Okaloosa County School District
No. 04-4138E
Initiated by: District
Hearing Officer: Diane Cleavinger
Date of Final Order: March 1, 2005

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OKALOOSA COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-4138E
	)	
[redacted],	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to notice, a formal hearing was held on December 15, 2004, in Shalimar, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioners: Thomas W. Dickson, Esquire
The Weatherly Law Firm
3414 Peachtree Road, Northeast
Monarch Plaza, Suite 1550
Atlanta, Georgia 30326

For Respondent: [redacted]
(Address of Record)

STATEMENT OF THE ISSUE

The issue in this proceeding is whether Petitioner is entitled to conduct a comprehensive reevaluation of Respondent utilizing evaluators of its choosing.

PRELIMINARY STATEMENT

Respondent's parents withheld their consent to a comprehensive reassessment of [redacted] On Wednesday, November 17, 2004, Petitioner, the Okaloosa County School Board, filed a request for a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1401, et seq., asking that it be permitted to conduct a comprehensive reevaluation of Respondent in order to ensure that Respondent is receiving a free, appropriate public education (FAPE) as required by the IDEA. Respondent's parents received a copy of Petitioner's request shortly after it was filed. The case was assigned to Judge Barbara Staros.

On November 18, 2004, in an effort to quickly schedule a pre-hearing conference within the time frames established in Florida Administrative Code Rule 6A-6.03311(11), and meet the 45-day hearing deadline on Petitioner's due process request established under IDEA; and in order to schedule the requested hearing convenient to all the parties, Judge Staros attempted to contact the parties to obtain dates to schedule a pre-hearing conference. Dates were quickly obtained from Petitioner's representative. However, dates could not be quickly obtained

from Respondent's parents. Therefore, on November 18, 2004, Judge Staros, sua sponte, set the required pre-hearing conference for Monday, November 22, 2004, at 1:30 p.m., Central Time to be conducted by telephone. The notice of pre-hearing conference was faxed to Petitioner on the same date. The notice of pre-hearing conference was telephonically delivered to Respondent's parents since they did not have an available fax machine. The notice was also mailed to both parties.

On the afternoon of Friday, November 19, 2004, Respondent's mother returned the Division's telephone call and indicated that, because of other commitments, they may not be available for the scheduled pre-hearing conference. Respondent's mother indicated she would call back with alternative times.

Over the weekend, Respondent's mother left two telephone messages that were retrieved when the Division re-opened on Monday November 22, 2004. The telephone messages indicated that Respondent's parents had not received anything in writing about the pre-hearing conference, that they could not participate in the pre-hearing conference, and that somehow their due process rights had been violated.

After receiving the messages and in an effort to either hold the pre-hearing conference or co-ordinate further with the parents, a telephone call was placed to Respondent's parents at the time the pre-hearing conference was scheduled. No answer to the call was obtained and a telephone message was left for the

parents. The pre-hearing conference was cancelled. However, because the 45-day time period was running, Judge Staros issued a Pre-hearing Order and a Notice of Hearing scheduling the final hearing for December 7, 2004 at 10:00 am, Central Time, in Shalimar, Florida.

On November 23, 2004, Judge Staros entered an Order instructing the parties to immediately inform her of available times to schedule a pre-hearing conference on November 29 or November 30, 2004. Division staff called both parties to read them the Order and advise them of the hearing date, time and place. Staff was able to reach the Petitioner's attorney by telephone; however, Respondent's parents could not be reached by telephone. A message could not be left advising the parents of the contents of the Orders and the date, time and place of the hearing since their answering machine was not picking up the telephone. The Orders were mailed to both parties. Also on November 23, 2004, Petitioner filed by fax Petitioner's Response to Order Regarding Scheduling of Pre-hearing Conference. Petitioner's response stated available times for November 29 and 30.

On November 24, 2004, Petitioner filed a Motion to Continue the final hearing due to a scheduling conflict with the hearing date.

Over the Thanksgiving holidays, Respondent's mother left a telephone message indicating that she had been trying to fax some

documents, including a motion to dismiss to the Division, but was not successful. She also indicated that they were unavailable for a pre-hearing conference on November 29 and requested that someone get back with her. The message did not indicate whether Respondent's parents would be available on November 30. The message was received by the Division when its office re-opened on Monday, November 29, 2004.

