

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 10-4494E
)
██████████,)
)
 Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on July 27, 2010, and August 16 and 17, 2010, in Fort Lauderdale, Florida, before Edward T. Bauer, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Barbara J. Myrick, Esquire
Broward County School Board
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

For Respondent: ██████████, parent, pro se
(Address of record)

STATEMENT OF THE ISSUE

The issues for determination are (1) whether Respondent is entitled to an independent Functional Behavioral Assessment at public expense; (2) whether Respondent is entitled to an independent neuropsychological examination at public expense;

(3) whether Respondent is entitled to an independent speech and language evaluation at public expense; and (4) whether Respondent is entitled to an independent occupational therapy evaluation at public expense.

PRELIMINARY STATEMENT

On June 21, 2010, Respondent's parents requested an independent Functional Behavioral Assessment ("FBA") at public expense. The parents further requested, at public expense, independent evaluations in the areas of neuropsychology, speech and language, and occupational therapy. The Broward County School Board declined to provide the independent evaluations on the grounds that its FBA was appropriate and that Respondent's requests for the other three evaluations were time-barred. On July 1, 2010, the School Board requested a due process hearing and the matter was forwarded to the Division of Administrative Hearings for assignment of an administrative law judge.

The parties advised the undersigned that one day would be needed for a final hearing, which was scheduled for July 27, 2010. However, the final hearing was not completed on July 27, which required that the proceedings be reconvened on August 23 and 24, 2010.

At the hearing, the Petitioner presented the testimony of John Moorehead, Christine Orlando, Marian Klinger, and Felicia Starke. Petitioner's Exhibits 1, 5, 6, 7, 8, 9, 10, 11, 13, 14,

15 (page 53 only), 16, 17, 19 (pages 62 and 63 only), 20, 21, 22, and 23 (pages 101-115 only) were received into evidence. Respondent presented the testimony of Ana Esparza, Mindy Morgan, Tonya Frost, and both of [REDACTED]'s parents.¹ Respondent's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 were received into evidence.² At the conclusion of the hearing, the court reporter indicated that the transcript would not be completed until September 2, 2010. As both parties wished to review the transcript prior to filing any post-hearing submission, a due date of September 20, 2010, was established for the filing of proposed final orders. The undersigned advised the parties that a final order would be issued by September 30, 2010.

Due to the court reporter's workload, the two-volume transcript of the record was not filed with the Division of Administrative Hearings until September 8, 2010. As a consequence, on September 14, 2010, [REDACTED]. requested that the deadline for submitting proposed final orders be extended until September 30, 2010. Petitioner advised that it did not object to [REDACTED]'s request for an extension of time, which the undersigned granted on September 15, 2010. The parties timely submitted proposed final orders, which have been considered in the preparation of the Final Order.

Unless otherwise indicated, references to the Florida Statutes, the United States Code, the Florida Administrative

Code, and the Code of Federal Regulations shall be to the 2010 versions of those sources.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Respondent is a [REDACTED]-year-old student who entered the Broward County School District on July [REDACTED], and continues to be enrolled in the district. Respondent initially attended [REDACTED] Elementary School, but was subsequently transferred to [REDACTED] Elementary School in March of 2009.

2. Respondent receives exceptional student education ("ESE") services for the exceptionality of autism spectrum disorder. In addition, Respondent receives occupational therapy.

3. A number of evaluations have been conducted while Respondent has been enrolled in the Broward County School District. In particular, the school district conducted speech and language evaluations of Respondent in 2004 and 2007. The 2004 evaluation covered the areas of pragmatic language and oral motor. The 2007 evaluation, which was conducted by a Speech-Language Pathologist, assessed pragmatic language.

4. In addition, the school district conducted psychological examinations of Respondent in September of 2004 and June of 2007.

5. Further, the school district performed an occupational therapy evaluation of Respondent, which was finalized in September of 2006.

6. There is no evidence that either of Respondent's parents disagreed with any of the evaluations described above.

7. In late May of 2009, school personnel made the decision, following a request from Respondent's father, to conduct an FBA of Respondent. As the end of the school year was impending, Marian Klinger, the school district's Program Specialist for Behavior, conferred with Respondent's father and decided that the process of formulating an FBA should begin the following academic year.

