

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 19-1143E

** ,

Respondent.

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FINAL ORDER

Pursuant to notice, a due process hearing was held on [REDACTED], [REDACTED], in Lauderdale Lakes, Florida. Administrative Law Judge Jessica E. Varn, of the Division of Administrative Hearings, heard the case.

APPEARANCES

For Petitioner: [REDACTED], Esquire
School Board of Broward County
K. C. Wright Administration Building
11th Floor
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301

For Respondent: Parent of the Student, pro se
(Address of Record)

STATEMENT OF THE ISSUE

Whether the School Board's psychoeducational evaluation, [REDACTED] ([REDACTED]), and speech and language pathology evaluation were appropriate; and whether Respondent is

entitled to a [REDACTED] independent educational evaluation (IEE).

PRELIMINARY STATEMENT

On [REDACTED], [REDACTED], during a meeting where evaluation results were being reviewed, the student's parent requested a "[REDACTED] evaluation including a [REDACTED] [REDACTED] ([REDACTED]) conducted specifically by [REDACTED]." On [REDACTED], [REDACTED], the School Board filed a Request for a Due Process Hearing (Complaint), asserting that the school district's evaluations were full, individualized, and appropriate, and that Respondent's request for an IEE at public expense should be denied.

On [REDACTED], [REDACTED], a pre-hearing scheduling conference was held with the parties. During the telephone conference, the parties agreed to consolidate the instant case with a Respondent-filed Complaint which had been assigned to Judge [REDACTED] (Case No. [REDACTED]), and agreed to schedule the consolidated Complaints for a due process hearing on [REDACTED] and [REDACTED], [REDACTED]. On [REDACTED], [REDACTED], Judge [REDACTED] dismissed Case No. [REDACTED], stating the following:

On [REDACTED], [REDACTED], Petitioner filed with Respondent a due process complaint (Complaint). In the Complaint, Petitioner appears to dispute an evaluation completed by Respondent and requests an independent education evaluation (IEE). Additionally, the Complaint re-alleges facts that were in

dispute in DOAH Case No. [REDACTED], which was dismissed with prejudice by agreement of the parties upon settlement of that case. On [REDACTED], [REDACTED], Respondent filed with DOAH its Motion to Dismiss, arguing that the Complaint is duplicative of the issues raised in DOAH Case No. [REDACTED] (currently before Judge [REDACTED]) and is otherwise barred by the doctrine of res judicata. On [REDACTED], [REDACTED], Petitioner filed a response to the Motion to Dismiss.

After review of the file, it is clear that Petitioner's Complaint in DOAH Case No. [REDACTED] is duplicative of the issues raised in DOAH Case No. [REDACTED], currently pending before Judge [REDACTED]. Therefore, the portions of the Complaint related to the Respondent's evaluation and IEE should be dismissed. Further, the Complaint raises the same issues that were raised in DOAH Case No. [REDACTED], which were dismissed with prejudice by agreement of the parties upon settling the case. As such, the remainder of the Complaint is barred by the doctrine of res judicata and should be dismissed with prejudice.

The hearing commenced as scheduled on [REDACTED], [REDACTED]. During the hearing, the School Board presented the testimony of [REDACTED], an exceptional student education ("ESE") specialist; [REDACTED], a school psychologist; [REDACTED], a speech and language pathologist; [REDACTED], a school social worker; and [REDACTED], a due process coordinator. School Board Exhibits 2, 3, 5 through 10, 12 through 17, 19, and 21 were admitted into evidence. Respondent presented the testimony of the student's [REDACTED] and [REDACTED], a parent advocate; Respondent did not enter any exhibits into evidence. The final

hearing Transcript was filed on [REDACTED], [REDACTED]. The School Board, thereafter, submitted a Proposed Final Order, which the undersigned has considered.

By agreement of the parties, the Final Order was due to be entered no later than [REDACTED], [REDACTED]. For stylistic convenience, the undersigned will use [REDACTED] pronouns in this Final Order when referring to the student. The [REDACTED] pronouns are neither intended, nor should be interpreted, as a reference to the student's actual gender.