On November 29, 2004, due to a death in Judge Staros' family, the case was reassigned to the undersigned. Prior to 10:30 a.m., Eastern Standard Time and after receiving the telephone message left over the holidays, several telephone calls were made to Respondent's home number in an attempt to get some dates and times that would be convenient to the parents for the pre-hearing conference, to advise them that no faxed documents had been received by the Division and to fax the documents again so that they could be considered. No answer was obtained. At about 11:20, a.m. Eastern Standard Time, the undersigned received Respondent's Response to Order Regarding Scheduling of Pre-Hearing Conference. The response indicated times of availability for November 29 and 30. The response also provided dates of availability for future planning purposes.

Given the parties' responses to the scheduling of the pre-hearing conference, a pre-hearing telephone conference was scheduled for November 30, 2004 at 5:30 p.m., Central Time. Both parties were advised by telephone of the date, time and

conference number of the pre-hearing conference. Both parties indicated that they would participate in the hearing.

On November 30, 2004, the pre-hearing conference was held in this case. All parties and their representatives or persons assisting the parties participated in the pre-hearing conference. Several issues and any questions that either party had were discussed including any procedural, discovery and service matters.

Additionally, during the conference and after assurances that the parent's had received a copy of Petitioner's Motion to Continue, Petitioner's Motion to Continue was taken up. The parties were advised that the final hearing could not be rescheduled within the 45-day hearing time period provided for under IDEA and would therefore have to be waived, if the Motion to Continue was granted. Thereafter, discussion of a possible hearing date occurred and all parties agreed to reschedule the hearing to after the 45-day period on December 15, 2004, at 9:30 a.m. in Shalimar, Florida. Since the hearing location was not known at the time of the pre-hearing conference, the specific location for the hearing would be included in a written notice of hearing that was issued on December 2, 2004.

Respondent's father raised the issue of whether testimony could be taken by telephone. Both parties were advised that although it was preferable that a witness be present at the hearing, such an arrangement could be made. However, since

telephone testimony precludes actually viewing the document a witness is looking at, the person calling the witness is required to ensure any exhibits that would be used during the telephonic testimony be pre-numbered or pre-marked for the witness, the judge and the parties so that everyone could be assured of looking at the same page and exhibit. The parties were also advised that the party calling the witness was responsible for ensuring that the witness was available at the time their testimony was required and for setting up any conference calls, if needed, in order to take the testimony by telephone. Since the Respondent's parents did not seem familiar with setting up a conference call, they were advised to contact the undersigned's secretary so that she could instruct them on the procedure. Also, the parties were advised that, the facility at which the hearing might be held may restrict out-going, long-distance calls and that they needed to contact the undersigned's secretary to determine if the facility had such a restriction and, if it did, obtain the number for a witness to dial that would connect him or her to the hearing room. The parties were not advised that the undersigned's secretary would make the arrangements for telephonic testimony other than to ensure that a telephone was available at the yet-to-be-determined site. Petitioner agreed to waive the requirement of having a person capable of administering oaths available at the witnesses' end to swear in and verify the witnesses' identity.

Respondent's parents were also advised that a person who was not an attorney, but was familiar with the IDEA process could either represent or assist them during the hearing and the parents' assistant, Sharon O'Toole, who assisted them during the pre-hearing conference was invited to attend the final hearing.

Finally, in order to clarify the issues, discussion was held on whether the parents were asking for reimbursement for several private evaluations they had completed. The parents stated that reimbursement was not an issue in this proceeding.

Around December 6, 2004, Respondent filed a Motion to Dismiss. In a shot-gun approach to pleading, the motion raised a variety of process issues that related, among other things, to parental notice, records review, notice of mediation availability, which the parents already knew were available since they had requested such on November 8, 2004 and to Petitioner's failure to perform a re-evaluation of [redacted] when the parents requested, and to the mootness of the School Board's request since the parents had attained several private evaluations of [redacted], in what appeared to be many areas in which the IEP team wished to re-evaluate [redacted].

On Monday, December 13, 2004, the undersigned received the Respondent's Motion to Dismiss, as well as two letters from Respondent's parents that were filed on December 10, 2004. The letters inquired about the Motion to Dismiss and indicated that Respondent's parents desired to offer telephone testimony, as

well as, have their lay-person representative participate in the hearing by a continuously-connected telephone. The letter also indicated that the parents had been told that the Division would make arrangements for such participation.

