

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 12-1514E
)
██████,)
)
 Respondent.)
_____)

FINAL ORDER

A final hearing was held in this case before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on June 14, 2012, by video teleconference at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Barbara J. Myrick, Esquire
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For Respondent: Anne Blanford, Esquire
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STATEMENT OF THE ISSUE

The issue in this proceeding is whether Petitioner's psychological evaluation of ██████ is appropriate.

PRELIMINARY STATEMENT

On April 23, 2012, the Broward County School Board ("School District" or "Petitioner") filed a request for a due process hearing ("Hearing Request") that sought a determination of the appropriateness of its most recent psychological evaluation of [REDACTED] ("Respondent"). The School District's Hearing Request was necessitated by its decision to deny the request of [REDACTED]'s parents to provide an independent psychological evaluation at public expense.

On April 26, 2012, the undersigned issued a Notice of Hearing that scheduled the due process hearing requested by the School District for May 21, 2012. In response to Petitioner's unopposed motion to continue, filed April 26, 2012, the final hearing was rescheduled to June 14, 2012. Thereafter, on June 8, 2012, the parties filed a Joint Statement of Undisputed Facts, the contents of which have been incorporated into this Final Order.

During the final hearing, the School District called the following witnesses: Dr. Shelley Yeckes; Teresa Pena-Diaz; and Shelley Ludwig. The School Board also introduced six exhibits into evidence, numbered 1-6. Respondent presented the testimony of [REDACTED] ([REDACTED]'s mother), but offered no exhibits into evidence. At the conclusion of the final hearing, the parties

agreed to a deadline of July 13, 2012, for the submission of proposed final orders.

The final hearing transcript was filed on June 29, 2012. Both parties thereafter submitted proposed final orders, which the undersigned has considered in the preparation of this Final Order.

For stylistic convenience, the undersigned will use masculine pronouns in this Final Order when referring to [REDACTED]. The masculine pronouns are neither intended, nor should be interpreted, as a reference to [REDACTED]'s actual gender.

Unless noted otherwise, citations to the Florida Statutes refer to the 2012 version.

FINDINGS OF FACT

1. [REDACTED] is a [REDACTED] child who has attended the [REDACTED] [REDACTED] since August 2007, when [REDACTED] parents enrolled [REDACTED] as a [REDACTED] student. By all accounts, [REDACTED] is kind, well-mannered, and obedient.

2. At all times relevant to this proceeding, [REDACTED] received exceptional student education ("ESE") services in the areas of Other Health Impairment ("OHI") and Speech Impairment ("SI").

3. As [REDACTED]'s [REDACTED]-grade year (2011-2012) progressed, [REDACTED] parents became concerned that [REDACTED] was falling further and further behind [REDACTED] peers, particularly in the subject of reading. This

prompted ██████'s mother and father, in January 2012, to request a meeting to develop a re-evaluation plan.

4. The School District acceded to the request and held a meeting on January 30, 2012, at the conclusion of which the parties agreed that ██████ would be evaluated to determine the following: (1) the manner in which ██████ receptive and expressive skills compare with ██████ same age peers; (2) ██████ current academic levels; (3) ██████ IQ range; and (4) any processing weaknesses that might be impacting ██████ ability to be successful academically.

5. Shortly thereafter, the School District assigned one of its employees, Ms. Shelley Ludwig, a school psychologist who has been employed with the School Board in that capacity for over eight years, to conduct ██████'s evaluation. Ms. Ludwig is both trained and knowledgeable in her field; she holds an education specialist degree—an advanced academic degree beyond the master's degree level—in the area of school psychology and is licensed and certified in the State of Florida as a school psychologist.^{1/}

6. Prior to her administration of formal tests and assessments to ██████, Ms. Ludwig conducted an observation of ██████ in the classroom of Ms. Pena-Diaz, the child's ██████-grade teacher. In addition, Ms. Ludwig reviewed background information concerning ██████ from a variety of sources, which included: a "Parent Information Form," wherein ██████'s mother

and father described [REDACTED] medical history, family and peer relationships, and academic struggles; standardized tests scores from 2010 and 2011 in the areas of reading and math; an April 2010 report prepared by a fellow school psychologist, which outlined [REDACTED]'s significant weakness in reading comprehension; documentation relating to parent conferences held in October and December of 2011; a "Comprehensive Problem-Solving & Evaluation" form prepared by Ms. Pena-Diaz; [REDACTED]'s present academic performance, as related by Ms. Pena-Diaz; and observational summaries of [REDACTED] prepared by Ms. Ingrid Saenz.