Unless otherwise noted, all statutory and rule citations are to the versions in effect at the time the School Board performed the assessments at issue.

FINDINGS OF FACT

1. At the time of the due process hearing, the student in this case was a [REDACTED] grader who was being evaluated for eligibility for ESE services.

2. The student had entered [REDACTED] in the Fall of [REDACTED] at Charter School A. [REDACTED] was withdrawn from the school on [REDACTED], [REDACTED], and received a homeschool education until the end of the school year. [REDACTED] then began [REDACTED] grade, in the Fall of [REDACTED], at Charter School B. Due to [REDACTED] and [REDACTED], [REDACTED] was withdrawn from Charter School B in November of [REDACTED], and enrolled at School C.

3. The student's parent provided consent for evaluation on [REDACTED], [REDACTED]. The areas to be evaluated were: academic achievement, adaptive behavior, [REDACTED], medical and health conditions that may affect educational performance, hearing, intellectual and cognitive abilities, language, occupational therapy, physical therapy, speech, social/emotional behavior, and social/developmental history. The evaluations would include [REDACTED] data; interviews with parents, teachers, and when appropriate, the student; observations of the student; and an [REDACTED].

Psychological Evaluation

4. [REDACTED] is a licensed school psychologist with a master's degree in [REDACTED] Education and a specialist degree in Psychology. [REDACTED] has more than 20 years of experience in the [REDACTED] County Public School System. [REDACTED] followed the test administrators' protocols with fidelity when administering the assessments.

5. [REDACTED] specifically evaluated the student in the following areas: achievement, adaptive behavior, [REDACTED], intellectual/cognitive, and social/emotional behavior. He reviewed interviews, observations, [REDACTED] data, and social/developmental history in formulating [REDACTED] findings.

6. [REDACTED] used a variety of assessment tools and strategies including: observations, interviews, parent and

teacher behavior rating scales, and assessments of both cognitive and auditory and [REDACTED] functioning. The assessments included the [REDACTED] to assess the student's sequential memory skill; Test of Auditory Processing Skills because it was specifically requested by the parent; [REDACTED] because an achievement-scaled assessment would help in identifying a number of possible eligibilities; [REDACTED] to determine the student's executive functioning skills, and [REDACTED] fine and sensory motor skills; [REDACTED] Rating Scales because it was requested by the parent; [REDACTED] to identify any emotional behavioral disability and attention impulsivity related to the student's [REDACTED] diagnosis; the [REDACTED] because [REDACTED] was a parent concern; and the Comprehensive Parent Interview Form. [REDACTED] also reviewed the student's records, and observations were also given consideration.

7. The evidence established that these assessments are technically sound, and could assess the relative contribution of [REDACTED] and [REDACTED] factors affecting the student in an educational setting, as well as physical or developmental factors. [REDACTED] selected assessments that are widely used in the field of psychology and are accepted as appropriate for use with school-aged children.

8. The assessments selected and administered were chosen to aid in the identification and/or need for special education services and for educational planning. [REDACTED] ultimately found that the student would benefit from a school setting with as much individualization and increased structure that can be provided and that current academic levels should be taken into consideration when giving instruction. Although the student did not exhibit [REDACTED], [REDACTED], or [REDACTED], [REDACTED] lack of school attendance may be why the student struggles with academics. [REDACTED] concluded that low tolerance for frustration and a desire for attention rather than an underlying emotional symptomology are likely the issues with [REDACTED].

9. The results of the assessments provided relevant information for the determination of the student's educational needs based upon [REDACTED] determined cognitive functioning, behavioral functioning and/or functional behavioral assessment, social/emotional functioning, language and communication functioning, and physical and occupational functioning. [REDACTED] report ultimately identified an educational need for ESE services and made the recommendation that the student would likely benefit from increased structure within the classroom, individualized educational programming, [REDACTED] expectations with positive reinforcement for classroom [REDACTED] compliance,

and extracurricular programs to enable structured peer-to-peer interactions.

