STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 18-5161E

ORANGE COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A final hearing was held in this case before Diane Cleavinger, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on [redacted], [redacted], in Pensacola, Florida.

APPEARANCES

For Petitioner: [redacted]
Jessup, Inc.
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Orange City, Florida 32763

For Respondent: [redacted], Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's (Student) parents should be reimbursed for the independent education evaluation (IEE) paid for by the parents.

PRELIMINARY STATEMENT

On [redacted], [redacted], Petitioner filed a due process complaint with the Orange County School Board (Respondent or the School Board) in which Petitioner sought: 1) reimbursement from the School Board for an IEE costing $[redacted].00; 2) amendment to the individualized education plan (IEP); and 3) a written apology from the School Board. The case was forwarded to DOAH for hearing.

On [redacted], [redacted], Respondent filed a Notice of Insufficiency and Motion to Dismiss, which was granted in part, striking complaint paragraphs 18, 19, 20, and portions of 21. Resolutions contained in paragraphs C and D of the complaint were dismissed.

On [redacted], [redacted], Petitioner filed a Motion for Leave to Amend Request for Due Process Hearing. An Order granting leave to amend was issued on [redacted], [redacted], and the amended complaint was accepted. The amended complaint requested:

1) reimbursement from the Orange County School Board for an IEE in the amount of $[redacted].00; 2) amendment to the IEP; and 3) compensatory education in the form of one year of applied [redacted] services.

On [redacted], [redacted], Petitioner filed a Motion for Summary Order. Respondent filed a response on [redacted], [redacted]. An

Order Denying Motion for Summary Order was issued on [redacted], [redacted].

A telephonic status conference was held on [redacted], [redacted]. Based on the discussions during the teleconference, a final hearing was scheduled for [redacted], [redacted]. On [redacted], [redacted], an Unopposed Motion to Continue Final hearing was filed. The motion to continue was granted on [redacted], [redacted]. Thereafter, a telephonic status conference was held on [redacted], [redacted], to discuss scheduling the final hearing. Based on those discussions the final hearing was scheduled for [redacted], [redacted].

The hearing proceeded as scheduled, with all parties present. During the hearing, Petitioner presented the testimony of eight witnesses and offered into evidence Petitioner's Exhibits 1, 2, 3, 4, 4B, 4C, 4E, 4F, 4G, and 6, which were admitted into evidence. Respondent did not call any witnesses separate from those called by Petitioner, but did offer into evidence Respondent's Exhibits 7, 8, 9, 10, 11, 16, 17, 18, and 30, which were admitted into evidence.

At the conclusion of the final hearing, the post-hearing schedule was discussed. Based on that discussion, an Order establishing a schedule for submission of proposed final orders and deadline for the final order was entered on [redacted], [redacted]. The Order established that proposed final orders should be filed on or before [redacted], [redacted], and that a final order would be

issued by [redacted], [redacted]. The final hearing Transcript was filed on [redacted], [redacted]. On [redacted], [redacted], an Unopposed Motion to Extend Deadline for Proposed Final Orders was filed. An Order of Specific Extension of Time for Final Order was issued the same day, requiring proposed orders to be filed no later than 5:00 p.m., on [redacted], [redacted], with the final order to follow by [redacted], [redacted].

On [redacted], [redacted], Petitioner and Respondent filed proposed final orders. Both parties' proposed orders were accepted and considered in preparing this Final Order.

Additionally, unless otherwise indicated, all rule and statutory references contained in this Final Order are to the version in effect at the time Petitioner's IEP was drafted.

Finally, for stylistic convenience, [redacted] pronouns are used in the Final Order when referring to the Student. The [redacted] pronouns are neither intended, nor should be interpreted, as a reference to the Student's actual gender.

FINDINGS OF FACT

1. The Student was enrolled in the Orange County Public Schools as a [redacted]. At the time of the hearing, the Student was [redacted] years old. The Student was eligible for exceptional student education (ESE) services in the eligibility category of [redacted] ([redacted]). [redacted] also was

eligible to receive [redacted] ([redacted]), [redacted] ([redacted]) and [redacted] ([redacted]) as related services.

2. On [redacted], [redacted], Respondent performed a [redacted] ([redacted]) and, subsequently, on [redacted], [redacted], created a [redacted] ([redacted]) for the student.

