

STATEMENT OF THE ISSUE

The issue is whether the psychological evaluation conducted by Petitioner is appropriate, pursuant to Florida Administrative Code Rule 6A-6.03311(6)(g)2.

PRELIMINARY STATEMENT

By Request for Due Process Hearing filed June 22, 2011, Petitioner requested a determination that its psychological evaluation dated May 25, 2011, is appropriate.

By Amended Notice of Hearing dated June 28, 2011, the Administrative Law Judge set the final hearing for July 15, 2011. On July 6, 2011, Petitioner filed a motion for continuance. On July 8, 2011, the Administrative Law Judge entered an Order continuing the final hearing by 20 days to August 4, 2011. On August 15, 2011, the Administrative Law Judge entered an Order Granting Specific Extension of Time, which extended the original deadline for the final order from August 6 to August 26, 2011.

At the hearing, Petitioner called three witnesses and offered into evidence 27 exhibits: Petitioner Exhibits 1 and 3-28. Respondent called three witnesses and offered into evidence 15 exhibits: Respondent Exhibits 1-15. All exhibits were admitted.

The parties did not order a transcript and did not file proposed final orders.

FINDINGS OF FACT

1. Respondent was born on [REDACTED]. Respondent achieved [REDACTED] early developmental motor and language developmental milestones within normal limits.

2. By the time Respondent reached [REDACTED] of age, [REDACTED] mother had become concerned about the child's tendencies to become upset easily, to overreact to mistakes, and to lose [REDACTED] temper. The mother consulted licensed clinical psychologists Melanie A. Ferber and Kristin M. Lindahl for a neuropsychological evaluation of Respondent. Drs. Ferber and Lindahl administered a battery of tests.

3. A preschool test of intellectual ability revealed generally superior abilities, although Respondent's comprehension and object assembly scores were only average, and [REDACTED] processing speed subtests--symbol search and coding--were below average. [REDACTED] academic achievement testing revealed largely average scores.

4. Drs. Ferber and Lindahl also administered a NEPSY[®], which tests neuropsychological functioning by assessing language processing, memory, attention and executive function skills, visual-spatial functions, and sensorimotor functions. In the language subscale of the NEPSY[®], Respondent's scores varied widely. [REDACTED] ability to process and respond to verbal instructions of increasing syntactic complexity and [REDACTED] verbal

fluency skills were high average. [REDACTED] capacity to analyze the phonological composition of words was average. But Respondent's ability to access and produce familiar words was poor, and [REDACTED] word-retrieval performance was in the impaired range.

5. In the attention/executive function skills of the NEPSY®, Respondent's scores were uneven, but generally in the low average range. On the visual attention subtest, Respondent's score was high average, but in the auditory attention and response set subtest, Respondent's score was borderline. This continuous-performance test assesses the ability to be vigilant and maintain selective auditory attention, as well as the ability to shift set, to maintain a complex mental set, and to regulate responses to contrasting and matching stimuli. On the tower subtest, Respondent's score was also borderline. This test assesses the executive functions of planning, monitoring, and problem-solving.

6. Respondent's memory skills also varied widely. A visual memory subtest disclosed borderline scores. A narrative memory test revealed low average scores. But the memory for names subtest revealed superior scores.

7. For sensorimotor skills, Respondent's scores were also uneven. The visuomotor precision subtest, which assesses fine motor skills and eye-hand coordination, showed impaired scores. The fingertip tapping subtest was average, and the imitating

hands subtest was low average. Respondent tested in the low average range on two subtests of visual-spatial skills.

8. Drs. Ferber and Lindahl determined that ADHD and Oppositional Defiant Disorder should be ruled out. They recommended a reevaluation of Respondent's attentional skills in the classroom, where [REDACTED] teachers should provide a supportive, structured learning environment. Drs. Ferber and Lindahl [REDACTED] occupational therapy to allow Respondent to improve [REDACTED] sensorimotor, graphomotor, fine motor, and organizational skills. Given Respondent's variability in verbal memory skills, Drs. Ferber and Lindahl warned that [REDACTED] might need information repeated to [REDACTED] and a suggested that multimodal approach to teaching might be more effective. Finally, they recommended a brief reevaluation of Respondent in six months.

9. Richard Boozer, who holds a Doctor in Psychology degree, evaluated Respondent on July 17 and 19, 2007--a little over one year after the Ferber and Lindahl evaluation. The reason for the referral was persistent difficulty with attention control and a reported lack of success in therapeutic interventions.

