

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 16-3525E

█,

Respondent.

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FINAL ORDER

Pursuant to notice, a formal administrative hearing was held in Fort Lauderdale, Florida, on July 19, 2016, before Administrative Law Judge Diane Cleavinger of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Barbara Joanne Myrick, Esquire  
Office of the School Board  
600 Southeast Third Avenue, 11th Floor  
Fort Lauderdale, Florida 33301

For Respondent: (No Appearance)

STATEMENT OF THE ISSUES

Whether the Broward County School Board (School Board), upon its receipt of Respondent's request for an independent educational evaluation (IEE) in █, initiated a due process hearing without unnecessary delay; and, if so, whether

the School Board's psychological evaluation in the areas of [REDACTED] were appropriate.

PRELIMINARY STATEMENT

On June 21, 2016, the School Board filed a request for a due process hearing that sought a determination of the appropriateness of its previously-performed psychological evaluation. The School Board's Hearing Request was necessitated by its decision to deny Respondent's request to provide an independent psychological evaluation at public expense.

On June 24, 2016, a Notice of Video Teleconference that scheduled the due process hearing for July 11, 2016, was issued. Subsequently, during a pre-hearing telephone conference call on June 29, 2016, Respondent made an unopposed ore tenus motion to continue the due process hearing. Finding that good cause existed for a continuance, the request was granted and, by separate order, the due process hearing was rescheduled for June 19, 2016.

Respondent did not appear at the final hearing. Petitioner did appear at the final hearing.

During the final hearing, the School Board called four witnesses and introduced Petitioner's Exhibits 1 through 24 into evidence.

At the conclusion of the hearing, Petitioner announced that it would not file a proposed final order. It was also agreed

that this Final Order would be entered on or before August 15, 2016.

Further, unless noted otherwise in this Final Order, citations to the Florida Statutes refer to the versions in effect at the time the School Board performed the assessments at issue. Additionally for stylistic convenience, [REDACTED] pronouns are used in this Final Order when referring to Respondent. The [REDACTED] pronouns are neither intended, nor should be interpreted, as a reference to Respondent's actual gender.

FINDINGS OF FACT

1. The student is an [REDACTED] child who, at all times relevant to this proceeding, was eligible to receive special education and related services pursuant to [REDACTED] [REDACTED] designations.

2. [REDACTED] is currently in the [REDACTED] grade at a Broward County public school, in a self-contained classroom for students with [REDACTED]. [REDACTED] receives [REDACTED] due to [REDACTED].

3. Additionally, the student requires and is provided a [REDACTED] [REDACTED] [REDACTED]. [REDACTED] is [REDACTED] on tasks for approximately [REDACTED] with

[REDACTED]

[REDACTED].

4. The student requires direct [REDACTED] and constant reminders to [REDACTED]. [REDACTED] in whole group instruction and is [REDACTED] in such settings, [REDACTED].

5. On [REDACTED], the parent provided consent for a psychological reevaluation in [REDACTED]. A school psychologist completed the psychological evaluation in [REDACTED]. However, the evaluation for [REDACTED] could not be completed due to the [REDACTED]. A report on the [REDACTED], was generated.

6. At an individualized education plan (IEP) meeting held on [REDACTED], the team reviewed the information obtained in the most recent psychological reevaluation. The team also proposed that the student be placed in an exceptional student education center that would provide a [REDACTED] with [REDACTED] throughout the day.

7. On [REDACTED], the parent consented to a second psychological reevaluation of the student in the areas of





13. The uncontroverted evidence demonstrated that the School Board's psychological evaluation was appropriate and provided a more comprehensive and complete picture of the student's [REDACTED], than the "■" test requested by the parent could provide. At this time further testing is not necessary or required. Given this appropriateness, Respondent is not entitled to an IEE at public expense.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 1003.57(1)(b) and 120.57(1), Fla. Stat., and Fla. Admin. Code R. 6A-6.03311(9)(u).

15. District school boards are required by the Florida K-20 Education Code to provide for an "appropriate program of special instruction, facilities, and services for exceptional students [ESE] as prescribed by the State Board of Education as acceptable." §§ 1001.42(4)(1) & 1003.57, Fla. Stat.

16. 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); Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th Cir. 2012).

17. Under the IDEA and its implementing regulations, a parent of a child with a disability is entitled, under certain circumstances, to obtain an IEE of the child at public expense. The circumstances under which a parent has a right to an IEE at public expense are set forth in 34 C.F.R. § 300.502(b), which provides as follows:

Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.



(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

18. 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.