3. On [redacted], [redacted], the [redacted] requested an IEE of the [redacted]. On [redacted], [redacted], Respondent acknowledged receipt of the IEE request. On [redacted], [redacted], Respondent approved the IEE request and sent correspondence to the [redacted] indicating that the "evaluator who completed the [redacted] must be credentialed as a [redacted]." The correspondence also provided the parents with a document, titled "Procedures to Follow for an Independent Education Process (IEE)." The document in numbered step 6 states, "The private provider prepares an estimated quote for the anticipated evaluation services and sends it to the OCPS District ESE office for approval." The document in numbered step 7 states that a purchase order will be sent to the evaluator indicating approval for the IEE. The document does not contain established criteria for cost containment or provide a maximum cost allowed for an [redacted]/IEE. In fact, Respondent provided no cost criteria or maximum allowable costs to the parents. The evidence demonstrated that such information at this early point in the process would have been useful in helping the parents select a

[redacted] ([redacted]) who met Respondent's cost requirements, if Respondent had such criteria.

4. Petitioner's parent subsequently selected [redacted], a [redacted], to perform the IEE. There was no dispute regarding [redacted] qualifications to perform the IEE. By [redacted], [redacted], [redacted] had become qualified as a district vendor and, on [redacted], [redacted], Respondent requested a cost estimate for [redacted] services.

5. On [redacted], [redacted], [redacted] submitted an estimate to Respondent for the IEE in the amount of $[redacted].00 and anticipated [redacted] to [redacted] or more [redacted] of work ($[redacted].00 to $[redacted].00 per [redacted]) would be required to complete the IEE. There was no challenge to the scope of work proposed by [redacted].

6. By [redacted], [redacted], the next day, [redacted], the School Board's coordinator of independent evaluations, had completed a quick cost review of three previous [redacted] IEEs that had been completed for the district. [redacted] also obtained input from personnel with more experience in analyzing [redacted]. Later that day and based on [redacted] review, Respondent rejected [redacted] $[redacted].00 fee stating, in part, "as stewards of public funds, we must be mindful of these cost containment guidelines when accepting quotes for these evaluations" and that "typically a similar private evaluation for an [redacted] has been running around $[redacted].00." The communication effectively set a maximum

cost for the IEE at $[redacted].00 and denied Petitioner's request for the same.

7. However, the evidence was clear that Respondent had not promulgated any policies or rules establishing any cost containment guidelines for IEEs involving [redacted]. Respondent has conducted no credible or valid surveys of the customary and usual charges for [redacted] IEEs. Respondent did not consult with any other school districts about what rates those districts pay. Further, Respondent did not do any market research to determine what [redacted] are paid an hour. In fact, [redacted] did not know what the usual and customary rate for [redacted] was in the central Florida area. As such, Respondent did not use any cost containment guidelines to determine that [redacted] fee was excessive. Instead, as indicated, Respondent reviewed and relied upon the fees paid by Respondent for three other [redacted] IEEs previously performed for Respondent. Moreover, there was no credible evidence demonstrating that the fees reviewed were representative of the customary and usual charges for [redacted] IEEs. Similarly, there was no evidence that the fee "running around $[redacted].00" provided Petitioner reasonable access to a private practitioner of their choice who could conduct the requested [redacted] IEE.

8. On the other hand, [redacted] testified that [redacted] had been able to negotiate a rate of $[redacted].00 per [redacted] to perform services

as a [redacted] with multiple insurance companies and had billed those companies over 1300 hours, albeit those contracts were not shown to be for educational purposes. [redacted] also testified that [redacted] performed a recent IEE/[redacted] for Lake County School District (an adjacent school district) and that the school district paid $[redacted].00 for the evaluation as part of a settlement in an unrelated Individuals with Disabilities Education Act (IDEA) case. The evidence did not demonstrate the circumstances relevant to this IEE and it is unknown if the evaluation required special circumstances justifying a higher rate. Additionally, the evidence showed that [redacted] has negotiated rates for [redacted] services directly with parents at the rate of $[redacted].00 per hour. Such evidence indicates that an hourly fee of $[redacted].00 is reasonable for [redacted] services irrespective of whether for therapy or evaluation.

9. By the evening of [redacted], [redacted], [redacted] communicated to Respondent that [redacted] would reduce the cost of the IEE to $[redacted].00. The reduction in price was rejected by Respondent. However, by this time, the lack of established cost criteria had caused a delay of four months from the time of the request for an IEE by the parent on [redacted], [redacted]. The parents were advised to choose another [redacted] and were provided with a list of vendor-approved providers. There was no evidence that the listed

providers would meet the quickly developed cost limitations of Respondent.

