also included written observations of the Respondent's behavior and responses in the classroom during the school day. The Respondent's paraprofessional also kept scatter plots, on which the paraprofessional recorded the time and activity and the number of times the Respondent exhibited particular behaviors.

12. Also during the fall of 2009, the behavior specialist conducted conferences with the Respondent's parent and school personnel to discuss the Respondent's progress in the general

education classroom and the concerns regarding the Respondent's behavior. During these conferences, the behavior specialist received input from the Respondent's parent about the Respondent's life outside of school.

13. In October 2009, school personnel made the decision to conduct a formal Functional Behavioral Assessment of the Respondent. Several School Board employees, including the Respondent's [REDACTED] grade teacher, the ESE specialist at the elementary school, the behavior specialist, and the school's autism cluster coach met on October 19, 2009, to begin the process of preparing the Functional Behavioral Assessment.

14. The purpose of a Functional Behavioral Assessment is to isolate a target behavior and to develop a hypothesis regarding the function of the target behavior. A target behavior is one that interferes with a student's ability to progress in the curriculum and to achieve the student's IEP goals. Once the target behavior is identified and the hypothesis developed, a Positive Behavior Intervention Plan can be prepared to address the target behavior with strategies and interventions, if necessary, or the target behavior can be addressed using a more informal approach.

15. A Functional Behavioral Assessment is based on information collected over an extended period of time relating to a student's behavior in school and other settings. The

information includes teacher observations; the observations of ESE specialists; interviews with persons involved in the student's school activities; information gathered from the student's parents; and data collected in the classroom regarding antecedent/behavior/consequence, the magnitude of behavior, the frequency of the behavior, the duration of behavior, the time of day the behavior occurs, and the activity in which the student is engaging or supposed to engage when the behavior is exhibited.

16. The Functional Behavioral Assessment developed for the Respondent included a number of items. First, the team stated the rationale for conducting the Functional Behavioral Assessment, which focused mainly on the failure of consistently implemented behavior management strategies to have a positive effect on the Respondent's behavior difficulties. A major concern was that, because of the Respondent's behavior in avoiding tasks, [REDACTED] was unable to participate in class activities and benefit from the curriculum.

17. The Functional Behavioral Assessment team prepared a profile of the Respondent in which the Respondent's academic and social strengths were noted, as well as the academic, social, and behavioral limitations that had been observed. The limitations included the Respondent's lack of attention; non-compliance and problems taking direction or assistance from

adults; need for multiple prompts for most tasks; refusal to face inward during reading group; refusal to work with the paraprofessional; and difficulty starting, continuing with, and completing a task.

18. The Functional Behavioral Assessment team identified the Respondent's target behavior as defiance towards adults, which the Respondent exhibited by saying "no" loudly to prompts by an adult and by refusing to respond to directives given by adults. Defiance was not the only behavior that the Respondent was exhibiting, but the team felt that it was the most prominent behavior based on the data that had been gathered.

19. In preparing the Functional Behavioral Assessment, the team reviewed the Respondent's IEP and the results of a reading evaluation and mathematics assessment to determine the Respondent's level of functioning in these areas. It also reviewed the data and observation reports that had been compiled since the beginning of the 2009-2010 school year to assess the success or failure of the various strategies and interventions that had been implemented; anecdotal notes prepared by the teacher and by the Respondent's parent; the results of the psychological evaluation that had been completed in January 2009; input received from the Respondent's parent during the IEP meetings in February and March 2009 and during conferences with school personnel during the fall of 2009;

information obtained in an interview with the Respondent's general education teacher; and the results of the direct assessments of the Respondent's behavior, including scatter plots, behavior charting, and frequency data, that had been compiled by the Respondent's general education teacher and paraprofessional; and on the results of the observations of the Respondent in the classroom by the school's autism cluster coach and by the behavior specialist.

