

**STATE OF FLORIDA DIVISION OF
ADMINISTRATIVE HEARINGS**

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 22-0206E

**,

Respondent.

_____ /

FINAL ORDER

A due process hearing was held on March 7, 2022, before Jessica E. Varn, an administrative law judge with Florida's Division of Administrative Hearings (DOAH), in Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Susan Jane Hofstetter, Esquire
School Board of Broward County, Florida
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Fort Lauderdale, Florida 33301

For Respondent: Maria Cammarata, Esquire
Cammarata and Cammarata, P.L.
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Pompano Beach, Florida 33060

Stephanie Langer, Esquire
Disability Independence Group, Inc.
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STATEMENT OF THE ISSUE

Whether, pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et.al.*; its implementing regulations at 34 C.F.R. § 300; and Florida Administrative Code Rule 6A-6.0331, the School Board is authorized to conduct a reevaluation of the student.

PRELIMINARY STATEMENT

On January 20, 2022, the School Board filed a request for a due process hearing utilizing the consent override provisions available to a School Board pursuant to rule 6A-6.0331(7)(d). Eight days later, on January 28, 2022, the School Board filed a Motion for Summary Final Order.

On January 31, 2022, Respondent filed a Motion to Dismiss, stating that the parent had never refused consent and seeking, in part, the following relief:

Respondent also respectfully requests that this court order that Petitioner may not interfere with the granted IEE [Independent Educational Evaluation] at public expense and allow Respondent to conduct evaluations freely and not simultaneously with Petitioner.

A telephonic motion hearing was held on February 1, 2022. With both motions still pending, Respondent, on February 7, 2022, filed Respondent's Cross Motion for Summary Order, once again, stating that the parent had not refused consent and requesting, in part, the following relief:

There is no genuine issue of fact as to whether or not the District granted the IEE at public expense. Since the District granted the IEE at public expense, [**] should be able to benefit from same without interference. Respondent respectfully seeks a Summary of [sic] Final Judgment denying the District's request for consent to conduct its own

evaluations simultaneously and instruct the District to permit the IEE at public expense to be conducted free from interference as intended by the law.

On February 14, 2022, the undersigned issued an Order on Pending Motions, denying all relief sought by both parties. The due process hearing was scheduled, with agreement of the parties, on March 7 and 8, 2022.

The due process hearing was held as scheduled. The parties called three witnesses to testify. The Transcript of the due process hearing reflects the exhibits entered into evidence. At the conclusion of the due process hearing, the parties agreed to file proposed final orders 14 days after the transcript was filed with DOAH. The parties also agreed that this Final Order would issue no later than 24 days after the transcript was filed with DOAH. The Transcript was filed on March 23, 2022. Accordingly, proposed final orders were due on April 5, 2022, and the deadline for this Final Order was extended to April 15, 2022. Both parties filed timely Proposed Final Orders which were considered in the preparation of this Final Order.

Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged violations. For stylistic convenience, the undersigned will use female pronouns in this Final Order when referring to Petitioner. The female pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. The student is eligible for Exceptional Student Education (ESE) under the eligibility category of Developmentally Delayed (DD).
2. At the beginning of the 2021-2022 school year, the student was [REDACTED] years old.

3. As early as September 20, 2021, the parent had retained Ms. Cammarata as her attorney.

4. Prior to her [REDACTED] birthday, on [REDACTED], the student's parent requested that the student be evaluated for eligibility in the areas of Autism Spectrum Disorder (ASD) and Emotional/Behavioral Disability (EBD).

5. Four days later, on [REDACTED], the parent reiterated the request for an evaluation.

6. On [REDACTED], the student turned [REDACTED] years old, and the School Board had not yet reevaluated the student.

7. A little over a month later, on December 1, 2021, the School Board created a Parent Participation Form, setting a meeting for December 16, 2021, to develop the reevaluation plan.

8. On December 3, 2021, Ms. Cammarata emailed Ms. Hofstetter, counsel for the School Board, indicating that she and the parent were unavailable on the meeting date, and stating, in part:

The district was again informed and put on notice of requested information and evaluations formally by counsel and parent on September 20, 2021, October 5, 7, 9 and thereafter. The district's intentional actions and inactions are tantamount to a denial. Thus, I am requesting an Independent Education Evaluation ("IEE") at public expense for all requested evaluations and those related and necessary.

