

PRELIMINARY STATEMENT

On September 30, 2008, the Petitioner filed a request for a due process hearing with the Division of Administrative Hearings related to the Petitioner's denial of a request from the Respondent's mother to fund an Independent Educational Evaluation (IEE) for the Respondent.

A Case Management Order was issued on September 30, 2008, setting forth various deadlines related to the case. Pursuant to Florida Administrative Code Rule 6A-6.003311(11)(c)2., a telephonic pre-hearing conference was conducted on October 13, 2008, at which time the proposed date of the due process hearing was identified in the event that efforts to resolve the dispute were unsuccessful.

Ultimately, resolution efforts failed, and the hearing was scheduled on the date identified during the pre-hearing conference. The hearing date and location were thereafter re-scheduled at the request of the parties.

At the hearing, the Petitioner presented the testimony of two witnesses and had two exhibits admitted into evidence. The Respondent presented the testimony of one witness and had one exhibit admitted into evidence. At the conclusion of the hearing, the parties established a deadline for submission of proposed final orders and stipulated to a specific extension of

the 45-day final order deadline to accommodate the filing of a transcript and the proposed orders.

The Transcript of the hearing was filed on November 25, 2008. The Petitioner's proposed final order was filed on December 8, 2008. The Respondent's Proposed Final Order was filed on December 9, 2008. Both proposed final orders have been considered in the Preparation of this Final Order.

FINDINGS OF FACT

1. ■■■ is a student with a disability.
2. On March 25, 2008, Leah Marchewka, a school psychologist employed by the Petitioner performed a psycho-educational evaluation of the Respondent.
3. The uncontroverted evidence establishes that Ms. Marchewka has the appropriate education, training, and experience to meet all relevant state requirements and commonly conducts psycho-educational assessments and evaluations of students in Sarasota County Schools.
4. The purpose of the evaluation was to collect information about ■■■ in order to provide recommendations to the group of school personnel charged with creating an Individual Education Plan (IEP) for the Respondent. The performance of evaluations and use of such evaluations in the creation of IEPs is a routine practice.

5. The assessment included administration of standard tests including: the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), and the Woodcock-Johnson cognitive ability test, as well as various other visual, motor skill, social, and behavioral assessment tools.

6. The uncontroverted evidence establishes that Ms. Marchewka used the evaluative tests to collect the information as specified by school board policy and routinely used by school psychologists to perform such tasks. There is no evidence that the psycho-educational evaluation performed was inadequate, inappropriately administered, or otherwise contrary to standard practice.

7. Ms. Marchewka prepared a written report of the evaluation that included recommendations based upon her review of the various assessment tests.

8. The Respondent's mother disagreed with information and statements within the narrative set forth in the school psychologist's written report.

9. On or about September 10, 2008, the Respondent's mother requested that the Respondent provide an IEE at the Petitioner's expense. The Petitioner denied the request on September 25, 2008.

10. The Respondent's mother noted that the evaluation report included an erroneous historical reference indicating

that the Respondent received individual therapeutic services at the Child Development Center in 2000. There is no evidence that the apparently erroneous information had any impact on Ms. Marchewka's recommendations to the IEP team.

11. The Respondent's mother questioned the Respondent's Intelligence Quotient (IQ) score set forth within the report and asserted that the score did not correlate to previous IQ scores.

12. There are two "Full Scale IQ" scores reported by Ms. Marchewka's report. On page 4, Ms. Marchewka reports that the Respondent has a Full Scale IQ of 86 and a "General Ability Index" (GAI) score of 98. On page 10, Ms. Marchewka reports the Full Scale IQ as 98.

13. At the hearing, Ms. Marchewka testified that the page 10 reference was erroneous and that the identification for the reported score should have read "GAI" rather than "Full Scale IQ."

14. The uncontroverted evidence establishes that despite the erroneous reporting of the Respondent's IQ on page 10 of the report, Ms. Marchewka relied upon the GAI score in formulating her recommendations because she considered it a more accurate reflection of ■■■ true intellectual abilities.

15. As to the Full Scale IQ score of 86, there is no evidence that the numerical score reported was not based upon the result reported by the WISC-IV test. Although the

Respondent's mother disagreed with the score, there was no credible evidence presented to suggest that the score was incorrect.

16. The Respondent's mother observed that for several elements reported from the "Behavioral Assessment Scale for Children-Self Report Rating Form" (BASC-SRP), Ms. Marchewka's written narrative erroneously reported "T-Score" results in a manner contrary to the scoring key included within the evaluation.

17. The school psychologist's written report contains the following statement:

To assess the student's emotions and self-perceptions in the school setting, the Behavior Assessment Scale for Children-Self Reporting Rating Form (BASC-SRP) was completed by [Respondent] and revealed the following Clinically Significant behaviors: sensation seeking and hyperactivity. The following behaviors were reported to be in the low range: locus of control, social stress, anxiety, depression, sense of inadequacy, relations with parent; and self esteem.

18. Based on the scoring key contained within the evaluation, the Respondent's scores for social stress, depression, and sense of inadequacy are within the average range, not within the low range.