10. ██████████ synthesized the tools and observations ██████████ made when conducting ██████████ evaluation, taking into account the student's ability to socially interact with ██████████ peers and ██████████ ██████████. With regard to the student's cognitive functioning, ██████████ found that the scores placed ██████████ abilities well ██████████ the ██████████ range, but due to the student's inattentive and ██████████, the results should be interpreted with caution. ██████████ also noted that the student displayed ██████████ abilities in the areas of auditory processing, short-term sequential memory, phonological processing, rapid naming abilities, working memory, and verbal processing.

11. ██████████ assessed the student's ██████████ skills and determined that ██████████ makes appropriate social interaction and eye contact. The student's language and communication skills were observed and revealed that ██████████ engaged in reciprocal conversation. These skills are deemed inconsistent with children diagnosed with ██████████. In summing up the student's overall functioning, ██████████ stated that due to his ██████████, ██████████, and ██████████, the ██████████ results should be interpreted with caution. Because the student displayed quality social responses, frequent initiations of social interactions, and an interest in shared

enjoyment with others, the student did not display repetitive and stereotyped [REDACTED] associated with [REDACTED].

12. The cumulative results of the various evaluations aided the IEP team in determining the student's present level of performance, priority educational needs, goals, and the selection of the special education and related services [REDACTED] requires in order to make meaningful progress. Based upon the assessments, the student was found eligible for the [REDACTED] category.

13. [REDACTED] psychological evaluation complied with Florida Administrative Code Rule 6A-6.0331(5), which sets forth the elements of an appropriate evaluation.

[REDACTED]

14. An [REDACTED] was initiated on [REDACTED], [REDACTED]. Team members tasked with the formulation of the [REDACTED] were: [REDACTED], Social Worker; [REDACTED], ESE Specialist; [REDACTED], ESE Teacher; [REDACTED], General Education Teacher; the student's parent; and [REDACTED], Teaching Assistant.

15. The purpose of an [REDACTED] is to isolate a target [REDACTED] and [REDACTED] a hypothesis regarding the function of the target [REDACTED]. A [REDACTED] is one that interferes with a student's ability to progress in the curriculum and to achieve the student's IEP goals. Once the [REDACTED] is identified and the hypothesis is developed, a

████████████████████ can be prepared to address the ██████████ with strategies and interventions, if necessary, or the ██████████ can be addressed using a more informal approach.

16. The student's identified ██████████ were ██████████, ██████████, ██████████, ██████████ and ██████████ and off-task ██████████, ██████████, moving ██████████, refusal to ██████████, and ██████████ on ██████████. The ██████████ are more likely to occur in less structured settings and when confronted with a non-preferred task.

17. The team reviewed a variety of data, including the student's records from previous schools, ██████████ attendance and discipline records, home notes, the psychological evaluation, and the psychosocial report, which had documented interviews with ██████████ therapist and family members. Data from direct and indirect assessments were reviewed. Class observations as well as interviews with family and the student's therapist were conducted.

18. The selected assessments obtained information directly from parent and family members to obtain the dynamics of the home setting. Direct assessments such as scatter plot and frequency charts were implemented to capture the student's ██████████ in the school setting. These are appropriate tools

to use to assess a student's [REDACTED] at home and in school, and are widely used when assessing the [REDACTED] of [REDACTED].

19. The assessment tools employed provided relevant information in determining the student's educational needs. Based upon observations of [REDACTED] and [REDACTED], it was determined that the function of [REDACTED] was [REDACTED] and [REDACTED]. Both the student's parent and the staff concluded that a structured and supportive environment would likely ameliorate these [REDACTED].

20. The [REDACTED] complied with rule 6A-6.0331(5), which sets forth the elements of an appropriate evaluation.

Speech and Language Evaluation

21. [REDACTED] is a master's-level licensed Speech Language Pathologist with four years of experience in the field.

