STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 20-3855E

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Respondent.
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FINAL ORDER

Pursuant to notice, a due process hearing was held by Zoom Conference before Administrative Law Judge Diane Cleavinger of the Division of Administrative Hearings (DOAH) on October 27 and 28, 2020.

APPEARANCES

For Petitioner: Susan Jane Hofstetter, Esquire
School Board of Broward County
K. C. Wright Administration Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

For Respondent: Rochelle Zucker Marcus, Esquire
Marcus Ed Law, L.L.C.
Suite 1400
401 East Las Olas Boulevard
Fort Lauderdale, Florida 33301

Sarah E. Kay, Esquire
Kay Family Law, PLLC
8323 West Forest Circle
Tampa, Florida 33609

STATEMENT OF THE ISSUE

The issue in this proceeding is whether Petitioner's request for an independent education evaluation (IEE) at public expense should be denied.

PRELIMINARY STATEMENT

On August 25, 2020, a due process complaint was filed with DOAH by Petitioner Broward County School Board (School Board) seeking approval of its denial of Petitioner's request for an IEE. On September 8, 2020, after telephonic discussion with the parties, this matter was set for hearing. The parties were advised both orally and by written Notice of Hearing of the date, time, and manner of hearing. The hearing proceeded as scheduled, with all parties present.

At the hearing Petitioner presented the testimony of four witnesses and offered Petitioner's Exhibits numbered 7 through 9, 11, 12 through 22, 24 through 32, 40 and 42, all of which were admitted into evidence. Respondent presented the testimony of nine witnesses and offered Respondent's Exhibits numbered 18, p. 33; 22, p. 35; 25 (limited); 38, p. 61; 40, p. 63 and p. 67; 49, p. 81; 118, p. 193; 134, 135, 143, 146 through 148, 150 through 152, 174 and 175, all of which were admitted into evidence. Additionally, official notice was taken of paragraphs 3, 5, 6, 8, 11, 13, and 16 of Respondent's First Request for Judicial Notice filed on October 19, 2020.

At the conclusion of the hearing, a discussion with the parties regarding the post-hearing schedule occurred. Based on that discussion it was determined that proposed final orders were to be filed on or before November 30, 2020, with the final order to follow by December 30, 2020.

After the hearing, Petitioner and Respondent filed proposed final orders on November 30, 2020. The 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.

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

FINDINGS OF FACT

1. The Student has been enrolled in the Broward County School District for several years. Since [redacted], the Student has been eligible as a gifted student attending School A, a public middle school in Broward County. At the time of the hearing, the Student was in his [redacted]-grade year.

2. On December 19, [redacted], during the Student's [redacted]-grade year, the School Board received a faxed letter from Respondent's attorney containing a variety of concerns regarding the Student's education. The letter requested an evaluation of the Student for special education services in the parentally-chosen areas of Achievement, Assistive Technology, Health/Medical, Interviews, Language, Observations, Occupational Therapy, Speech, Psychoeducational and Response to Intervention (RTI) Data.[1] Attached to the letter was a discontinued School Board form for parental consent to evaluate, which was filled out and signed by the parent. The form did not include parental consent for an evaluation in the areas of behavior. However, the evidence demonstrated that the form was not created in collaboration with

[1] No RTI services had been provided to the Student. Such data is required to determine eligibility in Specific Learning Disabilities (SLD) and Language Impairment (LI).

the School Board but was the parent's unilateral demand for the Student to be evaluated in the areas the parent chose. Absent such collaboration and the acquiescence of the School Board, the form did not serve as parental consent for the School Board to conduct special education evaluations.[2] The form did serve as a parent request to evaluate and did begin the referral process for evaluation and determination of eligibility under the Individuals with IDEA. Notably, under that process the School Board has 30 days to gather

[2] In Florida as with the federal requirements, the parent, legal guardian or School Board may initiate a request for an initial, pre-placement evaluation. Fla. Admin. Code Rule 6A-6.0331(3). Regardless of who initiates the request and after collaboration with the parent, the School Board is required to provide the parent or legal guardian with written notice of the evaluations the School Board is proposing to conduct so that the parent or legal guardian can provide *informed* consent to those evaluations. Fla. Admin. Code R. 6A-6.0331(4)(a). Consent means that the parent or legal guardian has been given all information relevant to the evaluation for which consent is sought, in his or her native language or through another mode of communication. 34 C.F.R. § 300.9; Fla. Admin. Code R. 6A-6.03411(1)(g). If a parent refuses consent or doesn't respond to requests for consent, a School Board may, but isn't required to, pursue the initial evaluation of the student by utilizing the procedural safeguards in Disabilities Education Act (IDEA), which include mediation procedures under 34 C.F.R. § 300.506 and due process procedures under 34 C.F.R. § 300.507 through 34 C.F.R. § 300.516. 34 C.F.R. § 300.300 (a)(3)(i).