8. The purpose of an FBA is to isolate a target behavior and to develop a hypothesis regarding the function of the target behavior. A target behavior is one that interferes with a student's ability to progress in the curriculum and to achieve the student's IEP goals. Once the target behavior is identified and the hypothesis developed, the target behavior can be addressed with informal strategies, or, if necessary, a behavioral intervention plan can be formulated.

9. As agreed, a team of school district employees formulated an FBA of Respondent during the fall of 2009. The team primarily consisted of Mr. Moorehead, Respondent's autism cluster classroom teacher; Ms. Orlando, the autism cluster coach assigned to [REDACTED] Elementary School; and Ms. Klinger.

10. In preparing the FBA, the team: (1) reviewed Respondent's records from the previous school year to assess the success or failure of the various strategies and interventions that had been implemented; (2) spoke with Respondent's father on several occasions; (3) reviewed the results of the psychological evaluation of Respondent that was conducted in June of 2007; (4) conducted an interview with Mr. Moorehead; (5) examined scatter plot data that was compiled by Mr. Moorehead during September of 2009, as well as antecedent/behavior/consequence ("ABC") data recorded by Mr. Moorehead during August and September of the same year; (6) consulted with the teacher who worked with Respondent during the summer; (7) reviewed the results of direct classroom observations of Respondent by Ms. Orlando, Ms. Klinger, and Ms. Morgan, an assistant principal at [REDACTED] Elementary; and (8) spoke with the therapist who was working with Respondent.

11. The FBA developed for Respondent contained a number of elements. First, the team stated the rationale for conducting the FBA: that Respondent's "behavioral difficulties persist

despite consistently implemented behavior management strategies based on a less comprehensive or systematic assessment."³

12. In addition, the FBA team prepared a profile of Respondent in which Respondent's skills, strengths, and interests were described, as well as the academic, social, and behavioral limitations that had been observed. The limitations included Respondent's limited language and low voice tone, which make it difficult for Respondent to express wants and needs, as well as the fact that Respondent does not independently participate in group tasks.

13. The FBA team identified Respondent's target behavior as "avoidance." Avoidance included verbal noises, "finger stimming," and pushing materials away, which occurred approximately 23 times per day by the team's estimate. As an additional avoidance behavior, Respondent would occasionally drop to the floor.

14. Based on all the information gathered and reviewed in preparation for completing the FBA, the team determined that, during the time for which data had been collected, Respondent exhibited two patterns of behavior, which the team described in the Summary (Hypothesis) Statements section of the FBA as follows:

When [Respondent] is presented with a non preferred activity, [Respondent] may lay on

the floor or run from the activity to avoid the activity.

When [Respondent] is working on a non preferred activity, [Respondent] will engage in avoidance behaviors such as verbal noises, finger stimming,^[4] and pushing materials away to avoid the activity.

15. Although pica behaviors were occasionally observed during the data collection period, the FBA team concluded that pica was not interfering with Respondent's education, as Respondent was easily redirected on the infrequent occasions when such behavior occurred.⁵ Further, Respondent's pica behaviors were limited in that Respondent did not swallow any of the items. Accordingly, the FBA team did not include pica as a targeted behavior.

16. The FBA team concluded that the targeted behaviors could be appropriately addressed without developing a behavioral intervention plan. Instead, the team formulated several strategies to address Respondent's target behaviors:

Social story^[6] to assist with taking the bus to school including being safe on the bus, using a seatbelt, bringing a preferred item home from school.

Use a token system of "good job" to work on task completion.

Use a high rate of verbal praise and positive attention when [Respondent] is completing . . . work and demonstrating the appropriate behavior. Ignore [Respondent] when [Respondent] [drops] to the ground.

17. Although the FBA was finalized on November 6, 2009, school personnel continued to monitor Respondent's behavior to determine if the strategies were correcting the target behaviors. On February 9, 2010, the FBA was reviewed, with the following results:

The data indicates that the social story has helped with [Respondent] getting on the bus and riding the bus to school and home. The token system is used in the class during teacher time and in the inclusion class. [Respondent] responds well to receiving immediate positive praise when [Respondent] is completing . . . work and on task. [Respondent] still needs close proximity and verbal encourage to complete . . . work. [Respondent] uses the break area 2-3 times a day to play with cars, do puzzles, and magnetic number activity.

