STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PASCO COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 19-0736E

**,

Respondent.
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FINAL ORDER

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH), on ████, ████, in Land O'Lakes, Florida.

APPEARANCES

For Petitioner: ████████████████, Esquire
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For Respondent: ██████████████, Esquire
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STATEMENT OF THE ISSUES

Whether Petitioner is entitled to conduct a reevaluation of Respondent's ██████ under the Individuals with Disabilities Education Act (IDEA) when Respondent's parents refused consent;

and, if so, what parameters or conditions shall Petitioner follow in conducting the reevaluation.

PRELIMINARY STATEMENT

On [redacted], Petitioner filed a request for a due process hearing that, with respect to Respondent, sought approval to conduct a reevaluation that included obtaining updated medical information and compelling Respondent's attendance at an independent medical examination. Petitioner's hearing request was necessitated by Respondent's parents' refusal to provide consent to the reevaluation.

After granting a request to extend the resolution period and conducting a telephonic status conference, the undersigned issued a Notice of Hearing scheduling the final hearing for [redacted] and [redacted], [redacted]. Thereafter on [redacted], [redacted], the undersigned granted a joint motion and stipulation to continue the final hearing, and the final hearing was rescheduled for [redacted] and [redacted], [redacted].

On [redacted], [redacted], the parties filed a Joint Pre-hearing Stipulation containing a "Concise Statement of Admitted Facts." To the extent relevant, those admitted facts are incorporated in this Final Order.

On [redacted], [redacted], the parties filed Joint Exhibits 1 through 28, which were stipulated to for admission.

On [redacted], [redacted], the final hearing proceeded, as scheduled. Stipulated Exhibits 1 through 28 were admitted. The identity of the witnesses and exhibits are as set forth in the final hearing Transcript.

At the conclusion of the final hearing, the parties and the undersigned agreed to set the deadline for the filing of proposed final orders to 14 days after the filing of the transcript and the undersigned's final order 28 days after the filing of the transcript. The Transcript was filed on [redacted], [redacted]. The parties timely filed Proposed Final Orders, which were considered in preparing this Final Order. Unless otherwise indicated, all rule and statutory references are to the version in effect at the time the subject reevaluation was requested.

For stylistic convenience, the undersigned will use [redacted] pronouns in the 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. Respondent is currently [redacted] years old.

2. During the [redacted]-[redacted] school year, [redacted] attended School A, a public high school in Pasco County, Florida.

3. Respondent was previously determined eligible to receive exceptional student education (ESE) services. Presently, [redacted] is being served in the ESE categories of [redacted],

, and . has also been previously determined eligible to receive specially designed instruction. Petitioner receives the related services of , , , , and and management throughout the school day.

4. The nature and extent of Respondent's medical conditions known to Petitioner are varied and complex. is and fragile. Respondent was born at weeks, weighed , and was required to remain in the care unit for the first and a half months of life. When was one month old, was required to undergo surgery. When Respondent was years old, had . has also had a , surgery, as well as a and .

5. The parties admit, and the available medical records in Petitioner's possession document that at varying times Petitioner has been diagnosed with or has the following: , , , , , , , , , , , ,

, (also referred to as), ( ) , , , , , and .

6. The parties further admit that, while in the school setting, Respondent uses a for mobility and is dependent upon educational staff to propel, manipulate, and maneuver the same. Respondent is totally dependent on educational staff members for all of activities of daily living. wears and is on a toileting schedule, which requires staff assistance. As noted above, Respondent receives all of nutrition through a . is also in communication.

7. is Petitioner's supervisor of , , Off-Campus Instruction and Inclusion. credibly testified that Respondent is the most medically fragile student currently attending school on campus in Petitioner's school district.

8. While at school, Petitioner's nursing staff is responsible for monitoring Respondent's , , , , , and . The nursing staff is further responsible for providing medication, treatments (the administration of oxygen),

and ██████████. To ensure ███ health and safety, Petitioner's nursing staff also accompanies and monitors Respondent on an air conditioned bus while ██ is being transported to and from school.