9. Ten days later, on December 13, 2021, a telephonic conference was held between Ms. Cammarata and the School Board's [REDACTED]

[REDACTED]. A week later, on December 20, 2021, the [REDACTED] [REDACTED] sent a letter to Ms. Cammarata, stating:

On December 13, 2021, we spoke about your request for an Independent Educational Evaluation ("IEE") at public expense provided to the District on December 3, 2021. As we discussed, for a parent to be entitled to an IEE at public expense, the parent must be in disagreement with an evaluation that the

District has conducted. [**] enrolled in Broward County Schools on [REDACTED]. To date, the District has not conducted any evaluations. In reviewing correspondence from you during the 2021-2022 school year, you have requested an evaluation by the District and to date an evaluation has not been conducted by Broward County Schools.

* * *

The Broward School District has agreed to grant Independent Educational Evaluations in the areas of psychological, functional behavioral assessment and language for your client[.]

* * *

Additionally, enclosed you will find a Consent for Reevaluation for [**]. The District is seeking consent from your client to evaluate [**] by a District evaluator for the two suspected areas of disability your client has indicated, ASD and EBD. This evaluation will occur concurrently with the Independent Educational Evaluation....

10. The parties continued, in writing and in future conversations, to incorrectly label these independent evaluations, which the School Board agreed to pay for, as IEEs.

11. The School Board generated reevaluation forms, including the parental consent form, on December 20, 2021. The suspected disabilities were identified pursuant to the areas identified by Ms. Cammarata. The suspected disabilities required a variety of assessments to be conducted, which the School Board properly sought parental consent to perform.

12. As conceded by the School Board, it had failed to timely reevaluate the student before her [REDACTED] birthday; this belated effort to reevaluate was nevertheless required by law.

[REDACTED]. During her testimony at the hearing, [REDACTED], one of the [REDACTED]

██████████, explained that she agreed to the independent evaluations because she was faced with an unprecedented situation: the parent had timely requested a reevaluation a few times, and the School Board had failed to do its job of promptly reevaluating the student. She made the decision to offer independent evaluations at public expense due to the School Board's failure to timely reevaluate the student.

13. On the same date that the School Board generated the reevaluation forms, Ms. Cammarata wrote an email, stating in part: "I would like to call you after break to discuss the evaluations and share information so that we best meet [**]'s needs. I am obtaining more information as I type and we may be looking at OHI [Other Health Impaired], EBD [Emotional/Behavioral Disability] or ASD [Autism Spectrum Disorder]."

14. At this juncture, the parent had not provided consent for the reevaluation to be conducted by the School Board.

██████████. On January 3, 2022, ██████████, one of the ██████████ ██████████ for the School Board, wrote an email to Ms. Cammarata, stating:

Good Morning and Happy New Year,
Ms. Cammarata:

I apologize for not getting back to you sooner as I was out on break. Hope you had some time off as well.

Thank you for your correspondence during the winter break. On December 20, 2021, you and your client received a letter granting an IEE at public expense. We discussed on the phone the areas of suspected disability and those areas are the evaluations that were granted. As discussed, there are no previous evaluations that you and your client are in disagreement with for which to base the unspecific IEE request received by you on behalf of your client. If you have other concerns now, you can certainly share those with me, and I will provide a response as to whether or not the District will pay

for these additional areas of concern that you are now seeking to be evaluated. The granted IEE was solely on a conversation with you where you stated the areas of suspected disability. The school offered to hold a meeting (reevaluation plan) to determine all areas of suspected disability/needs for further evaluation and you indicated that you wished for the District to just respond to the IEE request (granting or filing Due Process). The December 20, 2021 letter details the areas of assessment that the District will pay for by an independent evaluator.

The District does not agree that we can not seek to evaluate [**] by a District evaluator. It was for this reason that a consent to reevaluate was included with the December 20, 2021, correspondence. The School Board is entitled to conduct its own evaluations concurrently with any evaluations done by private evaluators: pursuant to the 11th Circuit: “a district cannot be forced to rely solely on an independent evaluation conducted at a parent’s behest.” Therefore, [T]he School Board is seeking consent from the parent to conduct its own evaluation. A refusal to provide consent will result in the consent override processes.

15. Twenty minutes after [REDACTED] email was sent, Ms. Cammarata replied by email, stating:

The district is not following the law. You cannot make the law up as you go along. You only have 2 options – grant the IEE without undue delay or file for due process. The District has been derelict with its duties under IDEA for both of these students. Again, the district failed to evaluate from April 2021 until now. The district further failed to evaluate when the parent requested months ago. Finally, the cumulative folder showed consent for evaluations were in process. Therefore, the district failed again and again to do what is right. Regardless, the law is clear and I know you are all well aware of it. Either you grant the IEE or file. You don’t get to do your own evaluations concurrently. That’s not how this

works and you all know this. This seems like a denial so I will wait for your filing.

16. At this juncture, the parent had not signed the consent form for reevaluation of the student.

17. On January 6, 2022, counsel for the School Board wrote an email to Ms. Cammarata, stating:

The District has agreed to fund private evaluations on behalf of [**], your client's student.