10. On [redacted], [redacted], Petitioner's parents subsequently hired [redacted] to perform the IEE and, through their advocate, paid [redacted] the sum of $[redacted].00 for the IEE.

11. [redacted] completed the IEE/[redacted] on [redacted], [redacted]. The evaluation took [redacted] hours to complete. Since the scope of [redacted] work was not challenged by Respondent, there was no credible evidence that [redacted] hours was an excessive amount of hours for a [redacted] IEE or that [redacted] hours for the completed evaluation was not justified by the circumstances of Petitioner. As such, the fee of $[redacted].00 equated to a fee of $[redacted].[redacted] per hour and was reasonable under the evidence.

12. Ultimately, Petitioner filed a due process complaint in an attempt to obtain reimbursement for the IEE performed by [redacted]. Respondent never filed a request for due process to determine that its evaluation was appropriate or that the IEE requested by Petitioner did not meet its criteria. Further, Respondent did not defend its evaluation on the basis that a free appropriate public education (FAPE) was provided to Petitioner.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this

proceeding. §§ 1003.57(1)(b) and 1003.5715(5), Fla. Stat., and Fla. Admin. Code R. 6A-6.03311(9)(u).

14. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

15. District school boards are required by the Florida K-20 Education Code to provide for an "appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable." §§ 1001.42(4)(l) and 1003.57, Fla. Stat.

16. The Florida K-20 Education Code's imposition of the requirement that exceptional students receive special education and related services is necessary in order for the State of Florida to be eligible to receive federal funding under the IDEA, which mandates, among other things, that participating states ensure, with limited exceptions, that a "free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A); Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th Cir. 2012).

17. In this case, Petitioner has raised one procedural issue as to whether Petitioner's parents should be reimbursed in the amount of $[redacted] for the cost of an IEE for which they paid.

18. In Board of Education v. Rowley, 458 U.S. 176 (1982), the Supreme Court held that a two-part inquiry or analysis of the facts must be undertaken in determining whether a local school system has provided a child with FAPE. As an initial matter, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Rowley, 458 U.S. at 206-207. However, a procedural error does not automatically result in a denial of FAPE. See G.C. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to a FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525 (2007).

19. Under the IDEA and its implementing regulations, a parent of a child with a disability is entitled, under certain circumstances, to obtain an IEE of the child at public expense. The circumstances under which a parent has a right to an IEE at public expense are set forth in 34 C.F.R. § 300.502(b), which provides as follows:

> 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.

20. Florida law, specifically Florida Administrative Code Rule 6A-6.03311(6), provides similarly as follows:

(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. (emphasis added)
>
> (h) If a parent requests an independent educational evaluation, the school district may ask the parent to give a reason why [redacted] or [redacted] 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.

21. These provisions make clear that a district school board in Florida is not automatically required to provide a publicly funded IEE whenever a parent asks for one. A school board has the option, when presented with such a parental request, to initiate——without unnecessary delay——a due process hearing to demonstrate, by a preponderance of the evidence, that

its own evaluation is appropriate or did not meet school board criteria. T.P. v. Bryan Cnty. Sch. Dist., 792 F.3d 1284, 1287 n.5 (11th Cir. 2015). See also Letter to Anonymous, 22 IDELR 637 (OSEP February 2, 1995), and Letter to Petska, 35 IDELR 191 (OSEP September 10, 2001). If the school board is able to meet its burden and establish the appropriateness of its evaluation or that the IEE desired by the parents did not meet its criteria, the school board is relieved of any obligation to provide the requested IEE.[1/]

22. Further, a school district may establish the criteria for funding an IEE. In terms of costs for an IEE, a school district may establish maximum allowable charges for specific tests if said maximum (i) allows a choice among qualified professionals, (ii) is not limited to the average fee customarily charged in that area, (iii) allows for exceptions for justified unique circumstances, and (iv) applies as well to the district when it initiates an evaluation. A school district may also establish reasonable cost containment criteria applicable to both district and parent evaluators, but only with a provision for an exception when the parents show unique circumstances justifying a higher fee. See, e.g., Letter to Anonymous, supra.; see generally Letter to Thorne, 16 IDELR 606 (OSEP Feb. 5, 1990) ("[I]t should be noted that if the total cost for an IEE exceeds the district's cost criteria and there is no justification for

the excess cost, the cost of the IEE must be publicly funded to the extent of the district's maximum allowable charge.”). Given such guidance, the denial of an IEE based solely on financial cost would be inconsistent with 34 C.F.R. § 300.502. See Guidance Letter from Stephanie S. Lee, Off. of Special Educ. and Rehab. Servs., U.S. Dep’t of Educ. (Oct. 9, 2002).

