

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 15-0558E

█,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, a due process hearing was held in this case before Jessica E. Varn, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on March 9, 2015, by video teleconference with sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Laura Pincus, Esquire
Palm Beach County School Board
Post Office Box 19239
West Palm Beach, Florida 33416-9239

For Respondent: Respondent, pro se
(Address of Record)

STATEMENT OF THE ISSUE

Whether Respondent is entitled to Independent Educational Evaluations (IEEs), at public expense, in the fields of psycho-education and occupational therapy.^{1/}

PRELIMINARY STATEMENT

On January 15, 2015, Respondent requested an independent educational evaluation at public expense in the field of occupational therapy. On January 23, 2015, Respondent requested an independent educational evaluation at public expense in the field of psycho-education. On February 2, 2015, the Palm Beach County School Board (School Board) denied Respondent's request by filing a Request for Due Process Hearing (Complaint) that sought a determination of the appropriateness of its psycho-educational and occupational therapy evaluations of Respondent. On that same date, the School Board sent its request for a due process hearing to DOAH. The due process hearing was scheduled for March 9, 2015, and the undersigned notified the parties that the Final Order would be entered by March 19, 2015.

At the hearing, the School Board presented the testimony of [REDACTED], [REDACTED], [REDACTED], and Respondent's mother; School Board Exhibits 1 and 2, 5 through 9, and 11 through 13 were admitted into the record. Respondent's mother testified on the student's behalf; Respondent Exhibits E-4, N-8, N-5, B-1, A-2, B-13, F-4, F-5, A-1, B-2, B-4, B-5, B-6, B-7, B-8, B-9, B-10, B-11, B-12, C-2, C-3, E-1, F-3, G-1, G-2, L-1, N-4, and N-7 were admitted into the record. At the conclusion of the hearing, the parties agreed that the Transcript would be prepared and filed; the parties would have ten business days from the

filing date to file Proposed Final Orders, and the undersigned would have twenty business days to enter the Final Order. This agreement was memorialized in an Order dated March 16, 2015.

A one-volume Transcript was filed with DOAH on March 30, 2015. On that same date, an Order Modifying the Time for Filing Proposed Final Order and Issuance of the Final Order was entered, allowing the parties to file Proposed Final Orders by April 13, 2015, and establishing a Final Order due date of April 27, 2015. Both parties filed Proposed Final Orders timely, which were considered in preparation of this Final Order. Respondent filed an "Objection to Petitioner's Proposed Final Order" on April 15, 2015, which is considered a Reply to the School Board's Proposed Final Order. As this is an unauthorized pleading, it was not considered in the preparation of this Final Order.

For stylistic convenience, the undersigned will use [REDACTED] pronouns in this Final Order when referring to the student. The [REDACTED] pronouns are not intended to denote the student's actual gender and should not be understood as doing so.

All citations to the Florida Statutes are to the version in effect at the time the School Board performed the evaluations at issue, unless otherwise indicated.

FINDINGS OF FACT

1. Respondent is a [REDACTED]-year-old student who attends a public [REDACTED] school in the School Board's district. [REDACTED] is currently

deemed eligible to receive exceptional student education (ESE) in the areas of [REDACTED] and [REDACTED].

2. Prior to the psycho-educational evaluation that is at issue in this case, the student was deemed eligible to receive ESE in the area of [REDACTED]. The eligibility for [REDACTED] was added after the psycho-educational evaluation that is at issue in this case.

Psycho-educational Evaluation

3. In April 2014, the student underwent a psycho-educational re-evaluation. It was conducted by [REDACTED], a certified school psychologist. [REDACTED] has earned national certification as well as certification from the State of Florida. [REDACTED] also has a degree as an Educational Specialist.

4. The student had been referred to [REDACTED] because [REDACTED] was experiencing difficulty mastering [REDACTED] grade level curriculum, particularly in the area of reading.

5. [REDACTED] received information from the student's teacher and reviewed Response to Intervention (RTI) data. The RTI data, which had gone from Tier I to Tier III, revealed that the student showed some progress with the RTI Tiers, but was still reading significantly below grade level.

6. [REDACTED] administered six tests: Reynolds Intelligence Assessment Scales (RIAS); Kaufman Test of Educational Achievement-Second Edition (KTEA-II); Woodcock-

Johnson Tests of Cognitive Abilities-Third Edition (WJ-III); Comprehensive Test of Phonological Processing (CTOPP); The Beery-Buktenica Developmental Test of Visual Motor Integration (VMI); and Jordan Left-Right Reversal Test.