Because of the issues raised in the Respondent's Motion to Dismiss and the issue or feasibility of whether a party's representative could appear by telephone and the apparent confusion over the parties responsibility for making telephonic arrangements, a conference call was held on December 10, 2004. All parties were present and participated in the call.

During the conference, the issue of whether the Board's request for a hearing was moot since the parents had already had several private evaluations completed was raised. After discussion, the need for further evidence on the issue was apparent. Likewise the issues regarding the various alleged procedural violations raised by the parents were discussed.

Moreover, whether any relevant procedural violations had occurred and, if they had occurred whether such procedural violations had any material impact on the fairness of this proceeding or the question of re-evaluation, also required further evidence. Therefore, the Motion to Dismiss was denied with the right to again raise these issues at the hearing after evidence had been presented on the various points.

Also, during the conference, it was explained that it was neither advisable nor feasible for a party's representative to

appear and assist the parties by telephone because the nature of such representation or assistance required the representative to be physically present at the hearing since, among other considerations, such representation is personal and often requires privacy. Potential private discussions between the parties, potential witnesses and their respective representatives would be impossible. It was also explained that the facility at which the hearing was set only had one telephone in the room that was available for the Division's use. Therefore, it was not feasible to simultaneously telephonically connect both a witness and the parents' representative. In short, both parties' representatives had to physically attend the hearing, if the parties wished such assistance at the hearing. Additionally, the parties' responsibility for arranging for any telephone testimony was clarified.

Since Respondent's representative or assistant would be out-of-state on the date set for the hearing, inquiry was made as to whether Respondent's parents wished to continue the hearing in order to have their representative present to assist them. Respondent's father indicated they could proceed without the presence of their representative and a continuance would not be necessary. The undersigned inquired into whether the parties felt that they would be prepared for the hearing and had all the necessary information, including documents, that they felt they would need for the hearing, and, if not, a continuance could be

had. All the parties represented that they were prepared to go forward with the hearing and had all the necessary information they required. Therefore, the hearing remained scheduled for December 15, 2004.

At the hearing, the parties stipulated to the admission of all of Petitioner's Exhibits numbered 1 through 38, and all of Respondent's Exhibits numbered 1 through 81. Petitioner presented the testimony of six witnesses, including two expert witnesses. Respondent presented the testimony of one witness.

After the hearing, the parties filed Proposed Final Orders on January 3, 2005. Also after the hearing, the Division's docket for this case was reconstructed due to a major computer network failure in which documents were lost and not permanently docketed. Both parties provided copies of their respective documents which were lost.

FINDINGS OF FACT

1. [redacted] is a very complex disabled student entitled to receive special education services under the IDEA. [redacted] has been diagnosed with autism, hypotonia, Obsessive-Compulsive Disorder, Attention Deficit-Hyperactivity Disorder, auditory processing disorders and visual processing disorders. [redacted] has been found eligible for special education under the categories of autism, language impairment, and specific learning disability. [redacted] resides with [redacted] parents within the boundaries of the School District. Currently, [redacted] is in [redacted] grade and attends [redacted] School

and is making fairly good educational progress and receiving an educational benefit from [redacted] IEP. [redacted] clearly is receiving FAPE from the School Board. Indeed, next school year [redacted] will graduate to [redacted] grade and [redacted] school, a very different environment from the [redacted] school environment [redacted] is in now because [redacted] school generally requires students to change classes more frequently than [redacted] school.

2. In August 2002, the School Board conducted a psycho-educational evaluation of [redacted]. The 2002 evaluation was the last psycho-educational evaluation of [redacted] obtained by the School Board.

3. As early as 2003, because of difficulties in school that the evidence did not make clear, [redacted]'s parents requested the School Board evaluate [redacted] "in any and all areas of known or suspected disabilities."

4. On September 5, 2003, the School Board conducted an occupational therapy evaluation. The occupational evaluation was the last evaluation of [redacted] obtained by the School Board.

5. Around February 12, 2004, after input from [redacted]'s parents over times and persons attending a future IEP meeting, a Meeting Participation Notice for an IEP meeting was delivered to Respondent's parents. The Notice indicated the purpose of the meeting was to develop and/or review [redacted]'s IEP and to discuss and/or determine reevaluation.