9. School A is not an █████████ setting. Accordingly, due to various medical monitoring concerns that presented during the ████-████ school year, Petitioner's staff, concerned that Respondent's health was decompensating, was required to call 911 for emergency care services on eight separate occasions.

10. As noted above, Petitioner also provides ████████████████████ to Respondent. █████████████, Respondent's ██████████ teacher, credibly testifies that ███ provides ███ with three hours of academic instruction at night in the ████ setting. While at ████, Respondent is under the care of private duty nurses, unaffiliated with Petitioner.

11. Ongoing ██ eligibility places certain requirements upon a student's parents to provide a school district with information and documentation concerning the student's present medical condition(s) and needs. One such requirement is that the parent sign a "Family Agreement to ██████████████████ Instruction form." Here, Petitioner's agreement includes a provision that the parent consent to the exchange of information between the physician and school regarding educational decisions related to the individualized education program (IEP). For the last three school years, Petitioner's parent has signed the agreement,

however, has modified the agreement to reflect that the exchange of information shall be through the school and parent, not the physician directly.

12. Continuing ██ eligibility further requires a current medical report from a licensed physician. The medical reports submitted by Respondent for the pertinent time period are woefully deficient and fail to satisfy the requirements of Florida Administrative Code Rule 6A-6.03020(2) and (3). While Petitioner would be well within its rights to terminate Respondent's ██ eligibility due to these parental shortcomings, there is no indication from the record that Petitioner has terminated or, in this proceeding, seeks approval to terminate Respondent's eligibility for ██ services. Accordingly, no further discussion of ██ is required.

13. Pursuant to Respondent's operative IEP, Respondent receives 60 minutes of ██ and ██ per week. Where, as here, it has been determined that an educational need for ██ or ██ exists, a plan of treatment is required. Fla. Admin. Code R. 6A-6.03024. Prior to the filing of the instant Complaint, the last ███████████████ reevaluation had been performed in ████ and a current and appropriate plan of treatment had not been executed by a medical practitioner of record. Subsequent to the filing of the instant Complaint, however, Respondent's parent consented to a ██ reevaluation, and the same was conducted.

14. Petitioner's Proposed Final Order represents that, after the Final Hearing was conducted in this matter, Respondent's parent finally provided an appropriately executed plan of treatment, as well as an appropriately executed plan of treatment. Accordingly, this particular request for relief has been resolved and will not be further addressed in this Final Order.

15. Petitioner presented sufficient evidence to establish that, given the level of Respondent's , current evaluation materials are reasonably needed to assess Respondent's special education and related service needs and to safely care for Respondent while is in Petitioner's charge. Accordingly, Petitioner has requested a reevaluation. The evidence supports a finding that, at times, Respondent's has completely refused access to Respondent's health care providers. At other times, Respondent's has permitted limited direct access. Respondent's has consistently proposed scripting the flow of medical information to written question presented by Petitioner to , and not the health care providers directly.

16. Petitioner has presented sufficient evidence to support the finding that a health reevaluation of Respondent is warranted, and has been requested, but that Respondent has refused to consent to the same.

CONCLUSIONS OF LAW

17. DOAH has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 1003.57(1)(b) and 1003.5715(5), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

18. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

19. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them FAPE that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on the agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Alabama State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

20. Local school systems must satisfy the IDEA's substantive requirements by providing all eligible students with a free appropriate public education (FAPE), which is defined as:

> Special education services that--(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(9).

21. "Special education," as that term is used in the IDEA, is defined as:

> [S]pecially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--
>
> (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings. . . .

20 U.S.C. § 1401(29).

22. The components of FAPE are recorded in an IEP, which, among other things, identifies the child's "present levels of academic achievement and functional performance"; establishes measurable annual goals; addresses the services and accommodations to be provided to the child, and whether the child will attend mainstream classes; and specifies the measurement

tools and periodic reports that will be used to evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. "Not less frequently than annually," the IEP team must review and, as appropriate, revise the IEP. 20 U.S.C. § 1414(d)(4)(A)(i).

23. Under the IDEA, and its implementing regulations, a student receiving special education services must be reevaluated "at least every 3 years, unless the parent and the local educational agency agree that reevaluation is unnecessary."