18. During the final hearing, Ms. Klinger testified that the strategies employed resulted in a "dramatic decrease" in the targeted behaviors, which were no longer interfering with Respondent's productivity.⁷

Summary

19. The evidence presented by the School Board was sufficient to establish the appropriateness of the Functional Behavioral Assessment finalized on November 6, 2009. First, the FBA team included trained and knowledgeable personnel. Ms. Orlando, the team leader who coordinated the preparation of the FBA, holds a master's degree in varying exceptionalities, is certified by the State of Florida in that field, and has

received specific training in the preparation of FBAs. Ms. Klinger, who has been employed by Petitioner for ten years as a Program Specialist for Behavior, is a board-certified behavior analyst and is certified by the State of Florida in the fields of varying exceptionalities and learning disabilities. Mr. Moorehead possesses an endorsement in the area of profound disabilities, is a certified ESE teacher, and has also received specific training concerning the preparation of FBAs.

20. Further, the evidence demonstrates that the team formulated the FBA in a manner consistent with the requirements of Florida Administrative Code Rule 6A-6.0331(5).⁸ Specifically, several different instruments were used to collect data concerning Respondent's behavior, including scatter plots, ABC data, and direct observations, and these instruments are normally used in the development of FBAs. Input was received from Respondent's parent and therapist, and the team reviewed all of the data collected related to Respondent's behavior in the classroom and other records that concerned Respondent's academic, social, and emotional progress as part of the process of preparing the FBA.

CONCLUSIONS OF LAW

Jurisdiction

21. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of

the parties thereto pursuant to Sections 1003.57(1)(b) and 120.57(1), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

Issue One: Independent Functional Behavioral Assessment
At Public Expense

22. Florida Administrative Code Rule 6A-6.03311(6) provides in pertinent part:

(6) 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.

(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.

* * *

(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.

(j) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with the school district an evaluation at private expense:

1. The school district shall consider the results of such evaluation in any decision regarding the provision of FAPE to the student, if it meets the appropriate

district criteria described in this rule;
and

2. The results of such evaluation may be presented by any party as evidence at any due process hearing regarding that student.

See also 34 C.F.R. § 300.502(b).

23. As noted previously, Respondent's parents requested that the School Board provide a FBA of Respondent at public expense. An FBA is defined by Florida Administrative Code Rule 6A-6.03411(1)(q) as follows:

A FBA is a systematic process for defining a student's specific behavior and determining the reason why (function or purpose) the behavior is occurring. The FBA process includes examination of the contextual variables (antecedents and consequences) of the behavior, environmental components, and other information related to the behavior. The purpose of conducting an FBA is to determine whether a behavioral intervention plan should be developed.

24. The School Board rejected the request of Respondent's parents and, in accordance with the requirements of Florida Administrative Code Rule 6A-6.03311(6)(g)2., filed a request for a due process hearing to determine if the FBA completed by its personnel was appropriate. The School Board has the burden of proving by a preponderance of the evidence that the Functional Behavioral Assessment was appropriate. See Schaffer v. Weast, 546 U.S. 49 (2005); Fla. Admin. Code R. 6A-6.03311(6)(g)2.; 34 C.F.R. § 300.502(b)(2)(i).

25. Florida Administrative Code Rule 6A-6.0331(5) provides as follows:

(a) In conducting an evaluation, the school district:

1. Must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining whether the student is eligible for ESE and the content of the student's IEP or EP, including information related to enabling the student with a disability to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities), or for a gifted student's needs beyond the general curriculum;

2. Must not use any single measure or assessment as the sole criterion for determining whether a student is eligible for ESE and for determining an appropriate educational program for the student; and

3. Must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(b) Each school district must ensure that assessments and other evaluation materials used to assess a student are:

1. Selected and administered so as not to be discriminatory on a racial or cultural basis;

2. Provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically,

developmentally, and functionally, unless it is clearly not feasible to do so;

3. Used for the purposes for which the assessments or measures are valid and reliable; and

4. Administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments.

(c) Assessments and other evaluation materials shall include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(d) Assessments shall be selected and administered so as to best ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's sensory, manual, or speaking skills, unless those are the factors the test purports to measure.

(e) The school district shall use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the student.