7. Ms. Ludwig, upon her review of the foregoing materials and the completion the observation, conducted a comprehensive psychological evaluation of [REDACTED] over the course of three non-consecutive school days.^{2/} On each day of testing, [REDACTED] was evaluated during the morning hours to minimize any possible effects of fatigue.^{3/}

8. On February 13, 2012, the first day of [REDACTED]'s testing, Ms. Ludwig administered two instruments: (1) the Beery-Buktenica Developmental Test of Visual-Motor Integration ("VMI"), which assesses—by asking the child to copy a series of increasingly complex symbols into a booklet—visual perception, motor planning and execution, and kinesthetic feedback; and (2) the Kaufman Assessment Battery for Children, Second Edition ("KABC-II"), which measures the level of intellectual

functioning through an examination of five areas or "scales"—specifically, the child's short-term memory, visual processing (the ability to analyze visual information), long-term memory, fluid reasoning (i.e., problem solving), and general knowledge.

9. With respect to the VMI, ██████ exhibited difficulty copying the symbols as they became more complex, which led to a result that is low average for ██████ age. (██████'s standard score was calculated as 81, measured against a mean of 100.)

10. The KABC-II, like the VMI, is designed such that a majority of children score in the range of 90 to 109, with a mean score of 100. Ms. Ludwig's administration of the KABC-II revealed a "global" score of 81, as well as several significant weaknesses: ██████ received standard scores of 80 and 77, respectively, in the areas of visual processing and fluid reasoning—deficiencies that suggested the presence of a specific learning disability, an issue Ms. Ludwig investigated during the third day of testing on March 5, 2012.

11. ██████'s testing continued on February 27, 2012, with Ms. Ludwig's administration of the Kaufman Test of Educational Achievement, Second Edition ("KTEA-II"), an assessment that measures a child's grade level equivalent in multiple academic areas, such as math computation and concepts, spelling, and oral expression. Overall, the results of the KTEA-II demonstrate that ██████ is operating one to two years below grade level

equivalency in all academic areas. Of particular concern, [REDACTED] exhibited a significant weakness in math, as evidenced by [REDACTED] grade equivalent scores of 1.1 and 1.8, respectively, in the areas of math computation and math concepts. In addition, [REDACTED]'s progress in reading and written expression is below [REDACTED] level of intellectual functioning.

12. [REDACTED]'s second day of testing also featured the Comprehensive Test of Phonological Processing ("CTOPP"), an assessment that focuses on abilities that relate to reading, such as phonological processing, auditory memory span, and rapid naming (i.e., name-symbol association). [REDACTED]'s performance, which fell within the low to average range for [REDACTED] age, demonstrated that [REDACTED] abilities within these areas are unevenly developed. Specifically, [REDACTED]'s results in the areas of phonological memory and the synthesizing of sounds fell within the average range, while [REDACTED] demonstrated low ability in rapid naming, as well as removing phonological segments from spoken words to form other words.

13. Subsequently, on March 5, 2012, the final day of testing, Ms. Ludwig administered selected subtests from two evaluations—Differential Ability Scales, Second Edition ("DAS-2") and the Woodcock-Johnson III ("WCJ III")—to further examine [REDACTED]'s weaknesses in fluid intelligence and visual processing.

14. With respect to the DAS-2, four subtests were administered, two of which assessed ██████'s fluid reasoning (the Matrices and the Sequential and Quantitative Reasoning subtests), while the other subtests (Recall of Designs and Pattern Construction) examined ██████ visual processing ability. ██████'s results on the fluid reasoning subtests—a score of 32 on Matrices and 37 on Sequential and Quantitative Reasoning, as measured against a mean of 50 and a range of 43 to 57 for a majority of children—revealed low ability on tasks that require the analysis of progressively more abstract geometric figures. In the area of visual processing, ██████ demonstrated poor performance (a score of 38) on the Recall of Designs subtest, which assesses, through the child's reproduction of abstract figures, the short-term recall of visual and spatial relationships. On the final subtest, Pattern Construction, ██████ showed average ability when asked to reproduce drawings (from memory) with building blocks.

15. ██████'s fluid reasoning and visual processing were examined further with the WCJ-III, which was likewise administered on the final day of testing. With respect to fluid reasoning, the WCJ-III measures executive thinking (i.e., flexibility in thinking), as well as a child's ability to engage in deductive reasoning. ██████ performed poorly in these areas, which resulted in an overall fluid reasoning score of 57—a

score that equates to less than the first percentile. [REDACTED] fared slightly better on the visual processing component of the WCJ-III, but nevertheless performed in the low average range (18th percentile) when compared to others at [REDACTED] age level.