6. On February 20, 2004, an IEP meeting for [redacted] was held. At the time, [redacted] was in [redacted] grade. In attendance were Ms. Sandy Willingham, [redacted]'s special education teacher during both the 2003-2004 ([redacted] grade) and the 2004-2005 ([redacted] grade) school years; Mr. David Magnotti, [redacted]'s regular education teacher during the 2003-2004 school year; Ms. Dawn Sanders, school psychologist; Ms. Kaye McKinley, ESE Program Director; C.M. McKnight, [redacted]'s speech and language teacher; Dr. Crigger, principal; Robin Bothwick, guidance counselor; Theresa McInnis, ESE staffing specialist; and both of [redacted]'s parents. Other people were also in attendance at the meeting. The meeting was electronically recorded with a digital recording of the same introduced into evidence. The evidence was clear that both [redacted]'s parents actively participated in the IEP meeting and decision to re-evaluate [redacted]. There is no question that both parents had full and meaningful participation in the IEP meeting, in [redacted]'s educational plan and the teams' decision to re-evaluate [redacted]

7. During the course of the IEP meeting on February 20, 2004, [redacted]'s special education teacher, Ms. Willingham, indicated that she would like to have [redacted] reevaluated. Ms. Willingham said, "I would be interested in taking a whole new look [[redacted]] again. Evaluating [[redacted]] because there's bits and pieces of information here and information there and to help, I guess it would be beneficial to everyone, I would just like to take a whole new look at [[redacted]] and just reevaluate [redacted] again and, and I

don’t know, just get some ideas, ideas so I can better help [redacted].” Although not stated in precise language and very poorly communicated to the parents, it is clear from the transcript of the meeting that Ms. Willingham wanted to pull the bits and pieces of information about [redacted] the School Board had into a more coherent picture of [redacted]. Ms. Willingham wanted a more integrated analysis of [redacted] from an educational point of view.

8. The majority of the IEP team agreed with Ms. Willingham that a reevaluation of [redacted] needed to be completed because of the complexities of [redacted] disabilities. The parents agreed that a re-evaluation needed to be done and had already requested such. The team therefore made the decision that a re-evaluation of [redacted] needed to be performed.

9. While at the meeting, Ms. Willingham prepared a Consent for Formal Individual Reevaluation form and provided it to [redacted]’s parents during the February 20, 2004 meeting. The form checked-off several proposed areas for re-evaluation that were suggested by the meetings participants. At this point, the desired re-evaluation was only in the idea phase. No potential evaluators’ names or particular evaluative tests were known because it was too early in the process to make such a determination since such testing is individualized to the particular student. Similarly, whether earlier evaluations could be used in the proposed re-evaluation was not known since all the bits and pieces needed to be reviewed by an expert to determine if the earlier evaluations

continued to be valid to the present. [redacted]'s parents declined to execute the consent form at the meeting since no evaluators names or list of evaluative tests were given to them during the meeting. Respondent's parents mistakenly believed that informed consent required the school to provide the names and qualifications of evaluators and specific evaluative tests prior to their giving consent. Unfortunately, by not consenting, the evaluative process necessary to determine the information desired by the parents was at a standstill until parental consent was obtained or the matter resolved at a due process hearing.

10. Following the IEP meeting, the School District sent a letter to [redacted]'s parents dated February 26, 2004, again requesting that the parents execute the evaluation consent form.

11. In a letter dated March 4, 2004, [redacted]'s parents declined to provide consent and asserted that certain testing could not be done on [redacted] at that time and that adequate notice had not been provided to them regarding the request for consent because no evaluator's names or list of evaluative tests had been provided to them.

12. In the meantime, [redacted]'s parents, who had demanded evaluation of [redacted] and felt such a re-evaluation of [redacted] was warranted, arranged for several private evaluations of [redacted] The parents have obtained a Lindamood-Bell evaluation on May 28, 2003; a neuropsychological evaluation, conducted intermittently from May 21 to June 24, 2003; an occupational therapy evaluation

on May 12, 2004; a physical therapy evaluation on May 12, 2004; an auditory processing evaluation on July 23, 2004; a speech language evaluation on October 15, 2004; and a visual processing evaluation on November 15, 2004. These evaluations were completed by various experts in their fields. A couple of checklist forms for the private evaluators were given by the parents to [redacted]'s teachers. None of the private evaluators directly contacted school personnel in order to gain their far more knowledgeable input about [redacted] in an educational setting. Unfortunately, information from one evaluation was not coordinated among the various evaluators to obtain a comprehensive overview of [redacted] from an educational perspective. Also, unfortunately, the parents instructed school personnel not to contact the various evaluators who performed the evaluations obtained by the parents. These instructions interfered with the school's ability to inquire about perceived anomalies in [redacted]'s behavior during the evaluations that were not seen at school and with the school's ability to develop a comprehensive picture of [redacted]

13. On July 13, 2004, the School Board again corresponded with [redacted]'s parents seeking consent for reevaluation. This correspondence included a copy of the Consent for Formal Individual Reevaluation form and a statement of the procedural safeguards.