20. Based on all of the information gathered and reviewed in preparation for completing the Functional Behavioral Assessment, the team concluded that, during the time for which data had been collected, the Respondent exhibited two patterns of behavior, defiant behavior and task avoidance, which the team described in the Summary (Hypothesis) Statements section of the Functional Behavioral Assessment as follows:

When [Respondent] is given a directive to a non-preferred task or anticipates doing a non-preferred task[,] [Respondent] will in a defiant manner (say "no", say "get off me", push hand away, stick out [] tongue) [to] [a]void following classroom activity/directive

When given an individual directive[,] ignore the directive, verbally defy the adult ("no"), push the adult away [to] [a]void doing the activity or following the directive

21. The Functional Behavioral Assessment team recommended that a Positive Behavior Intervention Plan be developed to address the Respondent's target behavior of defiance.

22. The team met on November 19, 2009, on November 23, 2009, and again on December 2, 2009, to prepare, review, and finalize the Functional Behavioral Assessment and the Positive Behavior Intervention Plan. The Respondent's parent attended the December 2, 2009, meeting, at which the Respondent's IEP was also updated to include the new information that had been gathered and to add a behavioral goal for the Respondent.

23. School personnel continue to collect and review data on the Respondent's behavior to determine if the strategies and interventions in the Positive Behavior Intervention Plan developed from the Functional Behavioral Assessment are working to correct the target behavior. Usually, data is collected for six weeks after a Positive Behavior Intervention Plan is implemented before a decision is made to review and update the Functional Behavioral Assessment. In the Respondent's case, the data collected subsequent to the Christmas break ending the first part of January 2010, show that the Respondent's target behavior is not improving. School Board personnel have, therefore, decided that the Respondent's Functional Behavioral Assessment needs to be reviewed and updated, based on the more recent data.

24. The decision to review and update the Functional Behavioral Assessment does not mean that the Functional Behavioral Assessment finalized on December 2, 2009, was not appropriate because a Functional Behavioral Assessment is a fluid instrument which is subject to periodic review if indicated by newly-collected data.

#### Summary

25. The evidence presented by the School Board was sufficient to establish that the Functional Behavioral Assessment prepared during the fall of 2009 and finalized on December 2, 2009, was appropriate. In evaluating the appropriateness of the Respondent's Functional Behavioral Assessment, it is important to recognize that the purpose of the Functional Behavioral Assessment was limited to identifying the Respondent's target behavior and developing a hypothesis regarding the function of the behavior so that a Positive Behavior Intervention Plan could be developed that would address the behaviors that were interfering with the Respondent's ability to access the curriculum in the general education classroom and to achieve the goals set out in the Respondent's IEP.

26. The Respondent's general education teacher and the paraprofessional assigned to the Respondent were trained in the collection of data related to the various aspects of the

Respondent's behavior that would be used in preparing the Functional Behavioral Assessment. The School Board personnel who conducted observations of the Respondent in the classroom were trained ESE behavior specialists or were specifically trained in behavior analysis. The team leader who coordinated the preparation of the Functional Behavioral Assessment was the autism cluster coach at the elementary school and was a CORE behavior team member who was specifically trained in the preparation of Functional Behavioral Assessments.

27. Several different instruments were used to collect data about the Respondent's behavior, including scatter plots, data relating to the frequency and magnitude of the Respondent's behavior, and direct observations, and these instruments are normally used in the development of Functional Behavioral Assessments. Input from the Respondent's parent was considered by the team, and the team reviewed all of the data collected related to the Respondent's behavior in the general education classroom and other records related to the Respondent's academic, social, and emotional progress as part of the process of preparing the Functional Behavioral Assessment.

#### CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 1003.57(1)(b) and

120.57(1), Florida Statutes (2009), and Florida Administrative Code Rule 6A-6.03311(9)(u).

29. Florida Administrative Code Rule 6A-6.03311(7) provides in pertinent part:

(7) Independent educational evaluation.