16. Based on the results of the foregoing assessments—all of which were technically sound, administered properly, and selected and administered to yield an accurate reflection of [REDACTED]'s aptitude and/or achievement level—and other relevant information, Ms. Ludwig issued a report on March 19, 2012, which provided the following recommendations:

The following may be utilized to help build [REDACTED] phonic skills:

- Prepare a list of words and phrases from [REDACTED] reading material, which [REDACTED] does not recognize. Have [REDACTED] practice phonics skills using these words.
- Teach [REDACTED] word attack skills using a root word sight vocabulary to which various prefixes and suffixes may be added.
- Make certain [REDACTED] develops an awareness of hearing word sounds (e.g., say, "Listen to these words. Each of them begins with a /bl/ blend: blue, black, block").
- Develop a list of phonics sounds [REDACTED] needs to master. Remove sounds from the list as he demonstrates mastery of phonics skills.

To address [REDACTED]'s difficulties with visual processing:

- Provide activities with manipulatives
- Provide copying, drawing activities
- Tracing, sorting shapes, block building
- Copy, draw geometric patterns
- Building models, paper folding
- Assembly skills, involving nuts, bolts, etc.

17. On April 17, 2012, [REDACTED]'s parents notified the School District that they disagreed with Ms. Ludwig's evaluation and therefore desired an independent psychological evaluation at public expense. Subsequently, on April 23, 2012, the School Board initiated the instant due process proceeding to defend the appropriateness of its evaluation.

18. On May 16, 2012, during the pendency of this cause, the School District convened a meeting to determine if [REDACTED] met the eligibility criteria for Specific Learning Disabled ("SLD"), which was attended by: [REDACTED] mother; Ms. Ludwig; Ms. Pena-Diaz; a speech pathologist; and Ms. Shelley Yeckes, the director of special education for Pembroke Pines Charter School. Relying upon Ms. Ludwig's report, which the team found sufficiently comprehensive to identify [REDACTED] educational needs, Ms. Yeckes and other team members concluded that [REDACTED] was indeed eligible to receive ESE services as an SLD student

(in addition to the areas of OHI and SI, for which [REDACTED] was already receiving services) and updated [REDACTED] IEP accordingly.

CONCLUSIONS OF LAW

A. Jurisdiction

19. 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).

B. General Principles of the IDEA

20. 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.

21. 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); see also J.P. ex rel. Peterson v. Cnty. Sch. Bd. of Hanover Cnty., Va., 516 F.3d 254, 257 (4th Cir. 2008) ("Under the IDEA, all states receiving federal funds for education must provide disabled schoolchildren with a 'free appropriate public education.'").

C. Independent Evaluations at Public Expense

22. Under the IDEA and its implementing regulations, 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.

23. 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.

24. 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—without unnecessary delay—a due process hearing to demonstrate, by a preponderance of the evidence, that its own evaluation is

appropriate. See Serpas v. Dist. of Columbia, 2005 U.S. Dist. LEXIS 44536, *16 (D.D.C. Oct. 28, 2005) ("Once Serpas requested an independent educational evaluation at public expense, as both parties acknowledge she did, it was DCPS's burden to demonstrate . . . that the evaluations performed by DCPS were appropriate"). If the district 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.

25. To meet its burden of proof, Petitioner must demonstrate that Ms. Ludwig's psychological assessment complied with Florida Administrative Code Rule 6A-6.0331(5), which delineates the elements of an appropriate evaluation. See Miami-Dade Cnty. Sch. Bd. v. D.V.-A., Case No. 12-175E (Fla. DOAH May 29, 2012); Broward Cnty. Sch. Bd. v. G.H., Case No. 10-4494E (Fla. DOAH Oct. 5, 2010); Broward Cnty. Sch. Bd. v. A.G., Case No. 10-1496E (Fla. DOAH May 7, 2010). 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, 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 20 U.S.C. § 1414(b); 34 C.F.R. § 300.304(b) & (c).

26. Pursuant to the findings of fact contained herein, Petitioner has demonstrated that its psychological evaluation complies fully with rule 6A-6.0331(5). Specifically, the evaluation was conducted by a trained and knowledgeable school

psychologist,^{4/} who utilized—and administered properly—a variety of technically-sound assessment tools (i.e., the KTEA-II, KABC-II, WCJ-III, CTOPP, VMI, and DAS-2) that yielded reliable and comprehensive information regarding [REDACTED] special education needs.