10. Dr. Boozer's report notes that Respondent had two close friends at school and four close friends at home. The parents reported that, at home, Respondent quickly became upset, displayed a poor attention span, and exhibited low self-esteem.

11. Noting that Respondent had completed kindergarten and was about to start first grade, Dr. Boozer observed that the child struggled to remain compliant due to distraction and impulsivity, although ■ did not demonstrate outright misbehavior. Dr. Boozer attributed Respondent's playfulness during testing to impulsiveness and a need for self-stimulation, both of which led to a poor grasp of social boundaries: during testing, the child playfully tossed a toy into the face of the examiner and shadow-boxed in close proximity to the faces of the examiner and the child's mother. Dr. Boozer observed that Respondent grasped ■ pencil with a primitive grip--thumb and three fingers--and Respondent often required prompting to finish some fine motor drawing tasks.

12. Dr. Boozer administered the Wechsler Intelligence Scale for Children, Fourth Edition. Respondent's scores were average, except for verbal comprehension, which was high average. However, Respondent scored low in matrix reasoning, which is part of perceptual reasoning, and working memory. The matrix reasoning test assesses fluid visual information processing and abstract reasoning skills. The working memory tests revealed relative weaknesses in abilities to sustain attention, concentrate, and exert mental control.

13. Dr. Boozer administered the Woodcock Johnson III Tests of Academic Achievement. In all measures of broad academic

achievement, Respondent performed within the range to be expected, based upon [REDACTED] performance in the intelligence test described immediately above. [REDACTED] weakest area was academic fluency, which probably was driven by weaknesses in attention control and executive functioning.

14. Dr. Boozer administered the Woodcock Johnson III Tests of Cognitive Abilities. In general, Respondent performed within the range to be expected, based upon [REDACTED] performance in the intelligence test described above. Likely, weaknesses in attention control produced a discrepant result in Respondent's average working memory scores when compared to [REDACTED] working memory scores, discussed above, in the intelligence test.

15. Dr. Boozer administered the Developmental Test of Visual Motor Integration. In general, Respondent performed below the range to be expected, based upon [REDACTED] performance in the intelligence test described above. The Developmental Test of Visual Motor Integration analyzes Respondent's visual reasoning skills (i.e., [REDACTED] ability to use visually presented materials), graphomotor skills (needed for efficient, finely controlled writing), and ability to integrate visual and motor skills into actual free hand-writing tasks. Respondent's test of visual motor integration was in the borderline range, and [REDACTED] test of motor coordination was in the low average range.

Clearly, Respondent lost efficiency when integrating visual and graphomotor tasks.

16. Dr. Boozer administered the Dells-Kaplan Executive Function System and Behavior Rating Inventory of Executive Functioning (BRIEF). Each parent, the teacher, and the occupational therapist provided BRIEF ratings. Three of four raters provided elevated (i.e., problematic) scores for inability to inhibit, emotional control, and behavior regulation. Two of the four raters provided elevated scores for the ability to shift tasks. Other rating scales revealed problems with attention, anger control, bullying, executive functioning, and negative emotionality. But tests of autism revealed no indicators of the condition.

17. Dr. Boozer concluded that Respondent demonstrated a pattern of behaviors consistent with ADHD, but not Oppositional Defiant Disorder. Although [REDACTED] had not considered Respondent's performance in an educational environment, Dr. Boozer felt that Respondent met ESE criteria for students "with a specific disability." Dr. Boozer stated that Respondent would benefit from neurological management to address noted weaknesses in executive functioning, ADHD, and related behavioral variables, as well as occupational therapy to assess [REDACTED] visual-motor weaknesses and how they impact [REDACTED] ability to express [REDACTED] knowledge in the classroom. Dr. Boozer recommended that

Respondent receive extended time for tests and get breaks during testing. Dr. Boozer also noted that Respondent needed consistent structure and a behavior modification system.

18. Paula E. Williams, who holds a doctorate in psychology, evaluated Respondent on May 29, 2009, for eligibility for gifted placement. Dr. Williams found the child "mildly anxious" in demeanor. But she also noted that [REDACTED] demonstrated excellent attention, motivation, and effort during the assessment process. Dr. Williams found that Respondent functioned in the above range of intelligence with cognitive skills that range from average to high, and she concluded that Respondent was a "strong student whose learning needs should continue to be met in [REDACTED] current curriculum." Consistent with Dr. Williams' findings and conclusion, Petitioner determined that Respondent was not eligible for a gifted placement at that time.