(a) The parents of a child with a disability have the right to obtain an independent educational evaluation for their child and be provided upon request for an independent educational evaluation information about where an independent educational evaluation may be obtained and of the qualifications of the evaluation specialist in accordance with paragraph (4)(a) [now paragraph (3)(c)] of Rule 6A-6.0331, F.A.C.

(b) Independent educational evaluation is defined to mean an evaluation conducted by a qualified evaluation specialist as prescribed in paragraph (4)(a) [now paragraph (3)(c)] of Rule 6A-6.0331, F.A.C., who is not an employee of the district school board.

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

(d) Whenever an independent educational evaluation is conducted, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the evaluation specialist, shall be the same as the criteria prescribed by paragraph (4)(a) [now paragraphs (3)(c) and (5)] of Rule 6A-6.0331, F.A.C., for use by the school district when it initiates an evaluation to the extent that those criteria

are consistent with the parent's right to an independent educational evaluation.

(e) The school district may not impose conditions or timelines for obtaining an independent educational evaluation at public expense other than those criteria described in paragraph (7)(d) of this rule.

(f) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district.

(g) If a parent requests an independent educational evaluation at public expense, the school district must, without unnecessary delay either:

1. Ensure that an independent educational evaluation is provided at public expense; or

2. Initiate a hearing under subsection (11) of 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 independent educational evaluation obtained by the parent will be at the parent's 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 as described in subsection (11) of this rule.

(i) Evaluations obtained at private expense. If the parent obtains an independent educational evaluation at private expense:

1. The school district shall consider the results of such evaluation in any decision regarding the student if it meets the appropriate criteria described in paragraph (7)(d) of this rule; and

2. The results of such evaluation may be presented as evidence at any hearing authorized under subsection (11) of this rule.

(j) If an administrative law judge requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

See also 34 C.F.R. § 300.502(b).

30. The Respondent's parent requested that the School Board provide an independent Functional Behavioral Assessment of the Respondent at public expense. A Functional Behavioral Assessment is defined Florida Administrative Code Rule 6A-6.3411(1)(q) as follows:

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

31. The School Board rejected the request of the Respondent's parents and, in accordance with the requirements of Florida Administrative Code Rule 6A-6.03311(7)(g)2., filed a request for a due process hearing to determine if the Functional Behavioral Assessment completed by School Board personnel was appropriate. See also 34 C.F.R. § 300.502(b)(2). The School Board has the burden of proving by a preponderance of the evidence that the Functional Behavioral Assessment was appropriate. See Schaffer v. Weast, 546 U.S. 49 (2005); Fla. Admin. Code R. 6A-6.03311(7)(g)2.; 34 C.F.R. § 300.502(b)(2)(i).

32. Florida Administrative Code Rule 6A-6.0331(5) provides as follows:

(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.

See also 20 U.S.C. § 1414(b)(2) and (3)(2004); 34 C.F.R.

§ 300.304.

33. Based on the findings of fact herein, the School Board has established that it complied with the criteria set forth in Florida Administrative Code Rule 6A-6-0331(5) in preparing the Functional Behavioral Assessment of the Respondent. The School Board has, therefore, satisfied its burden of proving by a preponderance of the evidence that the Functional Behavioral Assessment of the Respondent finalized on December 2, 2009, was appropriate.

34. The Respondent's parents may obtain a Functional Behavioral Assessment of the Respondent at their expense, and, if it satisfies the criteria in Florida Administrative Code Rule 6A-6.03311(7)(d), the School Board must consider the results of the Functional Behavioral Assessment in making any decision regarding the Respondent.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Functional Behavioral Assessment completed by the Broward County School Board and finalized on December 2, 2009, is appropriate and that the parents of the Respondent are not entitled to an independent Functional Behavioral Assessment at public expense.

DONE AND ORDERED this 7th day of May, 2010, in Tallahassee, Leon County, Florida.

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PATRICIA M. HART  
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Filed with the Clerk of the  
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this 7th day of May, 2010.

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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 (2009), 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) of the Individuals with Disabilities Education Act, and Florida Administrative Code Rule 6A-6.03311(9)(w).