22. [REDACTED] selected assessments that are widely used by SLPs and are accepted as appropriate for use with school-aged children. [REDACTED] used a variety of standardized assessment tools and strategies including: observations; Broward County Teacher Checklist for Speech; Broward County Teacher Checklist for Language; [REDACTED] Evaluation; [REDACTED] [REDACTED] [REDACTED], Third Edition; Preschool Language Scales, 5th Edition; and [REDACTED] [REDACTED] [REDACTED] [REDACTED], [REDACTED].

23. [REDACTED] utilized the assessments to gauge the student's articulation and language abilities; [REDACTED] speech, receptive/expressive language; and pragmatic language concerns. [REDACTED] found that the student was [REDACTED] percent intelligible and that no articulation errors occurred, that [REDACTED] had some weaknesses in both [REDACTED] receptive and expressive language skills, as well as deficits in pragmatic language skills. The student has no speech sound substitutions or distortions and/or omissions, [REDACTED] oral musculature was symmetrical, [REDACTED] articulation was age appropriate, and [REDACTED] ability to communicate in both verbal and non-verbal modalities approximates [REDACTED] same-aged peers, [REDACTED]. [REDACTED] explained that the [REDACTED] noted could be the result of contributing factors, which included lack of exposure due to sporadic school attendance and decreased opportunity for peer interactions.

24. The SLP report ultimately identified a weakness with the student's ability to [REDACTED] and [REDACTED], which affects [REDACTED] ability to interact appropriately with [REDACTED] in the [REDACTED]. Thus, language services were identified and included in the IEP. A communication goal was added to the IEP, aimed at increasing the student's ability to identify non-verbal cues, respond appropriately to a hypothetical social scenario involving a conflict, and identify visual cues in an

illustration to infer the thoughts/feelings of depicted characters.

25. The speech and language evaluation complied with rule 6A-6.0331(5), which sets forth the elements of an appropriate evaluation.

26. The School Board never conducted a neuro-psychological evaluation of the student; therefore, a request for an IEE in neuropsychology is premature and not ripe for adjudication.

CONCLUSIONS OF LAW

27. 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-6.0331(9)(u).

28. 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.

29. 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).

30. 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.

31. Florida law, specifically 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.

32. 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 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 district school board is able to meet its burden and

establish the appropriateness of its evaluation, it is not required to provide the requested IEE.

33. To satisfy its burden of proof, the School Board must demonstrate that the assessments at issue complied with rule 6A-6.0331(5), which sets forth the elements of an appropriate evaluation. 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.

34. Based on the findings of fact as stated herein, the School Board has proven that its psychoeducational evaluation, its SLP evaluation, and its [REDACTED], fully complied with rule 6A-6.0331(5). In particular, they were all conducted by trained and knowledgeable professionals who utilized, and properly administered, a variety of valid instruments that yielded reliable and comprehensive information concerning the student's educational needs.

35. As to the premature request for an IEE in neuropsychology, rule 6A-6.0331(6)(a) states that 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." The plain language of this provision requires a predicate evaluation with which to disagree prior to requesting an IEE. Stated another way, there

is no right to an independent evaluation at public expense unless the parent disagrees with an evaluation obtained by the School Board.

36. Although Respondent is not entitled to IEEs at public expense, the parent is free to present a [REDACTED] evaluation, a [REDACTED], an SLP evaluation, and a [REDACTED] evaluation obtained at private expense to the School Board, the results of which the School District is required to consider. See Fla. Admin. Code R. 6A-6.03311(6)(j)1. (providing that if a parent "shares with the school district an evaluation obtained at private expense . . . [t]he school district shall consider the results of such evaluation in any decision regarding the provision of FAPE to the student, if it meets appropriate district criteria").

ORDER

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

ORDERED that the School Board's psychological evaluation, speech and language evaluation, and [REDACTED] were appropriate, and met all the criteria set forth in Florida Administrative Code Rule 6A-6.0331(5). The student is not entitled to an IEE, at public expense, in [REDACTED].

DONE AND ORDERED this 1st day of July, 2019, 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 1st day of July, 2019.

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).