Neither the IDEA nor Section 504 requires that a School Board assess all children for whom evaluations are requested. *Pasatiempo v. Aizawa*, 25 IDELR 64 (9th Cir. 1996); and *Clark County Sch. Dist.*, 37 IDELR 169 (SEA NV 2002). However, parents must be given notice of a district's decision not to evaluate a child. 34 C.F.R. § 300.503(a)(2). The requirements relating to the pre-placement evaluation are separate and distinct from the District's child find obligation under the IDEA. *See* 34 C.F.R. § 300.111. Child find is the screening process used to identify those children who are potentially in need of special education and related services. Children identified in the child find process then undergo the initial evaluation of 34 C.F.R. § 300.301. Importantly, this case is not a child find case but only involves determination of whether the parent is entitled to an IEE prior to the occurrence of an evaluation with which the parent disagrees.

Notably under IDEA, an initial or preplacement evaluation is a set of procedures to determine first, whether a student has a disability; second, whether the student needs specially designed instruction or related services; and third, the extent and nature of that student's need. As noted above, under IDEA, pre-placement evaluation planning is a collaborative process. A team of professionals at the school along with the parent determine what areas of evaluation are warranted based upon the student's individual learning profile. *See* 34 C.F.R. §§ 300.301, 300.304 and 300.305. *See also* Fla Admin. Code R. 6A-0331.

information about the Student, meet with the parent to plan for an evaluation and gain consent of the parent to any proposed evaluations.[3]

3. On December 20, [redacted], the School Board commenced its Winter Break. Staff returned to work on January 6, [redacted], 18 days into the 30-day time period.

4. The evidence showed that, shortly after school resumed, the School Board began within a reasonable amount of time to review the Student's records to respond to the parent's request and prepare for an evaluation planning meeting. The evidence demonstrated that the review of records was not an evaluation of the Student to determine eligibility for Exceptional Student Education (ESE) services but was simply a review of historical information to prepare a response to the parent's request.

5. On January 17, [redacted], within the 30-day time period, an evaluation planning meeting was held. The parent attended the meeting along with the school psychologist, the ESE specialist and a regular education teacher. These individuals constituted the School Board's Child Problem Solving Team (CPST). The team reviewed recent teacher input regarding the Student's classroom performance,[4] as well as, historical data, assessments, work product and grades. Teacher concerns regarding the Student focused on off task behaviors, failure to hand work in, impulsivity and lack of effort. The Student's teachers did not have academic or language concerns and did not suspect a disability.

6. At the meeting, the parent and the parent's attorney voiced concerns about the Student's grades and reading skills. The parent indicated that a

[3] Prior assessments of a student do not expire but are not necessarily relevant to current educational planning or performance. However, during the preliminary process to determining an appropriate evaluation response, the School Board is required to review the information it has on a Student, such as grades, assessments and classroom performance, to respond to a parental request for evaluation, collaborate with the parent on an evaluation plan and hopefully gain consent to that plan.

diagnosis for [redacted], which diagnosis is necessary for evaluation under other health impaired (OHI) based on [redacted], would be provided. Pending provision of the [redacted] diagnosis, the team agreed that a variety of assessments in the area of OHI were warranted. The parent and the parent's attorney also asked that the Student be evaluated in the ESE categories of SLD and LI, including voice issues. However, the evidence did not demonstrate that, at the time of the January 17th meeting, there was any RTI data or enough documentation to warrant targeted assessments for SLD, LI or voice. The team concluded that it did not have enough information to determine whether evaluations in SLD, LI or voice were needed. The team did not conclude that evaluations in those areas would not be conducted should data indicate more targeted assessments were appropriate. However, the team needed more information, which information could be revealed in the assessments the team proposed to complete.

7. Around January 21, [redacted], the school received a letter from the Student's doctor, providing a diagnosis of [redacted]. The diagnosis was provided shortly after the 30-day time period for obtaining parental consent expired.

8. On February 4, [redacted], after receipt of the medical documentation of an [redacted] diagnosis and review of the available records, School A sent home a consent to evaluate for OHI.[5] The same day, School A also sent the required written Notice of Proposal/Refusal that advised the parent more information and data were needed to conduct assessments targeted towards SLD, LI and voice.

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[4] Teacher screening/rating forms provide informal data about whether to intervene with a student to guide decisions about next steps in a student's education. They are not evaluations, but are observations of a student.