7. The RIAS was administered because it measures cognitive ability for children of different ages. The intelligence quotient (I.Q.) scores on the test allow the student to be classified into one of several ability categories for educational purposes. According to [REDACTED], the most reliable component of the RIAS demonstrated that the student's score was within the [REDACTED] range of cognitive abilities; the student performed equal to or better than [REDACTED] out of [REDACTED] of [REDACTED] same age peers.

8. The WJ-III was administered to assess the student's cognitive abilities; in particular, it was used to assess processing speed, and long-term retrieval. The student scored in the [REDACTED] range, with [REDACTED] and [REDACTED].

9. The CTOPP was used to evaluate the student's phonological processing, which has a direct correlation to [REDACTED] ability to decode words and read fluently. The student demonstrated [REDACTED] in all three areas that were tested, which is consistent with a student who has [REDACTED].

10. The Jordan Left-Right Reversal Test was used because [REDACTED] had concerns regarding the student's reversal of

numbers and letters, and because the student's mother requested that the test be administered. The student performed [REDACTED] on this test, indicating the presence of [REDACTED].

11. The VMI was administered to assess the student's visual motor integration ability. The student scored in the [REDACTED] range, which manifests itself usually in a student's inability to keep up with written work.

12. The KTEA-II was used to assess the student's academic skills. In the areas of reading, math, and writing, the student was in the [REDACTED] range.

13. [REDACTED] concluded that the student had difficulty in [REDACTED] and in all academic areas tested, especially in reading. [REDACTED] also demonstrated significant [REDACTED], which are important for acquiring academic skills. [REDACTED] noted that the student, given [REDACTED] cognitive profile, would likely struggle to achieve average "C" grades, and would need strong support, motivation, and encouragement to make academic progress in all areas.

14. The IEP team met on June 3, 2014. [REDACTED] evaluation was considered when adding the eligibility of [REDACTED].

15. The School Board has established, by a preponderance of the evidence, that the psycho-educational re-evaluation conducted in 2014 was appropriate for this student.

Occupational Therapy Evaluation

16. At the June 2014 IEP meeting, the student's mother requested an occupational therapy evaluation. The team agreed to provide the evaluation.

17. [REDACTED], a licensed occupational therapist, conducted the evaluation on September 4, 2014. [REDACTED] has a Bachelor of Science degree in occupational therapy.

18. [REDACTED] considered the mother's concerns, reviewed the student's file, received feedback from the student's teachers, met with the student, and observed the student in several different settings during the course of her evaluation ([REDACTED] classroom, the cafeteria, the media center). The focus of the occupational therapy evaluation is to assess whether the student needs any assistance to independently function and participate in the school setting.

19. [REDACTED] used skilled observation of the student as [REDACTED] method for assessing the student. [REDACTED] assessment addressed the following areas: self-help, mobility, gross motor skills, fine motor skills, and sensory processing.

20. In the area of self-help, the student demonstrated functional independence. [REDACTED] could use buttons, snaps, and

zippers, and ■ could tie ■ shoes. ■ could obtain food, carry a tray of food, and open food containers. And ■ had no difficulty organizing school materials, ■ desk area, or ■ schoolwork papers.

21. As to mobility, the student ambulated independently throughout the school. The student explained to ■ that ■ rode the bus to school in the mornings, and attended camp after school. Furthermore, no concerns in this area had been identified.

22. In the area of gross motor skills, ■ observed that the student's gross motor skills for all transitions in the school setting were within functional limits.

23. As to fine motor skills, ■ found that the student could write legibly, with adequate spacing. ■ was able to print ■ name, copy letters of the alphabet, and copy a nine-word sentence from a book. When the student was writing, ■ tended to drift away from the left margin. The student was able to self-correct mistakes while writing and ■ utilized scissors independently to cut out basic geometric shapes.

24. In the area of sensory processing, ■ observed that the student tolerated closeness with peers, unexpected bumps or touches, and manipulated several textured materials. The student appeared to transition easily; ■ also seemed to tolerate

everyday noises, and unexpected noises. The student self-reported that ■ uses a variety of playground equipment.

25. Ultimately, ■ concluded that the student demonstrated functional abilities to access ■ learning environment with the supports and accommodations already in place in ■ IEP. ■ did not recommend school-based occupational therapy services for the student because the student's needs are addressed in the curriculum and other services that were already being provided.