19. These provisions make clear that a district school board in Florida is not automatically required to provide a publicly funded IEE whenever a parent asks for one. A school board has the option, when presented with such a parental request, to initiate—without unnecessary delay—a due process hearing to demonstrate, by a preponderance of the evidence, that its own evaluation is appropriate. T.P. v. Bryan Cnty. Sch. Dist., 792 F.3d 1284, 1287 n.5 (11th Cir. 2015). 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 IEE.

20. Whether a school district filed its due process hearing request "without unnecessary delay"—a phrase not defined by Federal or Florida law—is a fact specific inquiry. See J.P. v. Ripon Unified Sch. Dist., 2009 U.S. Dist. LEXIS 32035, at \*21 (E.D. Cal. 2009) ("Whether or not unwarranted delay has occurred must be determined given the facts of each particular case.").

21. In Pajaro Valley Unified School District v. J.S., 2006 U.S. Dist. LEXIS 90840 (N.D. Cal. Dec. 15, 2006), the student's attorney submitted a written request to the school district for an IEE at public expense on June 1, 2005. Id. at \*5. Twenty days later, the school district responded by letter, explaining that its assessment was appropriate; advising that it was "prepared" to go to a due process hearing to defend its assessment; and instructing the student's parent to submit, within nine days, a re-request for the independent evaluation if one was still desired. Id. Six days later, the student's attorney once again submitted a request for an IEE at public expense. Id. at \*5-6. Thereafter, some eleven weeks after it received the first request for an independent evaluation, the school district filed a request for a due process hearing. Id. at \*6. Following the conclusion of administrative proceedings, the reviewing court held that the school district failed to file

its due process request without unnecessary delay, which entitled the student to relief irrespective of the appropriateness of the district's evaluation:

The IDEA's procedural safeguards are considered so important that violations of those safeguards may warrant relief . . . . Under the facts of the present case, the court finds that the District's unexplained and unnecessary delay in filing for a due process hearing waived its right to contest Student's request for an independent educational evaluation at public expense, and by itself warrants entry of judgment in favor of Student . . . in this action.

Id. at \*8-10; Fremont Unified Sch. Dist., Case No. 2009-40633, 109 LRP 31206 (Cal. Off. Adm. Hear. June 1, 2009) (concluding that although some of the delay between the district's receipt of the request for an independent evaluation and the initiation of a due process hearing could be explained, the district "did not produce evidence to establish that its continued delay for a period of two additional months . . . was reasonable . . . . Student is therefore entitled to an IEE"); Los Angeles Unified Sch. Dist., 48 IDELR 293, 107 LRP 45586 (Cal. Off. Adm. Hear. June 20, 2007) (concluding that school district failed to act without unnecessary delay where it waited 74 days to initiate a due process hearing after it received the parent's request for an IEE at public expense).

22. In this case, the request for the psychological IEE was made on [REDACTED], at an IEP meeting, with the IEP team

present. The School Board without significant delay filed a request for a due process hearing to defend the psychological evaluation it had completed on [REDACTED]. The School Board's actions complied with the requirements of IDEA.

23. Further, to satisfy its burden of proof on the appropriateness of the psychological evaluation, the School Board must demonstrate that the assessment at issue complied with rule 6A-6.0331(5), which sets forth the elements of an appropriate evaluation. Palm Beach Cnty. Sch. Bd. v. \*\*, 66 IDELR 29 (Fla. DOAH July 2, 2015). Rule 6A-6.0331(5) provides 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 within a data-based problem solving process, including information about the student's response to evidence-based interventions as applicable, and information provided by the parent. This evaluation data may assist in determining whether the student is eligible for ESE and the content of the student's individual educational plan (IEP) or educational plan (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 and procedures 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 and procedures 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 suspected disability.

24. In this case, the evidence demonstrated that the School Board's psychological evaluation fully complied with rule 6A-6.0331(5). In particular, the assessment was conducted by a trained and knowledgeable professional who utilized—and properly administered—a variety of valid instruments that yielded reliable and comprehensive information concerning Respondent's educational needs. The assessments were not discriminatory and were conducted in a manner most likely to yield accurate information. Given these facts, the evaluation completed by the School Board is appropriate and Respondent is not entitled to an IEE at public expense.

ORDER

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

1. Respondent is not entitled to a psychological independent educational evaluation at public expense.

DONE AND ORDERED this 3rd day of August, 2016, in Tallahassee, Leon County, Florida.

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DIANE CLEAVINGER  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 3rd day of August, 2016.

ENDNOTE

<sup>1/</sup> Additionally, a functional behavior assessment was completed and finalized on [REDACTED]. The assessment in part resulted in an updated Positive Behavioral Intervention Plan appropriate for the student.

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).