[5] Notably, evaluation in a particular ESE category does not preclude evaluation in other ESE categories since determination of eligibility occurs after evaluations are completed and is based on the results and analysis of all evaluations.

9. The request for parental consent to evaluate occurred after expiration of the 30-day time period to obtain parental consent. However, given the intervening winter break and late-provided [redacted] diagnosis, the evidence did not demonstrate that the delay in providing the consent impacted the parent, the Student or was material to educational planning for the Student.

10. The form requested parental consent for evaluations in, among other things, the areas of Achievement and Social/Emotional/Behavioral. The area of Achievement was broadly defined as being an assessment of academic achievement through data review and/or formal assessment to determine:

> [T]he Student's current level of functioning and identify strengths and weaknesses. Areas may include basic reading skills, reading fluency and comprehension, math calculations and reasoning, written and oral expression, and/or listening comprehension. (Required for initial identification of ASD, DHH, E/BD, InD, OI, OHI, SLD, TBI.

11. The parent signed the consent but with a condition that the school not evaluate during "core classes." The parent also refused to consent to evaluations in the area of Social/Emotional/Behavioral and marked out the area referencing those evaluations. The parent returned the amended form to School A around February 18, [redacted]. Since the parent placed conditions on the consent and refused to consent to the entirety of the school's proposed evaluation plan, parental consent was not provided to conduct an initial evaluation of the Student.[6]

12. As a result of the parent's refusal to consent, School A again forwarded the same form to the parent on February 26, [redacted]. The parent did not sign or return the request for consent to the school.

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[6] When the parent consents, the parent must consent to the student's evaluation or educational program generally. Parents may not pick and choose among portions of the student's evaluations or educational program and consent to only certain provisions. *See, G.J. v. Muscogee Cty. Sch. Dist.*, 54 IDELR 76 (M.D. Ga. 2010), *aff'd*, 58 IDELR 61 (11th Cir. 2012)(holding that because the parents sought several limiting conditions on the consent for an evaluation, the parents' consent was not consent at all).

13. On May 5, [redacted], the parent was provided a third Consent to Evaluate for OHI. The parent signed the third form on that same day. The consent sought evaluations in the areas of academic achievement, health/medical and intellectual/cognitive. Under "other factors considered" it specified that the staff were looking to evaluate executive functioning, auditory processing, writing and phonemic awareness. Importantly, the assessments for cognitive functioning, auditory processing and executive functioning require face to face assessments because the assessments were developed and standardized for administration in a one-to-one setting with the examiner and student. At the time, Broward schools were not open for face-to-face instruction or assessments having instituted online only classes and social distancing protocols beginning around late March [redacted] due to the Covid-19 pandemic.

14. The return of the form commenced the 60-day time period for conducting the evaluations proposed under the school's evaluation plan. In Florida, the time period for completing an evaluation does not include school holidays, Thanksgiving, winter break, spring break or summer break.

15. On May 13, [redacted], the Florida Commissioner of Education signed Emergency Order 2020-EO-02 due to the Covid-19 pandemic. Relevant herein, the order suspended Florida Administrative Code Rule 6A-6.0331, subject to federal approval of the flexibility, to extend the initial eligibility evaluations of an ESE student for the number of days that spring break was extended due to the emergency or until portions of the evaluation that require face-to-face assessment can be completed. Summer break commenced June 3, [redacted], 29 days into the 60-day period. Additionally, on October 23, [redacted], the Florida Department of Education published a Memorandum entitled "Students with Disabilities Initial Evaluation Timeline: Change in Guidance." The guidance extended the initial eligibility evaluation timeline for evaluations not completed prior to closure of brick and mortar schools due to Covid-19. The extension provides that for the time the brick and mortar school setting was closed, that time is added onto the 60-day timeline. Brick

and mortar attendance in Broward County for general education [redacted] graders, of which the Student is one, started on October 14, [redacted]. Thus, the 60-day time period would not recommence until the start of in person attendance on October 14, [redacted]. The evidence did not demonstrate that, during the period of school closure, evaluations requiring face-to face sessions could be completed through public or reasonably available private means.

16. On July 13, [redacted], Respondent's counsel emailed a request for an IEE at public expense. At that point, the proposed evaluation had not been completed and there was no evaluation with which the parent could disagree.

17. The School Board concluded that while Respondent was not entitled to an IEE, it agreed to collaborate with Respondent to avoid filing for due process. Eventually, the School Board concluded that collaboration was futile and denied the request for an IEE because it had not yet evaluated the Student. The denial was appropriate. At that point, the School Board filed for due process on August 25, [redacted], asking that its denial be upheld.