19. At the hearing, the school psychologist asserted that the cited results were in the lower end of the average ranges

and that they are but one element factored into her overall interpretation of a student's abilities upon which she makes recommendations to the IEP team.

20. She also testified that she reviews all of the information obtained during the evaluation in making her recommendations and that she does not rely solely on information from only one of the evaluative tests.

21. There is no evidence that Ms. Marchewka's erroneous mischaracterization of scores within the narrative of the written report altered her recommendations to the IEP team or that such recommendations were erroneous or inappropriate.

22. The uncontroverted testimony of Michael Santagata, a member of the Respondent's IEP team and an emotional-behavioral disability specialist for Sarasota County schools, was that the psycho-educational evaluation provided adequate information for the development of the Respondent's IEP.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 1003.57(1)(e), Fla. Stat. (2008).

24. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, et seq., provides the right of all disabled children to a free appropriate public education.

25. The right of the parent of a child with a disability to request and/or obtain an independent educational evaluation is set forth at 34 C.F.R. Section 300.502, which provides in relevant part as follows:

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.

26. In accordance with the federal rules, the right of the parent of a child with a disability to request and/or obtain an independent educational evaluation is codified at Florida Administrative Code Rule 6A-6.03311(6), which provides as follows:

Independent educational evaluations.

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

(b) The parent of a student with a disability has the right to be provided, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained and of the school district criteria applicable to independent educational evaluations.

(c) For purposes of this section, independent educational evaluation is defined to mean 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.

(d) 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.

(e) 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 used 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.

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

(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.

(j) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with the school district an evaluation obtained at private expense:

1. The school district shall consider the results of such evaluation in any decision regarding the provision of FAPE to the student, if it meets appropriate district criteria described in this rule; and

2. The results of such evaluation may be presented by any party as evidence at any due process hearing regarding that student.

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

27. The sole issue in this case is whether the evaluation done by the Petitioner was appropriate. The Petitioner has the burden of establishing the appropriateness of the evaluation by a preponderance of the evidence. Dravo Basic Materials Co., Inc. v. Department of Transportation, 602 So. 2d 632 (Fla. 2d DCA 1992); Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981). A "preponderance" of the evidence means the greater weight of the evidence. See Fireman's Fund Indemnity Co. v. Perry, 5 So. 2d 862 (Fla. 1942). The Petitioner has met the burden.

28. Federal requirements for evaluation of a student with a disability are set forth at 34 C.F.R. Section 300.304, which provides as follows:

§ 300.304 Evaluation procedures.

(a) Notice. The public agency must provide notice to the parents of a child with a disability, in accordance with § 300.503, that describes any evaluation procedures the agency proposes to conduct.

(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.

29. In accordance with the federal regulations, the state requirements for evaluation of a student with a disability are set forth at Florida Administrative Code Rule 6A-6.0331(5), which provides as follows:

Evaluation procedures.

(a) In conducting an evaluation, the school district:

1. Must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining whether the student is eligible for ESE and the content of the student's IEP or EP, including information related to enabling the student with a disability to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities), or for a gifted student's needs beyond the general curriculum;

2. Must not use any single measure or assessment as the sole criterion for determining whether a student is eligible for ESE and for determining an appropriate educational program for the student; and

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

(b) Each school district must ensure that assessments and other evaluation materials used to assess a student are:

1. Selected and administered so as not to be discriminatory on a racial or cultural basis;

2. Provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to do so;

3. Are used for the purposes for which the assessments or measures are valid and reliable; and

4. Are 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.

30. In this case, the preponderance of the evidence establishes that the evaluation done by the school psychologist

was appropriate. The Petitioner's evidence was essentially uncontroverted. There was no evidence that the evaluation performed by Ms. Marchewka was inappropriate or otherwise failed to meet relevant professional standards. There was no evidence that Ms. Marchewka's recommendations to the IEP team were not based on overall consideration of the evaluation.

31. The issues raised by the Respondent's mother and resulting in her request for an IEE reflected an apparent lack of information exchange between school officials and the mother. The miscellaneous errors within the narrative report, albeit of relatively minor nature, likely resulted in the Respondent's mother becoming concerned about the quality of the evaluation provided to her child. Had Ms. Marchewka's report been prepared more deliberately and the errors avoided, the potential for unnecessary confusion could have been avoided.

32. Other concerns addressed at the hearing included confusion over use of the word "placement," which the Respondent's mother believed identified designation of physical educational location rather than provision of programmatic services. Such misunderstandings reflected a failure by the Petitioner to provide sufficient information to the mother, which would presumably have resolved such matters without resort to a due process hearing.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is determined that the Petitioner's psycho-educational evaluation of the Respondent dated March 25, 2008, was appropriate, and, accordingly, the Petitioner's denial of the Respondent's request for an IEE is sustained.

DONE AND ORDERED this 19th day of December, 2008, in Tallahassee, Leon County, Florida.

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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 30 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 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(e), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(e) and 120.68, Florida Statutes.