

Broward County School District
No. 07-3350E
Initiated by: District
Hearing Officer: Eleanor M. Hunter
Date of Final Order: November 1, 2007

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 07-3350E
)
)
)
 Respondent.)

)

FINAL ORDER

A formal hearing was held in this case on August 28, 2007, as previously noticed, before Eleanor M. Hunter, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Edward J. Marko, Esquire
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For Respondent: David J. Pyper, Esquire
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STATEMENT OF THE ISSUE

Whether the Broward County School Board conducted an

adequate and appropriate evaluation of ■■■ and properly refused ■■■ parents' request for an independent educational evaluation.

PRELIMINARY STATEMENT

Respondent ■■■ ("Respondent" or "■■■") is a ■■■ who was referred to Petitioner, the Broward County School Board ("Petitioner" or "Board"), to determine whether ■■■ is eligible to receive services and, if so, what services under Part B of the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. 1400 et seq. On June 1, 2007, ■■■, ■■■, and ■■■ met with the Board's preschool assessment team for ■■■ evaluation. On or about July 13, 2007, ■■■ requested an independent educational evaluation ("IEE") at public expense based on concern that ■■■'s language tests were administered and scored improperly, that no speech tests were administered, and that ■■■ intellectual potential was not measured as required as a part of the Board's evaluation. On July 19, 2007, the Board refused the request for an IEE at public expense and, on July 20, 2007, initiated a due process hearing at the Division of Administrative Hearings.

A telephone pre-hearing conference was held on August 7, 2007, to set a final hearing date and to consider Respondent's discovery motions to shorten certain deadlines for Petitioner's responses. Discovery deadlines were modified as agreed by the parties, and the hearing was set, with the issuance of notice, for August 28, 2007.

At the final hearing, ruling was reserved on Petitioner's Motion in Limine to exclude as irrelevant all exhibits related to

matters that occurred after the June 1, 2007, evaluation of ■■■, including the Individual Education Plan ("IEP") that was subsequently developed. The parties were advised that ruling was reserved on the motion, and that objections to each document and consideration of the purpose for which it is offered would be considered at the time each proposed exhibit is tendered.

Petitioner presented the testimony of Ilene Anchell; Mary Stone; Laura Rogers, an expert in speech and language in the educational environment; and Debra Collins, Ph.D., an expert in psychology. Petitioner's Exhibits 1, 2, and 3 were received into evidence.

Respondent presented the testimony of David Lubin, Ph.D., and Tiffany Sutherland. Respondent's Exhibits 1 through 6 were received into evidence.

FINDINGS OF FACT

1. ■■■ is a ■■■, whose date of birth is ■■■. ■■■ has autism spectrum disorder or is "autistic" and has been receiving services under Part C of the IDEA.

2. A multidisciplinary child study team met with ■■■, ■■■, and ■■■ to evaluate ■■■ on June 1, 2007. The evaluation is required for preschool children who have received services under Part C and who are turning three years old to determine eligibility and to develop an IEP for moving them into Part B services. Team members reviewed the Part C Individualized Family Support Plan and other available

notes and records, including those provided by the family, in advance, to determine the appropriate assessments to use for the child study evaluation meeting.

3. The entire team conducted various assessments simultaneously, during a one and a-half to two-hour play-based session, which is considered by child psychologists to be the "best practice" to get information as quickly as possible due to the short attention span of preschoolers. Members took turns playing with, observing and assessing ■■■, while others were getting information from ■■■.

Administration and Scoring of Language Tests

4. Ilene Anchell is the Board's speech and language program specialist for preschool who was a member of the child study team for ■■■. She learned from ■■■, and found credible and consistent with progress notes and records in ■■■ file, that ■■■ has severe language delays, and has difficulty expressing ■■■self and understanding directions. She also learned from ■■■, according to ■■■. affirmative responses to questions during the hearing, that the child "did have 100 words" and was "capable" of 100 words.

5. Anchell administered two normed and validated language tests for young children, including three-year-olds, the Receptive-Expressive Emergent Language Test, Third Edition, ("REEL-3"), and the Receptive One Word Picture Vocabulary Test ("ROWPVT"). Both tests are approved by the State Department of Education and the Board.

6. Anchell also administered two assessments that are not normed, a pragmatics checklist that was completed by both the [REDACTED] and Anchell, and a language sample or observations of responses that were verbal or non-verbal during the evaluation meeting.

7. The tests, according to the manuals, should be administered in more than one session if the child is exhibiting negative behavior. The Board presented credible evidence that, although [REDACTED] was whining, crying and wanting to leave during approximately the first 25 minutes into the session, [REDACTED] [REDACTED] was able to calm [REDACTED] by flipping [REDACTED] upside down before the formal assessments began, and calmed [REDACTED] again at intervals during the session when necessary.