14. On July 29, 2004, [redacted]'s parents wrote to the School Board in response. [redacted]'s parents admitted that the IEP team had determined that a comprehensive reevaluation of [redacted] was appropriate and that they agreed with the necessity for reevaluation. However, they again declined to provide consent, asserting that they needed "specific information as to exactly which evaluations are proposed, who will conduct these evaluations, as well as the qualifications (i.e. training and experience) of the evaluator(s). . . ."

15. Again, the process to determine the information the parents desired was at a standstill because the parents would not consent so that the evaluative process could move forward. As will be seen, this Catch 22 situation and lack of communication on both sides have continued to date and have resulted in more shrill and hardened positions, as well as distrust between the parties. There was absolutely no credible evidence of a conspiracy to harass [redacted]'s parents as they alleged in some of their pleadings. Indeed, even though the parents asked for such evaluations to be done and attempted to have them privately done, the parents have consistently misperceived the issues in this case as involving notice, parental due process rights and full parental membership in the IEP team, as opposed to the primary issue of whether their [redacted] needs to be re-evaluated as proposed by the IEP team. This misperception is especially confounding when little or no evidence is adduced at the hearing on those

procedural issues which support the parents' position that their parental rights have been violated or that a violation materially interfered with the fairness of this proceeding or their participation in this process. The parents need to recognize that their full and equal participation in the IEP team does not give them a veto power over an IEP team decision. Indeed, no one IEP team member, including the parents, has the right to dictate the details of an IEP team decision. On the other hand, better explanations, better communication and listening between the parties would have benefited both parties in this case.

16. On September 7, 2004, another IEP meeting was held regarding [redacted]. [redacted]'s special education teacher, [redacted] regular education teacher, both of [redacted] parents, and others were in attendance. During this meeting, the IEP team again discussed the need for a reevaluation of [redacted] and [redacted]'s parents again declined to provide consent.

17. In correspondence from the School Board's counsel to [redacted]'s parents dated September 7, 2004, the School Board again requested that consent for reevaluation be provided. This correspondence explained the School Board's position that conditioning consent for evaluation on the identity of the evaluators and the listing of specific testing instruments to be employed was neither required by the IDEA nor a good practice since such information was not known at this point in the process.

18. In correspondence dated September 13, 2004, [redacted]'s parents responded, saying that they would not provide consent until the School Board provides the prior written notice that the parents already had and the information necessary to provide the parents' version of informed consent.

19. The written notices provided to [redacted]'s parents regarding the IEP team's decision to re-evaluate and the School Board's efforts to abide by and effectuate that decision and to obtain consent for a reevaluation of [redacted] include the Consent for Formal Individual Reevaluation form, and the February 26, 2004, July 13, 2004, and September 7, 2004, letters from the School District to [redacted]'s parents. Included with one or more of these was a copy of the procedural safeguards. The information contained in these documents supplied [redacted]'s parents with the information required for prior written notice and informed consent at the beginning of the evaluation or re-evaluation process because specificity occurs after the point in time when consent is required. Currently, it is the question of evaluation in broad areas of concern which requires consent. The specifics of evaluators and tests do not require parental consent and are not necessary to making a decision on the general desirability of an evaluation in broad areas.

20. Ms. Willingham primarily desired an educational evaluation of [redacted] that would be more helpful than the private evaluations provided by the parents.

21. Ms. Willingham admitted that the private evaluations provided by [redacted]'s parents have provided her with "wonderful" information, but that they have not given her a whole picture of [redacted] and have not amounted to an educational evaluation, with a comprehensive assessment of academics.

22. As indicated earlier, none of the private evaluators interviewed Ms. Willingham or [redacted]'s regular education teachers during the 2003-2004 and 2004-2005 school years as part of the private evaluation process. None of the private evaluators observed [redacted] in the school setting as part of the evaluation process. None of the private evaluators have attended any of [redacted]'s IEP meetings.