(f) A student shall be assessed in all areas related to a suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(g) An evaluation shall be sufficiently comprehensive to identify all of a student's ESE needs, whether or not commonly linked to

the disability category in which the student is classified.

See also 34 C.F.R. § 300.304.

26. Based on the findings of fact herein, Petitioner has established that it complied with the criteria set forth in Florida Administrative Code Rule 6A-6.0331(5) in preparing the FBA of Respondent, and has therefore proven by a preponderance of the evidence that the FBA was appropriate. See Broward County School Board v. A.G., Case No. 10-1496E (DOAH may 7, 2010) (finding that FBA was appropriate where it was formulated in accordance with Rule 6A-6.0331(5), Florida Administrative Code).

27. Respondent contends that the FBA is flawed because the school district did not develop a behavioral intervention plan. This argument is rejected because "[t]he purpose of conducting an FBA is to determine whether a behavioral intervention plan should be developed." Fla. Admin. Code R. 6A-6.03411(1)(q) (emphasis added). As discussed above, the FBA team concluded, after examining data from a variety of sources, that a behavioral intervention plan was not required and that Respondent's problematic behaviors could be addressed with less intrusive strategies (i.e., the use of a token system, as well as verbal praise and positive attention when Respondent is staying on task). The FBA team reviewed the effectiveness of

the strategies in February 2009, and concluded that Respondent's targeted behaviors had diminished substantially and were no longer interfering with Respondent's productivity. For these reasons, Respondent's argument that the FBA was deficient due to the lack of a behavioral intervention plan is without merit.

28. Respondent also contends that the FBA is deficient because it failed to include pica as a target behavior. In support of this argument, Respondent notes that the scatter plot data, which was gathered from September 10 through October 9, 2009, reveals that pica behaviors were observed on nine occasions. Although this is true, the evidence demonstrates that Respondent did not swallow any of the objects and was easily redirected when such behavior occurred. More important, the FBA team determined that pica was not interfering with Respondent's education. While the parents' concern over their child's exhibition of a potentially hazardous behavior is understandable, there is simply no evidence that pica was interfering with Respondent's ability to make educational progress. As such, the FBA was appropriate notwithstanding the exclusion of pica as a target behavior. See W.S. and L.S. on Behalf of C.S. v. Rye City School District, 454 F. Supp. 2d 134, 149-50 (S.D.N.Y. 2006) (rejecting argument that FBA was defective; "The parents' concern over their daughter's exhibition of distracting behaviors is perfectly normal and

natural. However, there is no evidence that the behaviors actually interfere with their [REDACTED] ability to make educational progress, because [REDACTED] could so easily be refocused. It is the ability to make educational progress -- not simply the fact of inappropriate behavior -- that is the concern of the IDEA.").

29. Although Respondent is not entitled an independent FBA at public expense, Respondent's parents may obtain an independent FBA at their own expense. Pursuant to Florida Administrative Code Rule 6A-6.03311(6)(j)1., the School Board would be required to consider the results of any such private assessment in making any decision regarding Respondent, provided that the private assessment satisfies the criteria in Florida Administrative Code Rule 6A-6.03311(6)(e).

Issue Two: Independent Neuropsychological Examination
At Public Expense

30. Next, the undersigned must determine if Respondent is entitled to an independent neuropsychological examination at public expense. As detailed below, Respondent is not entitled to such an examination at public expense for two reasons: (1) there is no evidence that Respondent's parents disagreed with the psychological evaluation conducted by the school district; and (2) even assuming Respondent's parents disagreed with the previous evaluation, their request is untimely.

31. Pursuant to Florida Administrative Code Rule 6A-6.03311(6) (a), 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." (Emphasis added); see also 34 C.F.R. § 300.502(b) (1) (providing that the right to a publicly funded independent evaluation only exists "if the parent disagrees with an evaluation obtained by the public agency."). The plain language of these provisions instructs that there is no right to an independent evaluation at public expense unless the parent disagrees with an evaluation obtained by the school board. This conclusion is supported by the recent decision of G.J. v. Muscogee County School District, 2010 U.S. Dist. LEXIS 28764, *30-31 (M.D. Ga. March 25, 2010), in which the court held:

Parents have a right, under certain circumstances, "to obtain an independent educational evaluation of the child." 20 U.S.C. § 1415(b) (1); *accord* 34 C.F.R. § 300.502. The right to a publicly funded IEE only exists "if the parent disagrees with an evaluation obtained by the public agency." 34 C.F.R. § 300.502(b) (1). Here, MCSD did not obtain an evaluation with which Plaintiffs disagreed; Plaintiffs refused to consent to the reevaluation. Therefore, Plaintiffs had no right to a publicly funded IEE at the time of their request for one

Though parents have a "right" to a publicly funded IEE under the circumstances discussed above, neither the statute nor the regulations provide for a parental "right"

to a privately funded IEE, except if a parent disagrees with the school's evaluation Again, MCSD did not obtain an evaluation with which Plaintiffs disagreed. Therefore, Plaintiffs had no right to a privately funded IEE at the time of their request for one. The ALJ's decision regarding the IEE is therefore affirmed.

(Emphasis in original); Krista P. v. Manhattan School District, 255 F. Supp. 2d 873, 889 (N.D. Ill. 2003) ("The [hearing officer] did not err in ruling that Parents had not met the prerequisite for requesting an IEE. A parent has the right to an IEE at public expense only if the parent disagrees with an evaluation obtained by the public agency") (internal quotations omitted); see also School Board of Manatee County, Florida v. L.H., 666 F. Supp. 2d 1285, 1290 (M.D. Fla. 2009) ("Parents of a child with a disability have the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency subject to the conditions set forth in the regulations) (emphasis added); D.Z. v. Bethlehem Area School District, 2010 Pa. Commw. LEXIS 438, *38 (Pa. Commw. Ct. July 27, 2010) ("Thus, by the regulation's express language, an evaluation must first be obtained by the public agency -- in this matter, the School District -- before D.Z. is vested with any right to disagree with that evaluation, or to request an IEE in connection with that disagreement").

32. Although Respondent's parents have disagreed (and continue to disagree) with the school district concerning various issues, there is no evidence that the parents disagreed with the school district's previous neuropsychological examination of Respondent. Rather, the parents' June 21, 2010, written correspondence to the school district plainly demonstrates that their request for an independent neuropsychological evaluation at public expense was precipitated by their belief that, "[f]or the first time [REDACTED]. did not master any of [REDACTED] academic goals." Further, neither of [REDACTED]'s parents testified at the final hearing that they disagreed with the psychological evaluation conducted by the school district in 2007. Accordingly, pursuant to the authority discussed above, Respondent is not presently entitled to an independent neuropsychological evaluation at public expense.

33. Even assuming the parents disagreed with the school board's 2007 neuropsychological evaluation, Respondent would not be entitled to an independent evaluation at public expense. Pursuant to Florida Administrative Code Rule 6A-6.03311(9)(b), "a due process hearing request must allege a violation that occurred more than two (2) years before the date the parent . . . knew or should have known about the alleged action that forms the basis of the due process hearing." See also 20 U.S.C. § 1415(f)(3)(C); Taylor v. Altoona Area School District, 2010 U.S.

Dist. LEXIS 91887, *15 (W.D. Pa. September 3, 2010) (noting that 20 U.S.C. § 1415(f)(3)(C) imposes a two-year statute of limitations for IDEA claims); J.D.-O. v. Orange County School Board, Case No. 06-4500E (DOAH August 7, 2007) ("Under the IDEA, Petitioner has the right to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, with the limitation that the alleged violation must have occurred not more than two years before the date the parent . . . knew or should have known about the alleged action forming the basis of the complaint.").

34. As the parents' June 21, 2010, request for an independent neuropsychological examination occurred more than two years after the school board's June 2007 evaluation, the demand is time-barred. Although Florida Administrative Code Rule 6A-6.03311(9)(b) contains two exceptions to the two-year period, the undersigned concludes that neither exception is applicable.

35. While Respondent is not entitled an independent neuropsychological examination at public expense, Respondent's parents may obtain an independent evaluation at their own expense. Pursuant to Florida Administrative Code Rule 6A-6.03311(6)(j)1., the School Board would be required to consider the results of any such private examination in making any

decision regarding Respondent, provided that the private examination satisfies the criteria in Florida Administrative Code Rule 6A-6.03311(6) (e).