8. The REEL-3 is a test of the understanding of language and the ability to express wants and needs. The ROWPVT tests language by having the child choose the object named from a page with four different pictures on it. Anchell calculated raw scores and age equivalency from the REEL-3, placing [REDACTED] at 11 months in understanding and 12 months in expressing language. She testified that she calculated only the scores needed to develop an appropriate IEP for [REDACTED]. Anchell did not calculate a confidence interval, a language ability score, or the percentile rank. She did not compare the REEL-3 and the ROWPVT to each other to resolve discrepancies between expressive and receptive language, as required by the manual. She did not calculate and did not recall that SEM on the score sheet was the standard errors of measurement, and forgot to calculate the

sum of the receptive and expressive vocabulary.

9. The evidence shows that the language tests were scored albeit not completely and ideally, but adequately enough to develop an IEP with specific language goals based on age equivalency.

Evaluation of Speech Without A Separate Test

10. During the multidisciplinary team evaluation, ■■■ was not given any normed and validated speech, as distinguished from language, tests. ■■■ treating speech therapist's notes indicated that ■■■ has Apraxia, a neurologically based motor speech disorder characterized by difficulty with movements of the mouth, affecting intonation and ability to form syllables and words resulting in choppy speech, and recommended further assessments.

11. The Board agrees that there is an available normed and validated test that will diagnose and indicate therapies for the treatment of Apraxia, the Kaufman Speech Praxis Test.

12. Rather than administer that or any other speech test, Anchell relied on notes, including those from an initial evaluation of ■■■, dated November 3, 2006, made by ■■■ treating speech pathologist, Tiffany Southerland, who indicated that ■■■ had "decreased oral-facial muscle tone and decreased sensory awareness" but that the "impact of these factors on speech production skills could not be determined at this time." Southerland testified that, after ■■■ had gained 20 consistent words in three months of therapy with her, she, as a specialist in Apraxia, could make that diagnosis

based on her experience and the way he presented clinically, and could develop appropriate oral motor exercises without using the Kaufman Speech Praxis Test.

13. An additional reason given for the need for ■■■ to have a separate test for speech production was the discrepancy, if there was one, between ■■■ ■■■ report concerning 100 words as compared to ■■■ having spoken only ten words during the evaluation.

14. The testimony that a preschooler will not do all that ■■■ is capable of doing in test sessions is accepted as reasonable.

15. The Board showed that ■■■ ■■■ reported that ■■■ had the vocabulary to name and identify 100 words pictured on stimulus cards. It is not clear that ■■■ makes all of the identifications by speaking, particularly given the testimony of ■■■ treating speech therapist that ■■■ had 20 consistent words, after three months of therapy that began in November 2006, which would have been in or around the beginning of February 2007, four months before the Board's evaluation.

16. The Board established that it is unlikely that follow-up sessions might resolve the discrepancy between the report, even assuming that it is taken to mean ■■■ could speak 100 words as compared to the observed 10-word production, considering the

intensity of therapy that was required for ■■■ to begin to use 20 words consistently

17. The evidence shows that, although no separate speech test was administered, reliance on notes from the treating speech therapist and observations provided a sufficient evaluation to develop an IEP with specific speech goals and that a speech therapist in a clinical setting, as in the past, can continue to respond to the need to treat ■■■ for Apraxia as ■■■ uses more words.

Comprehensive Evaluation of Intellectual Ability And Potential

18. David Lubin, whose Ph.D. is in behavioral psychology and who specializes in children with developmental disorders, including Autism, is the co-founder of the Children's Center for Development and Behavior, where ■■■ has been treated for approximately a year or more. Lubin testified that his staff has administered the Psychoeducational Profile Review ("PEP-R"), a developmental assessment, to ■■■ every six months to make sure the therapies are effective. The PEP-R is not a test of educational potential, but of current functioning.

19. Lubin noted that there are validated tests of intellectual potential for children with autism who are ■■■'s age and that the most popular is the Autism Screening Instrument for Educational Planning, Second Edition ("ASIEP-2"), with its five subparts. The only subpart administered by the Board was the Autism Behavior Checklist ("ABC"), a diagnostic screener. The other four parts

include a Prognosis of Learning Rate that gives a measurement of intellectual potential and can be administered to a child who can pick up a plastic chip, as ■■■ was capable of doing on June 1, 2007.