19. During third grade, Respondent scored at Level 4 of the five levels for the math FCAT and Level 3 for the reading FCAT, although [REDACTED] score was almost at Level 4. For all content areas, Respondent exceeded the state mean, except for geometry and spatial sense ([REDACTED] scored a 4; the state mean is 5) and main idea, plot, and purpose ([REDACTED] scored a 17; the state mean is 17).

20. For third grade, Respondent's report card shows that ■ performed on grade level in reading, language arts, and math, in which ■ earned As every grading period. ■ also earned As every grading period in science/health and social studies. Respondent mastered all tasks in social growth and study skills, but was still learning skills in music at year's end.

21. During fourth grade, Respondent scored at Level 4 for the math FCAT and Level 4 for the reading FCAT. All of ■ scores exceeded the state mean, except for vocabulary, which was at the state mean. For fourth grade, Respondent's report card shows that ■ performed on grade level in reading, language arts, and math, and ■ earned As in every grading period in these courses, as well as science/health and social studies. Respondent mastered all tasks in social growth and study skills, but was still learning art skills at year's end.

22. On May 25, 2011, at the request of Respondent's mother, Petitioner's school psychologist, Danielle R. Stock, performed an psychoeducational evaluation of Respondent. Respondent's mother requested the evaluation due to emotional and behavioral concerns she had about her child.

23. Reviewing the history of the child, Ms. Stock noted that, apparently following the evaluations described above, various medical and mental health professionals had managed Respondent's ADHD. These professionals included a pediatrician,

neurologist, psychiatrist, and psychologist. Respondent had received a variety of psychotropics, including Concerta[®], Vyvanse[®], Intuniv[®], and Daytrana[®]. At the time of Ms. Stock's evaluation, Respondent was taking 54 mg daily of Concerta[®], and ■ was experiencing side effects of reduced appetite, increased irritability, dry mouth, and mild sedation.

24. Ms. Stock noted that, when Petitioner evaluated Respondent for entry into the gifted program, Respondent's mother had felt that the evaluator had not accommodated Respondent's disabilities, including anxiety and ADHD. In connection with the mother's request for a Section 504 plan, Petitioner's employees collected data during third grade.

25. As documented by Ms. Stock, Respondent's teacher reported that Respondent asked more questions than ■ peers during class. The teacher intervened to reduce the questions--and, thus, the anxiety that she felt was producing the questions--by having Respondent ask ■, before asking a question, whether ■ already knew the answer to the question and whether the question pertained to a current activity. After a couple of months, the teacher discontinued this intervention because it had successfully reduced the number of questions and, more importantly, eliminated the source of the child's anxiety.

26. Ms. Stock reported that, on September 30, 2010, during Respondent's ■-grade year, a Section 504 meeting was

conducted, but no plan was adopted. Petitioner's employees determined that, although Respondent had ADHD, ■ did not display a "substantial limitation in ■ ability to function at school," so ■ was determined not to be eligible for a Section 504 plan.

27. Ms. Stock also documented that, in preparation for the fourth-grade FCAT, the school psychologist formed a counseling group for students who experienced stress during the test and exhibited signs of anxiety. She invited Respondent to participate in the group. Respondent did so and attended the handful of meetings that the school psychologist conducted with the group.

28. Lastly, Ms. Stock noted that, concurrent with her evaluation, Petitioner's employees had conducted a functional behavioral assessment (FBA), which had found that Respondent's teacher cued ■ to calm down by saying "relax" an average of two times per day. Finding that the average did not change during test days, the data did not support the hypothesis that Respondent experienced more stress during tests.

29. Ms. Stock administered the Kaufman Test of Educational Achievement, Second Edition: Comprehensive Form. Respondent scored high in reading and math and average in written language; ■ only low subtest score was in written expression.

30. Ms. Stock administered the Kaufman Assessment Battery for Children, Second Edition. Respondent scored average or high average in all of these scales. ■ scored highest in planning and lowest in sequential and learning.

31. Ms. Stock administered the Woodcock Johnson III Tests of Cognitive Ability. Respondent score low in working memory and very low in broad attention, numbers reversed, and pair cancellation.