Issue Three: Independent Speech And Language Evaluation At Public Expense

36. The undersigned likewise concludes, for the same reasons articulated in the Conclusions of Law for Issue Two, that Respondent is not entitled to an independent speech and language evaluation at public expense.

37. In particular, there is no evidence that the parents disagreed with the results of the school district's speech and language evaluations conducted in 2004 and 2007. Instead, the evidence demonstrates that the parents' request was prompted by their disappointment with ██████'s supposed failure to master any of ██████ academic goals during the 2009-2010 school year.

38. In addition, the parents' request was made more than two years after the school district's 2004 and 2007 speech and language evaluations, and is therefore untimely. The undersigned further determines that neither exception to the limitations period is applicable.

39. Although Respondent is not entitled an independent speech and language examination at public expense, Respondent's parents may obtain an independent evaluation at their own expense. Pursuant to Florida Administrative Code Rule 6A-

6.03311(6)(j)1., the School Board would be required to consider the results of any such private examination in making any decision regarding Respondent, provided that the private examination satisfies the criteria in Florida Administrative Code Rule 6A-6.03311(6)(e).

Issue Four: Occupational Therapy Evaluation At Public Expense

40. Finally, Respondent is not entitled to an independent occupational therapy evaluation at public expense.

41. As is the case with Issue Two and Issue Three, the record contains no evidence that the parents disagreed with the results of the school district's occupational therapy evaluation, which was conducted in August and September of 2006.

42. Further, the parents' request for an independent occupational therapy evaluation at public expense is time-barred, as it was made long after the expiration of the two year period provided for in Florida Administrative Code Rule 6A-6.03311(9)(b). The undersigned concludes that neither exception to the two year period is applicable.

43. As discussed above in paragraphs 35 and 39, Respondent's parents may obtain an independent evaluation at their own expense.

CONCLUSION

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

1. ORDERED that the Functional Behavioral Assessment completed by the Broward County School Board is appropriate and that the Respondent is not entitled to an independent Functional Behavioral Assessment at public expense.

2. ORDERED that Respondent is not entitled to an independent neurological examination at public expense.

3. ORDERED that Respondent is not entitled to an independent speech and language evaluation at public expense.

4. ORDERED that Respondent is not entitled to an independent occupational therapy evaluation at public expense.

DONE AND ORDERED this 5th day of October, 2010, in Tallahassee, Leon County, Florida.

S

Edward T. Bauer
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2010.

ENDNOTES

¹ Respondent attempted to present the testimony of witness ██████, a ten-year-old classmate of Respondent's. ██████ was not permitted to testify, however, as the undersigned was not persuaded that the child understood the difference between the truth and a lie. See Final Hearing Transcript, pp. 136-139; J.B.J. v. State, 17 So. 3d 312, 317 (Fla. 4th DCA 2010). Had ██████ been permitted to testify, it is extremely unlikely that the child would have been able to offer relevant evidence concerning the appropriateness of Respondent's FBA or the other three issues framed for hearing. In particular, Respondent's father proffered that ██████ would testify "to what the school staff [does] when [Respondent] eat[s] [an] eraser." See Final Hearing Transcript, p. 133.

Following a relevance objection from Petitioner, the undersigned also precluded Respondent from presenting the testimony of Gary Grigull and Carol Baskind. See Final Hearing Transcript, pp. 630-644.

² Respondent also proffered five exhibits that were received by the undersigned but not admitted into evidence.

³ See Petitioner's Exhibit 10.

⁴ Mr. Moorehead testified that Respondent would make verbal noise "in conjunction with moving [Respondent's] hands in [Respondent's] peripheral vision." See Final Hearing Transcript, p. 231.

⁵ See Final Hearing Transcript, pp. 239-241; 456.

⁶ Ms. Orlando explained that social stories are "stories that are written with pictures to help explain the process of something that's going to happen. If something new were going to happen, if something [was] going to change in [Respondent's] day or [Respondent's] school, then we would write a story to help [Respondent] prepare for that so [Respondent] wouldn't feel as anxious when it was happening." See Final Hearing Transcript, pp. 41-42.

⁷ See Final Hearing Transcript, pp. 362; 367; 546.

⁸ See Final Hearing Transcript, pp. 50-53; 364-367.

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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) of the Individuals with Disabilities Education Act, and Florida Administrative Code Rule 6A-6.03311(9)(w).