27. In their Proposed Final Order, the parents argue that Dr. Ludwig's evaluation of [REDACTED] was inappropriate because it did not include a "traditional" IQ test (e.g., Stanford-Binet Intelligence Scales). This contention is unavailing, however, due to the absence of supporting empirical evidence. See Ford v. Long Beach Sch. Dist., 291 F.3d 1086, 1089 (9th Cir. 2002) ("[The] parents do not provide any empirical grounds on which to base a challenge to the District's decision not to use traditional IQ tests. Such tests have come under increasing criticism in recent years because of cultural bias and other factors tending to diminish their reliability and they have undergone a number of successful legal challenges [W]e conclude that the assessment was not rendered inadequate by the District's decision not to rely on traditional IQ tests") (internal citations omitted); see also E.M. v. Pajaro Valley Unified Sch. Dist., 652 F.3d 999, 1003 (9th Cir. 2011) ("[S]chool districts have discretion in selecting the diagnostic tests they use.").

28. The undersigned has also considered, and rejected, Respondent's assertion that Ms. Ludwig's evaluation was inappropriate in that it did not identify the root cause of [REDACTED] visual processing issues. As the School District correctly points out, the purpose of the psychological evaluation was to determine [REDACTED] educational needs and eligibilities—not to provide a diagnosis or cure. See Gwinnett Cnty. Sch. Dist., 59 IDELR 21, 112 LRP 18864 (Ga. SEA Jan. 23, 2012) ("[The parents] complained that Dr. Turner conducted assessments that are used to assess and determine disabilities rather than focus on determining the cause of the [child's] anxiety and depression. However, Dr. Turner did so in compliance with the IDEA, which requires that he use assessment tools and strategies that address whether Defendant is a child with a disability and can assist with the content of the [child's] IEP.") (emphasis added); see also Coale v. State Dep't of Educ., 162 F. Supp. 2d 316, 331 n.17 (D. Md. 2001) ("If the IDEA required the State to 'cure' Alex's disability . . . then the State's decision to accommodate Alex's 'fine motor skills' problems with adaptive technology might be more problematic. But the court does not understand the IDEA to impose such [a] requirement[] on the State"); Indep. Sch. Dist. No. 283 v. S.D., 948 F. Supp. 860, 885 (D. Minn. 1995) ("The IDEA does not demand that the State cure the disabilities which impair a child's

ability to learn, but requires a program of remediation which would allow the child to learn notwithstanding her disability."), aff'd, 88 F.3d 556 (8th Cir. 1996).

29. Although Respondent is not entitled to an independent psychological evaluation at public expense, Respondent's parents may obtain an independent evaluation at their own expense, the results of which the School District would be 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, the 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 described in this rule").

CONCLUSION

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

ORDERED that: (1) the School District's psychological evaluation is appropriate; and (2) Respondent is not entitled to an independent educational evaluation at public expense.

DONE AND ORDERED this 20th day of July, 2012, in
Tallahassee, Leon County, Florida.

S

Edward T. Bauer
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of July, 2012.

ENDNOTES

^{1/} Ms. Ludwig also holds a bachelor's degree in elementary education and a master's degree in social work.

^{2/} Consistent with the dictates of Florida Administrative Code Rule 6A-6.0331(5)(b), each assessment was administered: in [REDACTED] native language; in a non-discriminatory manner; and in the form most likely to yield accurate information.

^{3/} Although [REDACTED] was distracted on occasion during the assessments ([REDACTED] suffers from attention deficit disorder), [REDACTED] responded appropriately to Ms. Ludwig's redirection.

^{4/} Respondent's contention that Ms. Ludwig's lack of a Ph.D. in psychology rendered her unqualified to administer [REDACTED] evaluation is rejected. The parents' argument in this regard is unsupported by any authority and runs contrary to the plain language of rule 6A-6.0331(5)(b)4., which requires only that an evaluator be "trained and knowledgeable"; there is no mandate that a psychologist or other professional possess the highest possible level of training and knowledge. See also Fla. Admin.

Code R. 6A-6.0331(3)(c) ("The school district shall be responsible for conducting all initial evaluations necessary to determine if the student is eligible for ESE and to determine the educational needs of the student. Such evaluations must be conducted by examiners, including . . . school psychologists . . . who are qualified in the professional's field as evidenced by a valid license or certificate to practice such a profession in Florida.") (emphasis added).

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)(b), Florida Statutes, 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) and Florida Administrative Code Rule 6A-6.03311(9)(w).