23. In that regard, the evidence was clear that the parents requested an IEE and that Respondent agreed to provide such an evaluation. The parents selected a qualified evaluator to conduct the evaluation who proposed a fee of $[redacted].00 for the evaluation. The scope of the work proposed in the evaluation was not unreasonable and was not challenged by Respondent. After the selection and initial evaluation was completed, the School Board elected to engage in a review of the prices it paid for similar types of IEEs. It did not review or survey the prices normally charged in central Florida or other areas to determine a reasonable range of prices for similar evaluations. Based on its inadequate review of amounts previously paid for [redacted] IEEs, the School Board denied the IEE sought by Petitioner’s parents. Because there was no review of the amounts usually charged for [redacted] IEEs, the evidence was clear that the School Board had no established cost criteria for [redacted] IEEs and that the district personnel’s review of prior prices paid for [redacted] IEEs did not provide reasonable cost

criteria for such [redacted] IEEs. Moreover, because the School Board did not have previously established cost containment criteria, the consequent review of a small number of prices previously paid by Respondent for [redacted] IEEs caused an unnecessary delay in the performance of the IEE requested by the parents and placed an additional unreasonable burden on the parents to pay for an IEE. See Dover City Schs., 111 LRP 59555 (OH SEA 2011). As such, the School Board had no legitimate basis to deny the IEE the parents desired and, under the above-cited rule, should have either paid for the IEE or without unnecessary delay, filed a due process request defending the School Board's denial of the IEE. Instead, the Board had no cost criteria, took no action and forced the parents to pay for the IEE. As such, the School Board materially violated IDEA by forcing the parents to pay for an IEE and denying Petitioner an IEE paid for at public expense. See Cobb Cnty. Sch. Dist., 117 LRP 33458 (GA SEA 2017)(fee of $[redacted].00 an hour awarded for FBA IEE where agency failed to have reasonable cost containment criteria).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Respondent failed to ensure that an IEE was completed at no cost to Petitioner and that the amount of $[redacted].00, paid by Petitioner for the requested IEE, be reimbursed to Petitioner.

DONE AND ORDERED this 21st day of May, 2019, in Tallahassee, Leon County, Florida.

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DIANE CLEAVINGER
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of May, 2019.

ENDNOTE

[1/] There is a disagreement in the case law and regulatory guidance whether, under the fee reimbursement circumstances of this case, Respondent is required to file for a due process hearing to defend its evaluation or denial of the fee. Compare, Seth B. v. Orleans Parish Sch. Bd., 67 IDELR 2 (5th Cir. 2016)(court found that the school boards were not required to file for due process when the cost criteria are at issue), with Evans v. Dist. No. 17, 841 F.2d 824, 830 (8th Cir. 1988), and Bd. of Educ. v. Ill. State Bd. of Educ., 41 F.3d 1162, 1169 (7th Cir. 1994)(both courts found the school board was required to file for due process to defend their established criteria). More relevant here is Jefferson County Board of Educucation v. Lolita S., 581 F. App'x 760, 765-66, 64 IDELR 34 (11th Cir. 2014), where the court held "The Board did not file a due process request, and it cannot now defend its evaluation or challenge the IEE." Under the facts of the Jefferson case, the court did not find reversible error on the hearing officer's finding that the fee for the parent-obtained IEE should be reimbursed because the school board did not file for a due process hearing and regardless of the hearing officer's finding that the district had provided FAPE to the student. However, it is unclear in Jefferson as to whether the court determined that the parent-obtained IEE should be reimbursed because the school board was

required to file a due process complaint and failed to do so or because the school board failed to raise the issue or defend its evaluation/criteria in the underlying parent-brought district court hearing. Notably, none of these cases involve Florida's rule that requires the school board to "initiate" a due process hearing as opposed to the federal rules requirement of defending established criteria in a hearing that, arguably, could be brought by the parent. Irrespective of the above cases, the clear evidence in this case is that Respondent did not have any established reasonable cost containment criteria on which it could decline to pay for Petitioner's requested IEE.

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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)(c), Florida Statutes (2014), 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), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).