23. The evidence did not demonstrate that the private evaluators were aware of or had considered the strategies, techniques, successes, and failures experienced by [redacted]'s teachers in educating [redacted] on a daily basis. The evidence did not demonstrate that the private evaluators learned of any specific concerns or questions regarding [redacted] that [redacted] teachers may have. Such detailed information about [redacted]'s educational experiences is not reflected in [redacted] educational records. Because of the lack of integration, the private evaluations did not consider [redacted]'s school experiences or the concerns of [redacted] teachers within an educational context for those evaluations.

24. Indeed [redacted]'s special and general education teachers feel they have information regarding [redacted]'s classroom behavior and

demonstrated learning mechanisms that does not appear in any of the private evaluations. For example, Ms. Willingham has learned from her work with [redacted] that [redacted] retains information better if [redacted] reads aloud. She has not seen this aspect of [redacted] reflected in any of the private evaluation reports. In fact, the private auditory processing evaluation report recommends that [redacted] be told to repeat instructions silently to [redacted]self to improve [redacted] retention, which seems opposed to [redacted] teacher's observations and demonstrates a need for an integrated evaluation of [redacted] from an academic perspective.

25. Although [redacted] is making good progress, Ms. Willingham genuinely believes that [redacted] can do better, and she would like to learn from the reevaluation process what she can do differently to help [redacted] improve [redacted] academic performance. Ms. Willingham would like the reevaluation process to include informing the evaluators of what she sees and does not see with [redacted] in the classroom.

26. By the time of the hearing, Ms. Willingham also requested a reevaluation of [redacted], in part, because of the anticipated transition of [redacted] from [redacted] school to [redacted] school that would take place after the 2004-2005 school year. At the time of the two IEP meetings it was clear, that such a transition was in the future for [redacted] and was known to all the parties. More importantly, for purposes of this hearing, is the fact that this transition will occur in less than a year, and up-to-date

information on [redacted] will be useful to facilitate [redacted]'s transition. The fact that the information may be useful warrants the re-evaluation proposed by the IEP team.

27. Of particular persuasive evidence on the need for an integrated educational re-evaluation of [redacted] was the expert testimony of Dr. Thomas Oakland. Dr. Oakland is an expert in the areas of school psychology and the evaluation of children with disabilities for the purposes of developing educational interventions. Dr. Oakland is board-certified in school psychology and in neuropsychology, and a licensed psychologist in the State of Florida. Dr. Oakland has more than 30 years of experience with respect to the proper administration and development of testing instruments used in the evaluation of children with disabilities. He currently is the Foundation Research Professor and a professor with the Department of Educational Psychology at the University of Florida. Dr. Oakland is an extremely accomplished school psychologist with extensive professional experience and recognition for his work with respect to the evaluation of children with disabilities.

28. Dr. Oakland testified that the accepted methodology for evaluating children with disabilities includes heavy reliance on teacher judgments, teacher information, and input from educational staff. This is because the evaluator for purposes of the IDEA must be focused on educationally relevant characteristics.

29. Such an evaluation, therefore, includes interviews of teachers because, other than parents, teachers are likely to know these children more thoroughly than anyone else in the child's life. Additionally, teachers often have more fundamental knowledge of the child's academic behaviors. Often teachers are aware of behaviors and characteristics that the parents are not aware of. Similarly, parents are aware of behaviors and characteristics that are not displayed in an educational environment.

30. In addition, an important part of the educational evaluation process is observation of the child in an educational setting and is required in certain circumstances.

31. Dr. Oakland also explained that the evaluation process itself will influence the selection of testing instruments to use to evaluate a child and may influence the selection of evaluators to be involved in the evaluation.

32. Evaluating a child in an office setting, without involvement of educators in the evaluation process, is generally inadequate to provide the type of evaluation needed by educators in developing interventions to be used for children with disabilities such as [redacted]. In short, for a comprehensive evaluation to be educationally meaningful, it must include interviews of educators and observation of the child in the educational setting.

33. Dr. Oakland also recognized that the private evaluations of [redacted] are helpful to the process of developing [redacted] educational program, but were not adequate because of the lack of integration and current information about [redacted]. For example, [redacted]'s I.Q. score may be outdated because it was obtained at a time when [redacted] was not as testable as [redacted] is today.