20. Minimum requirements for evaluations of autistic children, as set forth on pages 183 to 184 of the policies and procedures for Broward County, relying on Florida Administrative Code Rule 6A-6.03023(3), include "a comprehensive psychological evaluation conducted by a certified school psychologist or licensed psychologist or psychiatrist, which shall include an individual evaluation of intellectual ability and potential, behavioral observations, and an educational evaluation, if appropriate." The psychologist on the child study team, Mary Stone, relied on her observations of ■■■ putting together a puzzle, stacking cups of graduated sizes, performing other tasks, and the results of sections of the PEP-R, administered on April 25, 2007, to evaluate intellectual potential. As is the practice at Dr. Lubin's center, the Board does not repeat a test that has been done within the last six months. Stone agreed that the PEP-R is a developmental assessment but suggested that it does indicate potential or future intellectual ability.

21. Debra Collins, Ph.D., the Board's expert in psychology testified that the PEP-R gave information about ■■■'s intellectual potential by reporting that eight skills have been mastered and four are emerging, and that the emerging skills are measures of potential. She was not able to identify the emerging skills but concluded that

the PEP-R, in some sense measures intellectual potential, although the team determined from the PEP-R report what the four emerging skills are and, therefore, could not use it for that purpose. Collins also expressed her expert opinion that in many cases it is inappropriate to try to measure the intellectual potential of a three-year old autistic child with a limited vocabulary, but conceded that was a matter for a case-by-case determination and that she was not involved in the evaluation of [REDACTED]

22. Stone also used cognitive sections of the language tests, the Childhood Autism Rating Scale ("CARS"), and the ABC to evaluate [REDACTED]. On the ABC subpart of "ASIEP-2," [REDACTED] had a score of 61. Although the ABC is separately normed and validated for diagnosing autism, the directions in the manual for ABC scores of 47 or above list additional subtests that should be administered, including the Sample of Vocal Behavior, the Interaction Assessment, the Educational Assessment, and the Prognosis of Learning Rate. The ASIEP-2, with its subtests, particularly the Prognosis of Learning Rate would have given validated results to determine [REDACTED]'s intellectual potential. [REDACTED] was not given the required subtests or any alternative standardized test to measure [REDACTED] intellectual potential.

23. Collins testified that non-verbal tests for intelligence exist and that the Leiter-R is one approved instrument, but that she believes, despite her reservations about testing [REDACTED] for intellectual potential, that the alternative instruments listed on page 230 of the

policies and procedures for Broward County are more flexible for use with a child like ■■■ She also noted that the PEP-R is not on the list.

24. The evidence shows that there was no evaluation of ■■■'s intellectual potential nor an affirmative effort to do so that justified a conclusion that it was impossible to measure ■■■ intellectual potential.

CONCLUSIONS OF LAW

25. 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.

26. 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).

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

28. In general, 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).

29. The rule in effect, at the time [REDACTED] was screened, required:

(c) A comprehensive psychological evaluation conducted by a certified school psychologist, licensed psychologist or psychiatrist, which shall include an individual evaluation of intellectual ability and potential, behavioral observations, and an educational evaluation, if appropriate.

* * *

(f) An evaluation of speech and language development.

Fla. Admin. Code R. 6A-6.03023(c) and (f).1

30. [REDACTED]'s parents disagreed with the scoring of the language assessments, the failure to administer a speech test for Apraxia, and the adequacy of a measurement of intellectual ability and potential.

31. As the parents of a child with a disability who disagree with an evaluation obtained by a public agency, [REDACTED]'s parents have the right to obtain an IEE at public expense, if the Board fails to demonstrate 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)).

32. The Board demonstrated by a preponderance of the evidence that its language assessment scoring was adequate to establish the language components of an IEP for ■■■ based on age equivalency.

33. The Board demonstrated by a preponderance of the evidence that the evaluation of ■■■'s speech was adequate to develop a speech component of an IEP for ■■■, and that it is appropriate for the treating speech therapist to rely on his clinical presentations to diagnose and treat specific problems as they appear when he attempts to produce more words.

34. The Board failed to demonstrate that its use of observations, portions of language tests; a developmental assessment, the PEP-R; the CARS and one subpart of the ASIEP-2 adequately assessed ■■■'s intellectual ability and potential. Even assuming the correctness of the Board's position that the language of Florida Administrative Code Rule 6A-6.03023(c) required a test for intellectual ability and potential only "if appropriate," the Board has, through the testimony of its own expert, failed to show that the various instruments and alternative instruments listed in the appendix to its policies were not appropriate for testing ■■■'s intellectual ability and potential.

ORDER

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

█ is entitled to an Independent Educational Evaluation of █ intellectual ability and potential at public expense.

DONE AND ORDERED this 1st day of November, 2007, in Tallahassee, Leon County, Florida.

S

ELEANOR M. HUNTER
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of November, 2007.

ENDNOTE

^{1/} The applicable rule was effective from July 2, 1979, until amended on July 1, 2007.

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 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.