32. Ms. Stock administered the Bender Visual Motor Gestalt Test, Second Edition. Respondent scored average on this test.

33. Interpreting these tests, Ms. Stock found that Respondent's educational achievement, which was average to above average, meant that ■ skills met age and grade-level expectations. ■ weakness in written expression skills had been noted in previous evaluations.

34. Ms. Stock discussed the average working memory score and the low broad attention skills score. She noted that the broad attention deficit was consistent with Respondent's ADHD. Considering Respondent's average scores in visual motor integration, recall, and simultaneous skills, Ms. Stock reasoned that Respondent's messy handwriting was more likely the result of ■ desire to work quickly and left-handedness.

35. Interpreting the ratings data, Ms. Stock found the information consistent with that of other students who have

ADHD. Reporting her interactions with Respondent during testing, Ms. Stock stated that Respondent is competitive and hard working and displays a strong sense of self, a strong will, and confidence in [REDACTED] ability to solve problems and perform at [REDACTED] best.

36. Respondent's fourth-grade teacher found Respondent to be respectful, very smart, curious, generally happy, but a little high-strung. She described [REDACTED] in class as sitting straight up, ready to pounce upon the next question that she would ask the class. According to the teacher, Respondent's anxiety was the sole behavior that could interfere with [REDACTED] education, although [REDACTED] could also suffer hurt feelings from time to time. Specifically, the fourth-grade teacher never saw any bullying or anger from Respondent, so [REDACTED] appears to have eliminated certain maladaptive behaviors.

37. While writing the FCAT essay, Respondent was so anxious that [REDACTED] tense grip on [REDACTED] pencil caught the attention of the teacher. She walked over to [REDACTED], placed her hands on [REDACTED] shoulders, and calmed [REDACTED] down. Respondent finished the essay and earned five of six points on this part of the test; only three students in the class earned sixes.

38. The fourth grade teacher concluded that the level and frequency of Respondent's anxiety was insufficient to interfere with [REDACTED] ability to learn or to access [REDACTED] curriculum.

39. Respondent's mother is understandably concerned about her son. He remains anxious in the classroom, as evidenced by nail biting, head scratching, and other nervous behaviors. ■■■ remains very concerned that ■■■ will not achieve perfect grades in school. ■■■ worrying at home, where ■■■ is unguarded, reveals to ■■■ parents a disturbing level of suffering that ■■■ does not display at school.

40. Respondent's expert witness, Ami Kuttler, is a clinical psychologist holding a doctorate in psychology. Dr. Kuttler testified that the evaluation by Ms. Stock failed to be sufficiently comprehensive to disclose the underlying reason for the student's "differences." Dr. Kuttler's conclusion is correct, but she applies the wrong standard to Ms. Stock's work.

41. Dr. Kuttler found Ms. Stock's testing was inappropriate in four respects. First, Ms. Stock failed to test fine motor functioning, which Dr. Kuttler testified was required due to the student's handwriting problems. Second, Ms. Stock failed to administer additional tests of language, language comprehension, attention, and processing speed, which Dr. Kuttler testified were required due to the student's poor performance on one test of working memory and processing speed. Dr. Kuttler explained that good attention skills are necessary to score well on broad attention, but this test assesses a child's working memory, speed, and auditory processing, so it is

an indirect test of attention. Third, Ms. Stock provided brief narratives of scores, rather than the quantitative scores themselves, for the ratings provided by various raters. Fourth, Ms. Stock failed to account for all the data in her summary.

42. Dr. Kuttler's objections to Ms. Stock's testing and Dr. Kuttler's overall conclusion--to a great extent, clinically valid--fail to account for Respondent's level of functioning in the educational environment. Dr. Kuttler has neither evaluated nor met Respondent, nor does it appear that she has evaluated [REDACTED] performance at school--academically, socially, or behaviorally.

43. Notwithstanding Dr. Kuttler's criticisms of Ms. Stock's evaluation, Ms. Stock's evaluation is appropriate because it is suited to a child with Respondent's academic/social characteristics. It is not merely that, for the past two school years, Respondent has made all As and mastered all the social growth and study skill tasks on which [REDACTED] is evaluated. [REDACTED] is respectful, curious, hard working, strong willed, and a perfectionist. [REDACTED] is intelligent, and [REDACTED] is anxious. On these facts, it is impossible to find that Respondent is a student whose ADHD or other health impairment has adversely affected [REDACTED] performance in the educational environment or leaves [REDACTED] in peril of academic or social failure at school.