34. Dr. Oakland opined that the private evaluations provided by [redacted]'s parents to the School District fail to address some of the critical issues [redacted]'s teachers have identified regarding [redacted]'s education and did not involve the teacher's input into those evaluations. Dr. Oakland's testimony was corroborated by other testimony in the case. On the other hand, there was no credible evidence offered by the parents contrary to the testimony of Dr. Oakland.

35. Finally, the fact that [redacted] has been evaluated recently and evaluated often does not prevent an appropriate and valid comprehensive reevaluation of [redacted] from being conducted now since it is highly unlikely that previous evaluations would interfere with any proposed evaluations in the future. Indeed some of the previous evaluations may be useful in the re-evaluation proposed by the IEP team. However, that point in the process has not been reached.

CONCLUSIONS OF LAW

36. 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.

37. 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). To accomplish this, Congress established an elaborate procedural framework, the cornerstone of which is the individual education plan (IEP). The IEP is a document that serves as the blueprint for a particular child's education for a given school year. See Honig v. Doe, 484 U.S. 305, 308-312 (1988) (history and purpose of and procedural framework created by IDEA). The IEP is to be developed based on relevant information by an IEP team consisting of local school personnel, relevant experts, if needed, and the parents at a formal meeting for which the parents are to be given adequate notice and an opportunity to attend and participate. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.501. IDEA does not give any one member of the IEP team the right to veto a decision made by the IEP team or to micromanage the details of a decision made by the IEP team.

38. 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. §§ 300.530–300.536. The evaluations must be designed to determine

the nature and extent of the child's disability and the child's educational needs. Id. Such evaluations are essential to the provision of a free appropriate public education to students with disabilities and serve as "the gatepost to the development of an IEP for the child and subsequent assignment to an appropriate special education program." Carroll v. Capalbo, 563 F. Supp. 1053, 1056 (D.R.I. 1983).

39. Consistent with the IDEA's and state law requirements, a reassessment of a child with a disability is to be conducted "if conditions warrant" or "if the child's parent or teacher requests a reevaluation, but at least once every three years." 20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.536; see also Fla. Admin. Code Ann. Rule 6A-6.0331 (1)(C); Board of Educ. of Murphysboro v. Illinois Bd. of Educ., 41 F.3d 1162, 1169 (7th Cir. 1994) (regulations require reevaluation every three years or more often if conditions require). In fact, School Board has a continuing obligation to determine whether [redacted] is a student who continues to have a disability, and whether [redacted] continues to need special education and related services. 34 C.F.R. § 300.533(a)(2)(i) and (iii).

40. Federal law requires parental consent before such assessments can be conducted. 20 U.S.C. § 1414(a)(1)(c).

41. In the absence of parental consent, a school district may still be granted the right to assess a student, if it establishes at a due process hearing the need to conduct such an

assessment or that a teacher has requested such or that three years has elapsed.

42. In this case, Ms. Willingham, who was attending the February 20, 2004 IEP in the capacity of a teacher, has requested [redacted]'s reassessment. For that reason alone the School Board is entitled to proceed with the reevaluation of [redacted].

43. In interpreting the IDEA and corresponding state law, courts throughout the United States have consistently affirmed the principle that parents who seek special education and related services for their children must permit school systems to conduct evaluations. See Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1315 (9th Cir. 1987) ("If the parents want [the student] to receive special education under the Act, they are obliged to permit such testing"); Patricia P. v. Bd. of Educ. of Oak Park, 203 F.3d 462, 468 (7th Cir. 2000) (parents who want their children to receive special education services under the IDEA must cooperate with the school district and permit the school district to conduct evaluations required by the statute); Andress v. Cleveland Indep. Sch. Dist., 64 F.3d 176, 178 (5th Cir. 1995) ("a parent who desires for her child to receive special education must allow the school district to evaluate the child…there is no exception to this rule"); Rettig v. Kent City School District, 720 F.2d 463 (6th Cir. 1983) (it is reasonable to require parents to permit the school district to conduct an evaluation as a condition to receiving benefits under IDEA). Again, Petitioner

must be entitled to reevaluate [redacted] once the IEP team makes a decision to reevaluate.