26. On October 22, 2014, the IEP team met and completed the Consideration of Educationally Relevant Therapy (CERT). The IEP team considered the input of the student's teacher, who reported that the student had no difficulty with writing legibly or with maneuvering around the various areas of the school. The IEP team concluded that the student does not currently qualify for occupational therapy services.

27. The School Board has established, by a preponderance of the evidence, that the occupational therapy evaluation conducted in 2014 was appropriate for this student.

CONCLUSIONS OF LAW

28. 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).

29. 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 [ESE] as prescribed by the State Board of Education as acceptable." §§ 1001.42(4)(1) & 1003.57, Fla. Stat.

30. 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 Individuals with Disabilities Education Act ("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).

31. A parent of a child with a disability is entitled, under certain circumstances, to obtain an independent educational evaluation of the child at public expense. The circumstances under which a parent has a right to an independent educational evaluation 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.

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

(a) A parent of a student with a disability has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district.

* * *

(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.

33. These provisions make clear that a district school board in Florida is not automatically required to provide a publicly funded independent educational evaluation whenever a parent asks for one. A school board has the option, when presented with such a parental request, to initiate a due process hearing to demonstrate, by a preponderance of the evidence, that its own evaluation is appropriate. If the School Board is able to meet its burden and establish the appropriateness of its evaluation, it is relieved of any obligation to provide the requested independent educational evaluation.

34. To meet its burden of proof, the School Board must demonstrate that the psycho-educational re-evaluation complied with rule 6A-6.0331(5), which set forth the elements of a proper evaluation. Rule 6A-6.0331(5) states as follows:

(5) Evaluation procedures.

(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.

35. Turning to the psycho-educational re-evaluation of the student in the present case, the School Board established that [REDACTED] was qualified to conduct the evaluation, and that the evaluation complied with rule 6A-0331(5). [REDACTED] used a variety of assessments that were related to the student's known disability and suspected disabilities. The evaluation was comprehensive, adequately identifying the student's ESE needs.

36. The occupational therapy evaluation is different from the psycho-educational evaluation in that it does not determine eligibility for special education services. Rather, the provision of occupational therapy services is a related service under the IDEA, as defined in 34 C.F.R. § 300.34(c)(6):

Occupational therapy—(i) Means services provided by a qualified occupational therapist; and

(ii) Includes—

(A) Improving, developing, or restoring functions impaired or lost through illness, injury or deprivation;

(B) Improving ability to perform tasks for independent functioning if functions are impaired or lost;

(C) Preventing, through early intervention, initial or further impairment.

37. The assessment of whether a student might need occupational therapy in the educational setting is governed by Florida Administrative Code Rule 6A-6.03024, which states as follows:

(2) Assessments. Assessments as defined in Section 468.203 or 486.021, F.S., shall be conducted by the related service provider prior to the provision of occupational or physical therapy.

38. Section 468.203, Florida Statutes, in turn, provides as follows:

(4) "Occupational therapy" means the use of purposeful activity or interventions to achieve functional outcomes.

(a) For the purposes of this subsection:

1. "Achieving functional outcomes" means to maximize the independence and the maintenance of any individual who is limited by any physical injury or illness, a cognitive impairment, a psychosocial dysfunction, a mental illness, a developmental or a learning disability, or an adverse environmental condition.

2. "Assessment" means the use of skilled observation or the administration and interpretation of standardized or non-standardized tests and measurements to identify areas for occupational therapy services.

39. Here, the School Board established that a licensed occupational therapist conducted a skilled observation assessment of the student's need for occupational therapy related services. In doing so, ██████████ concluded that the student demonstrated functional abilities to access his learning environment with the supports and accommodations already in place in ██████ IEP. ██████████ did not recommend school-based occupational therapy services for the student because the student's needs are addressed in the curriculum and other services that were already being provided.

40. The School Board established, by a preponderance of the evidence, that its occupational therapy evaluation complied with rule 6A-6.03024(2).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the School Board's evaluations were appropriate, and Respondent is not entitled to Independent Educational Evaluations in the fields of psycho-education and occupational therapy, at public expense.

DONE AND ORDERED this 22nd day of April, 2015, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of April, 2015.

ENDNOTE

^{1/} The student's parent raised another concern at the hearing and in the post-hearing submission. The other issue, which appears to be an alleged denial of a free and appropriate education, is not the subject of this proceeding.

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).