44. To the contrary, a reasonably clear picture emerges from this record of an individual who may not conform precisely to the profile of the average child in ■■■ classroom, but whose departure from the hypothetical average is not of a nature or extent to warrant specialized instruction or related services. Even assuming that Respondent's performance in an educational environment was adversely affected by ■■■ ADHD or other health impairment, it would be difficult to find academic or social deficits that would qualify for specialized instruction or related services.

45. As all the professionals have determined, the evaluations reveal a child with differences, but the evidence fails to link these differences to adverse effect in classroom performance or a failure to make progress educationally, socially, and behaviorally. This lack of linkage suggests that the child, thus far, has found means to compensate for ■■■ differences. Respondent has done so with the professional interventions of health-care and mental-health specialists treating ■■■ ADHD, the professional interventions of classroom teachers to relieve stress and promote learning and social growth, and the endless interventions of two loving, competent parents, who, with hard work and endless patience, have consistently implemented at home the interventions of Respondent's health-care, mental-health, and educational

professionals. But Respondent has also done so by tapping [REDACTED] resourcefulness, strong sense of self and strong will, intelligence, strong motivation, heightened competitiveness, and perhaps even anxiety in order to adapt and even thrive in [REDACTED] early primary school years.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 1003.57(1)(b), Fla. Stat., and Florida Administrative Code Rule 6A-6.03311(6)(g)2. and (9).

47. Florida Administrative Code Rule 6A-6.03311(6) provides:

Independent educational evaluations.

(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.

* * *

(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.

* * *

(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.

48. Petitioner bears the burden of proof. Rule 6A-6.03311(6)(g)2. Petitioner must prove the material allegations by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

49. To be eligible for specialized instruction and related services, it is not enough for a student to be diagnosed with ADHD, which is an other health impairment. Rule 6A-6.030152(4)(a) conditions eligibility on, among other things, a finding that the health impairment "adversely affects the student's performance in the educational environment." This requirement and the ensuing determination of the extent of adverse effect guide the consideration of the appropriateness of Petitioner's evaluation.

50. Once eligible, a student's specialized instruction and related services must provide a free appropriate public education. § 1003.571(1), Fla. Stat.; rule 6A-6.03028(1), Fla. Admin. Code. This standard ensures only that a program of specialized instruction and related services is reasonably

calculated to provide educational benefit to the child, not that ■ maximizes ■ potential. Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982).

51. The determination of whether a school evaluation is appropriate requires consideration of the nature of the health impairment, its effect on the student's performance at school, and the contours of a free appropriate public education. The scrutiny imposed on the school's evaluation is proportionate to the difficulties of the student in school--academically, socially, or behaviorally--and the potential scope of the specialized instruction and related services required to ensure that the student receives a free appropriate public education. The greater the dysfunction in performance in an educational environment and the more extensive the specialized instruction and related services, the more that is required of the evaluation in terms of its scope, as to the tests administered, the data collected, the analysis of the data, and the extent to which the data and analysis support the conclusions and recommendations contained in the evaluation. Cf. Council Rock Sch. Dist., 2010 US Dist LEXIS 135346 (E.D. Pa. Dec. 22, 2010), pp. 19-23.

52. The record reveals little, if any, basis to suspect that Respondent would meet the eligibility criterion of an adverse effect on performance in the educational environment.

The record reveals no basis to suspect that, even if ■■■ ADHD-related anxiety and attention issues were found to adversely affect ■■■ performance in the educational environment, Respondent is failing to make meaningful educational progress. Academically, ■■■ is flourishing. Behaviorally, ■■■ has eliminated the anger at school and seems to be handling ■■■ anxiety at school. Socially, the record is least developed, but Respondent seems to have friends at school.

54. At the time of Ms. Stock's evaluation, Respondent presented as a student with documented, persistent attention issues and episodes of anxiety--both of which had responded, in varying degrees, to the many interventions described above and to the child's compensation strategies. Under these circumstances, notwithstanding Dr. Kuttler's criticisms, Ms. Stock's evaluation was appropriate.

FINAL ORDER

It is

ORDERED that Petitioner's psychological evaluation dated May 25, 2011, is appropriate.

DONE AND ORDERED this 23 day of August, 2011, in
Tallahassee, Leon County, Florida.

S

ROBERT E. MEALE
Administrative Law Judge
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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)(b), Florida Statutes (2009), 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), and Florida Administrative Code Rule 6A-6.03311(9)(w).