44. Furthermore, parents are not entitled to qualify or limit the manner in which such evaluations are conducted or the individuals that conduct them. The choice of evaluator is left to the School Districts. Johnson v. Duneland Sch. Corp., 92 F.3d 554 (7th Cir. 1996) (because the school is required to provide the student with appropriate public education, it ought to have the right to conduct its own evaluation of the student and the school cannot be forced to rely solely on an independent evaluation conducted at the parents' behest); Andress v. Cleveland Indep. Sch. Dist., 64 F.3d 176, 178 (5th Cir. 1995) ("[I]f a student's parents want him to receive special education under the IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation"); Dubois v. Connecticut State Bd. Of Educ., 727 F.2d 44, 48 (2d Cir. 1984) ("the school system may insist on evaluation by qualified professional who are satisfactory to the school officials"); Vander Malle v. Ambach, 673 F.2d 49, 53 (2d Cir. 1982) (school district may have student examined by a psychiatrist of their choosing); Great Valley School District v. Douglas, 807 A.2d 315 (Pa. Commw. Ct. 2002) ("under the IDEA a school district has a right to use its own staff to evaluate a student, even over objections that the testing would harm the child medically or psychologically. . . .

The right of the school district to choose qualified professionals it finds satisfactory is unquestioned.”). Compliance with IDEA requirements regarding qualifications of evaluators is presumed unless evidence is introduced which demonstrates non-compliance. No such evidence was presented at this hearing because evaluators have not yet been chosen.

45. In this case, the testimony of [redacted]’s teachers and the expert testimony of Dr. Oakland demonstrated that the privately obtained evaluations of [redacted] are not sufficient to serve [redacted]’s educational needs. Up-to-date information and comprehensive assessments are the most useful data that will permit the IEP team to develop an appropriate educational program for [redacted]. At this point, based upon the evaluations in the record, it is not entirely clear what educational interventions would be most beneficial for [redacted]. Re-evaluation is warranted to provide [redacted] IEP team with sufficient information to enable v educational program to be developed. Under these circumstances the School Board is not only entitled to evaluate [redacted], it is required to evaluate [redacted].

46. To conduct a reevaluation, the School Board only must make a request for a reevaluation pursuant to notice requirements set out in the rules. 20 U.S.C. § 1414(b); Fla. Admin. Code Rules 6A-6.0331 and 6A-6.03311(1). The notice requirement provides that “prior written notice shall be given to the parent a reasonable time before any proposal or refusal to initiate or

change the identification, evaluation, or educational placement of the student or the provision of a free appropriate public education." Fla. Admin. Code R. 6A-6.03311.

47. In this case, the School District provided [redacted]'s parents with the required notice. The School Board informed the parents in writing on several occasions of the proposed comprehensive reevaluation, including specifically identifying the areas to be assessed, and explained the reasons why the reevaluation was necessary, including describing the information and factors considered in reaching this decision. Furthermore, the School Board supplied the parents with a statement of the protection provided by the procedural safeguards and information concerning whom to contact for additional information.

48. In particular, the identity of proposed evaluators and a list of the specific testing instruments to be used is not information required to be contained in the notice provided to parents in seeking consent for reevaluation. "Consent" means, in relevant part, that the parent "has been fully informed of all information relevant to the activity for which consent is sought, ..." 34 C.F.R. § 300.500(b)(1). The School Board has informed [redacted]'s parents of the areas to be evaluated and that the School Board will utilize appropriately qualified evaluators. In Letter to Sutler, 18 IDELR 307 (OSEP 1991), the United States Department of Education's Office of Special Education Programs (OSEP), addressed whether a school district must inform a parent

of the specific tests to be administered and the professional qualifications of the evaluators in order to obtain consent for a reevaluation. OSEP determined the notice provided to a parent "need not indicate every test to be administered," and "that there is no Federal requirement that the professional qualifications of the examiner(s) be described in the notice." In this case, the School Board provided [redacted]'s parents with the required information to enable them to make an informed decision to provide consent for a comprehensive reevaluation of [redacted] Therefore, the School Board is entitled to effectuate the IEP team's decision to obtain a comprehensive reevaluation of [redacted], with qualified evaluators of its choosing.

ORDER

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

ORDERED:

That Petitioner is entitled to immediately proceed with its comprehensive reevaluation of Respondent, utilizing evaluators of its choosing.

DONE AND ORDERED this 1st day of March, 2005, in Tallahassee, Leon County, Florida.

S

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Diane Cleavinger
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 1st day of March, 2005.

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NOTICE OF RIGHT TO SEEK JUDICIAL RELIEF

The decision and its findings are 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 230.23(4)(m)5, Florida Statutes; or c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 230.23(4)(m)5 and 120.68, Florida Statutes.