18. At the time of the hearing, only portions of the initial evaluation had been completed. Importantly, the necessary psychoeducational assessment had not been conducted since it requires a face-to-face setting. Similarly, other assessments that require face-to-face observations had not been completed. The assessments were in the process of being scheduled since in person meetings had resumed. The evidence was not clear if these assessments would be completed before the 60-day time period expired. The evidence was clear that the school was proceeding reasonably quickly to clear the backlog of evaluations that had accumulated prior to suspension of face-to-face meetings. More importantly, the delay caused by the pandemic in completing assessments that required in person meetings was unavoidable. The evidence did not demonstrate that any delay had a material impact on the parent, the Student or his educational planning. Further the delays engendered by the pandemic did not create any equitable right to an IEE.

19. Given these facts, the evidence did not demonstrate that Petitioner was entitled to an IEE at public expense and the decision of the School Board to deny the request is upheld.

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. *See* §§ 120.65(6) and 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

21. Petitioner bears the burden of proof with respect to each of the issues raised herein. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

22. 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.

23. 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 Cty. Bd. of Educ.*, 701 F.3d 691, 694 (11th Cir. 2012).

24. 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.

25. Florida law, specifically 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.
>
> * * *
>
> (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.

26. 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. *T.P. v. Bryan Cty. Sch. Dist.*, 792 F.3d 1284, 1287 n.5 (11th Cir. 2015). Further, a parent's right to an IEE only comes into being after a school board has conducted an evaluation that complies with the evaluation procedures in rule 6A-6.0331(5) with which the parent disagrees. Those evaluation procedures require "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student within a databased problem-solving process, including information about the student's response to evidence-based interventions as applicable, and information provided by the parent."

27. In this case, the evidence demonstrated that the School Board reviewed historical data on the Student and obtained teacher input regarding the Student. The evidence did not demonstrate that the School Board conducted or completed an evaluation of the Student utilizing a variety of assessment tools. As such, review of historical information and teacher input does not constitute an evaluation. *F.C. v. Montgomery Cty. Pub. Schs.*, 68 IDELR 6 (D. Md. 2016)(holding that the parents of a high schooler who believed that a Maryland district's examination of their son's report cards, 2009 evaluation, and teacher observations wasn't sufficient to identify his needs could not seek a publicly funded IEE).[7] Further, the School Board was in the process of completing an evaluation of the Student and had not refused to conduct the evaluation or more assessments if warranted. Therefore, based on the Findings of Fact as stated herein, the School Board has proven that they have not completed an evaluation of the Student in this case, but at the

[7] The case of *Haddon Township School District v. New Jersey Department of Education*, 67 IDELR 44 (N.J. Super. Ct. App. Div. 2016, *unpublished*) is not applicable to this case. In the *Haddon* case, the court ruled that the parents were entitled to an IEE at public expense based on the fact that the IEP team's refusal to conduct new assessments after review of the student's educational record constituted an evaluation that triggered the parent's right to an IEE. In this case, the School Board did not deny an evaluation and is completing the evaluation consented to by the parent.

time of hearing were completing such evaluations. Given that Petitioner has not completed an evaluation with which Respondent can disagree, Respondent's request for an IEE at public expense is denied. However, although Respondent is not entitled to an IEE at public expense, the parent is free to present any evaluations obtained at private expense to the School Board, the results of which the School Board is required to consider. *See* Fla. Admin. Code R. 6A-6.03311(6)(j)1. (providing that if a parent "shares with the school district an evaluation obtained at private expense . . . [t]he 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.").

ORDER

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

1. Respondent's request for an IEE at public expense is denied and the decision of the School Board to deny an IEE is upheld.

DONE AND ORDERED this 23rd day of December, 2020, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of December, 2020.

COPIES FURNISHED:

Susan Jane Hofstetter, Esquire
School Board of Broward County
K. C. Wright Administration Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301
(eServed)

Rochelle Zucker Marcus, Esquire
Marcus Ed Law, L.L.C.
Suite 1400
401 East Las Olas Boulevard
Fort Lauderdale, Florida 33301
(eServed)

Barbara Joanne Myrick, Esquire
School Board of Broward County
11th Floor
600 Southeast 3rd Avenue
Fort Lauderdale, Florida 33301
(eServed)

Victoria Gaitanis, Dispute Resolution Program Director
Bureau of Exceptional Education and Student Services
Department of Education
Turlington Building, Suite 614
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Amanda W. Gay, Esquire
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399
(eServed)

Julian Moreira, Educational Program Director
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399
(eServed)

Sarah E. Kay, Esquire
Kay Family Law, PLLC
8323 West Forest Circle
Tampa, Florida 33609
(eServed)

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Robert Runcie, Superintendent
Broward County Public Schools
Floor 10
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

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).