However, to date, the District has not conducted its own evaluation of [**]. The District is entitled to conduct its own evaluation of the student. To that end I have attached the Reevaluation Planning Document and the Consent to Reevaluate for review and signature by your client.

If consent is not provided for the District to conduct its own evaluation of [**] by January 13, 2022, the District will be obligated to utilize the consent override procedures outlined in IDEA, 20 USC § 1400 *et. al.* and Florida Administrative Code Rule 6A-6.03311(9).

18. Minutes after this email was sent, Ms. Cammarata responded by stating that a meeting could be scheduled to discuss the areas in which the District was seeking to evaluate the student. But the parent had still not signed the consent form for reevaluation.

19. On January 17, 2022, Ms. Cammarata wrote an email to counsel for the School Board, stating:

The re-evaluation document is missing a lot of information and we don't agree with everything written.

My client is willing to allow some evaluations to be conducted by the district now. She will sign consent for these with her input. However, anyone in the field knows we can't run evaluations concurrently because these would not be valid. We

will do our evaluation with Dr. Kelderman first and then we will sign consent for the district psych evaluation.

20. As reflected in the email, the parent was still refusing to sign the consent form for the reevaluation plan. Of greater concern, as the adults sparred over language and unmet obligations, this student had yet to be reevaluated by anyone—a private evaluator or a district evaluator.

21. Three days later, on January 20, 2022, the School Board filed the Complaint.

CONCLUSIONS OF LAW

24. 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).

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

26. This case concerns the School Board's obligation to reevaluate this student for eligibility under the IDEA, its implementing regulations, and rule 6A-6.0331(7), which states:

(7) Reevaluation Requirements.

(a) A school district **must** ensure that a reevaluation of each student with a disability is conducted in accordance with Rules 6A-6.03011-.0361, F.A.C., if the school district determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reevaluation or if the student's parent or teacher requests a reevaluation.

(b) A reevaluation may occur not more than once a year, unless the parent and the school district agree otherwise and must occur at least once every

three (3) years, unless the parent and the school district agree that a reevaluation is unnecessary.

(c) Each school district **must obtain informed parental consent** prior to conducting any reevaluation of a student with a disability.

(d) **If the parent refuses to consent to the reevaluation, the school district may, but is not required to, pursue the reevaluation by using the consent override provisions of mediation or due process.** The school district does not violate its child find, evaluation or reevaluation obligations if it declines to pursue the evaluation or reevaluation.

(e) The informed parental consent for reevaluation need not be obtained if the school district can demonstrate that it made reasonable efforts to obtain such consent and the student's parent has failed to respond. (emphasis added)

See also 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303.

27. The School Board was obligated to reevaluate this student due to her age. Florida Administrative Code Rule 6A-6.03027(6) requires school boards to reevaluate a student with a disability before the student turns six years old, in order to determine the student's continued eligibility for special programs.

28. Despite the delay in complying with the above cited-rules, the School Board began the process of reevaluation in December of 2021, and, as set forth in the above Findings of Fact, the parent never provided consent for the reevaluation.

29. The parent argues that because the School Board had authorized private evaluations at public expense, which both parties mistakenly labeled as IEEs, the School Board was not authorized to conduct its own evaluations of the student. The parent, however, is unable to cite to any rule or statute in support of this argument.

30. Both parties, during the course of events in this matter, improperly used the term IEE to describe the private evaluations that were granted in December 2021. An IEE, according to the IDEA, and its implementing regulations, is defined as an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student in question. Additionally, there is a limited circumstance in which a parent may seek an IEE at public expense. A parent is entitled to a publicly funded IEE if the parent disagrees with an evaluation obtained by the public agency. 34 C.F.R. § 300.502(b)(1). If a parent disagrees with an evaluation and requests an IEE at public expense, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate, or ensure that an IEE is provided at public expense. *Id.* § 300.502(b)(2).

31. Here, the School Board has yet to evaluate this student. Therefore, the agreement to pay for private evaluations should never have been characterized as granting IEEs.

32. The evidence in this case established that the parent never provided consent for the mandatory reevaluation of this student. *See, e.g., G.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258 (11th Cir. 2012)(finding that parents effectively withheld their approval for a triennial reevaluation by placing numerous restrictions on how the assessment would be conducted; and the district judge had properly found that with the restrictions, the purported consent was not consent at all).

33. The School Board is authorized to immediately reevaluate this student as required by law, overriding the parent's lack of consent.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the School Board is authorized to immediately reevaluate the student, overriding the parent's lack of consent.

DONE AND ORDERED this 14th day of April, 2022, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the Division
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14th day of April, 2022.

COPIES FURNISHED:

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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).