20 U.S.C. § 1414(a)(2)(B)(ii); Fla. Admin. Code R. 6A-6.0331(7)(b). In conducting the reevaluation, the school district must, inter alia, assess the student in all areas related to a suspected disability, including, if appropriate, health, vision, and hearing. Fla. Admin. Code R. 6A-6.0331(5)(f). The reevaluation must be conducted by examiners, including physicians, who are qualified in the professional's field as evidenced by a valid license or certificate to practice such a profession in Florida. Fla. Admin. Code R. 6A-6.0331(3)(e).

24. Parental consent is required for a reevaluation. 20 U.S.C. § 1414(c)(3). "Consent" is defined, in pertinent part, as:

> (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native

> language, or through another mode of communication;
>
> (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
>
> (c)
> (1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.
>
> (2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

34 C.F.R. § 300.9.

25. Among other things, the parents must be informed about "any evaluation procedures" the school proposes to conduct. Id. 34 C.F.R. § 300.304(a). "If the parent refuses to consent to the reevaluation, the [school district] may, but is not required to, pursue the reevaluation by using the consent override procedures," provided for in the regulations. 34 C.F.R. § 300.300(c)(1)(ii). The "consent override procedures" include mediation or a due process complaint. Id. 34 C.F.R. § 300.300(a)(3).

26. In Shelby S. v. Conroe Independent School District, 454 F.3d 450, 454 (5th Cir. 2006), the court held that "where a school district articulates reasonable grounds for its necessity

to conduct a medical reevaluation of a student, a lack of parental consent will not bar it from doing so." In concluding that the school district had met its burden, the Shelby court noted the following:

> The IDEA states that a reevaluation is warranted when the school district requires evaluation materials that are essential to assessing a child's special education needs. See 20 U.S.C. § 1414(c)(1)-(2). In order for [the school district] to know how to formulate an IEP consistent with Shelby's extreme symptoms, Shelby's [Admission, Review, and Dismissal] ARD committee needed access to her medical history and specialist, Dr. Kelly. However, Shelby's guardian, Ms. T., limited the medical information that was available to Shelby's ARD committee by scripting the main encounter between Dr. Kelly and the ARD committee with fourteen pre-approved questions. Ms. T. then edited Dr. Kelly's answers to the ARD committee's questions. Without more complete medical information about Shelby, the ARD committee was not able to fashion an IEP that would allow [the school district] to perform its IDEA-mandated duty.

Id.

27. The undersigned concludes that, under the circumstances present here, Petitioner has articulated reasonable grounds to perform a health reevaluation of Respondent, over the lack of parental consent. When conducting the reevaluation, Petitioner "is entitled to reevaluate Respondent by an expert of its choice." G.J. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1263 (11th Cir. 2012)(quoting M.T.V. v. DeKalb Cnty. Sch. Dist., 446

F.3d 1153 (11th Cir 2006)). "Every court to consider the IDEA's reevaluation requirements has concluded if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student. . . ." Id. at 1264.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner is entitled to conduct a reevaluation of Respondent's health over Respondent's parents' lack of consent. The reevaluation shall proceed under the following directives:

1. The health reevaluation may be used to update Petitioner's IEP or for any other purpose permitted by the IDEA.

2. Petitioner shall select the evaluator(s) to conduct the reevaluation.

3. Petitioner shall consult with Respondent to determine a mutually agreeable date and time for the reevaluation.

4. Petitioner shall disclose to Respondent in writing all information relevant to the reevaluation, including, but not limited to the evaluation procedures the school proposes to conduct.

5. If the evaluator(s) determine that additional testing is necessary, then Petitioner shall seek consent for those tests in accordance with these requirements.

6. The reevaluation reports and results shall not be shared with any third parties without prior written consent from Petitioner’s parents except to the extent allowed by the Family Educational Rights and Privacy Act and the IDEA.

7. If Petitioner’s parents disagree with the reevaluation results, they may request an Independent Educational Evaluation.

DONE AND ORDERED this 1st day of July, 2019, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
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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).