

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

L. H., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 08-0475E  
 )  
MANATEE COUNTY SCHOOL BOARD, )  
 )  
Respondent. )  
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FINAL ORDER

A due process hearing was held on February 28, 2008, in Bradenton, Florida, before Carolyn S. Holifield, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark S. Kamleiter, Esquire  
2509 First Avenue South  
St. Petersburg, Florida 33712

For Respondent: John Bowen, Esquire  
Robert J. Shapiro, Esquire  
Manatee County School Board  
Post Office Box 9069  
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STATEMENT OF THE ISSUE

The issue is whether Petitioner's parents have the right to have a private psychologist conduct observations of Petitioner at school as part of an independent educational evaluation.

PRELIMINARY STATEMENT

On January 24, 2008, Petitioner, L.H.'s, parents requested a due process hearing, alleging that Respondent, Manatee County School Board (hereinafter referred to as "School Board"), refused to allow the psychologist retained by Petitioner's parents to conduct school observations of Petitioner as part of an independent educational evaluation. Petitioner alleged that this action by the School Board is a direct violation of Petitioner's procedural safeguard rights.

The matter was forwarded to the Division of Administrative Hearings on January 25, 2008, and assigned to Administrative Law Judge William F. Quattlebaum. By notice issued on January 28, 2008, a pre-hearing conference was held on January 30, 2008. After the pre-hearing conference and pursuant to agreement of the parties and the Administrative Law Judge, the due process hearing was set for February 28, 2008.

The School Board filed a Motion to Dismiss Request for Due Process for Insufficiency ("Motion to Dismiss") on February 8, 2008. Petitioner filed a response to the Motion to Dismiss and a Memorandum of Law in support of the response on February 12, 2008. Administrative Law Judge Quattlebaum denied the Motion to Dismiss on February 12, 2008.

The case was transferred to Administrative Law Judge Carolyn S. Holifield on or about February 22, 2008.

Prior to hearing, the parties stipulated to facts that required no proof at hearing. At hearing, Petitioner presented the testimony of five witnesses: Petitioner's mother; Dr. Tashawna K. Duncan, a psychologist, who was accepted as an expert in the area of school psychology; and the following School Board employees, Ron Russell, director of the Exceptional Student Education program; Pat Bernhart, director of the Student Services Office; and Peggy Long, a teacher. Petitioner's Exhibits 1 through 18 were admitted into evidence.

Respondent presented the testimony of Vaishalee Wilson, a school psychologist employed by the School Board, and Ron Russell. Respondent offered no exhibits into evidence.

At the conclusion of the hearing, the parties agreed to submit proposed final orders 15 days after they received the Transcript. In light of the foregoing, the parties also agreed to extend the time for issuance of the final order in this case.

On March 24, 2008, counsel for Petitioner filed a Motion to Compel Production of Due Process Transcript ("Motion to Compel") alleging that earlier that day, he was advised that the School Board had received the transcript and would forward a copy to Petitioner's counsel, upon his paying 15 cents per page. The Motion to Compel charged that such payment violates the requirement that an "electronic verbatim record of the hearing

be provided at no cost to the parents." See Fla. Admin. Code R. 6A-03311(11)(e)1.d.

On March 26, 2008, Petitioner's counsel filed a notice advising the undersigned that on March 24, 2008, after he filed the Motion to Compel, he received an unsigned and uncertified electronic copy of the transcript. At some unspecified time thereafter, Petitioner received the hearing transcript in a PDF file showing a signature.

After the issue concerning Petitioner's counsel receiving the transcript was resolved, the parties agreed to file proposed final orders 15 days from the date the transcript was filed. Based on their belief that the transcript was filed on March 27, 2008, the parties agreed that the date for filing post-hearing submittals was April 11, 2008.<sup>1/</sup>

The hearing Transcript was filed with the Division of Administrative Hearings on March 31, 2008.

Pursuant to their agreement, both parties filed their post-hearing submittals on April 11, 2008. Petitioner filed a Proposed Final Order and the School Board filed a Post-Hearing Memorandum of Law.

On April 14, 2008, the School Board filed a Motion to Strike Petitioner's Proposed Final Order ("Motion to Strike") on the grounds that it exceeded 40 pages and, thus, violated Florida Administrative Code Rule 28-106.15. In response to the

Motion to Compel, on April 16, 2008, Petitioner filed a Motion to Exceed Page Limitations. On April 22, 2008, the undersigned denied the Motion to Strike Petitioner's Proposed Final Order and granted Petitioner's Motion to Exceed Page Limitations.

The parties' Proposed Final Order and Memorandum of Law have been carefully considered in preparation of this Final Order.

#### FINDINGS OF FACT

##### Stipulated Facts

1. Petitioner is an 11-year-old student at an elementary school (hereinafter referred to as "current school") in the Manatee County School District (hereinafter referred to as "School District").

2. Petitioner meets the eligibility criteria of emotionally handicapped and is entitled to the protections of the Individual with Disabilities Education Act (hereinafter referred to as "IDEA"). 20 U.S.C. § 1400, et seq.

3. In this action, Petitioner's parents are not requesting an independent educational evaluation (hereinafter referred to as "IEE") at public expense, nor are they presently challenging the appropriateness of the student's Individual Education Plan (hereinafter referred to as "IEP") or placement.

4. Petitioner's parents have retained the services of a psychologist to perform a psycho-educational evaluation of the

student and to render a report on the results of that evaluation.

5. The psychologist retained by Petitioner's parents has requested that the School District allow her to do a classroom observation of the student as part of the private psycho-educational evaluation.

FACTS BASED ON EVIDENCE PRESENTED AT HEARING

Background Information on Petitioner

6. Petitioner has been enrolled at the current school since January 2007, after transferring from another school in the School District.

7. As a student who has been found eligible for services under IDEA, Petitioner has an IEP. Under the IEP, Petitioner is being educated in a regular education classroom, with pull-out services for occupational therapy, speech therapy, and counseling.

8. Although not classified as such for purposes of IDEA, Petitioner also has been identified as a child with Asperger's Syndrome and Sensory Integration Dysfunction.

9. Children with Asperger's Syndrome present with significant impairments in social interaction and relating to others. Often they have problems reading body language, interpreting social cues, and can have serious problems with pragmatic language (knowing how to use language effectively).

Furthermore, it is not uncommon for children with Asperger's Syndrome to have behavior difficulties and to experience anxiety and depression.

2006-2007 School Year (January 2007 through May 2007)

10. When Petitioner transferred to the current school in January 2007, the student experienced behavioral difficulties at the school. These difficulties were believed to be associated with the student's adjusting to the current school.

11. During Petitioner's first semester at the current school, the parents were satisfied that a successful educational plan, with appropriate services, was developed for Petitioner. This plan was the result of the collaboration of school staff, Petitioner's parents, and the parents' advocate.

12.. One part of Petitioner's plan included providing the student with a certified behavioral specialist. Jean Ott was the certified behavioral specialist who worked with Petitioner during the student's first semester at the current school.

13. There were some periods during Petitioner's first semester at the current school when the transition was "hard" for Petitioner. However, overall, Petitioner was successful in adjusting to the current school during that first semester. Petitioner's mother attributed Petitioner's success that term to Ms. Ott's working with the student and to the school staff working with Petitioner's parents.

14. In December 2006, the month before Petitioner enrolled in the current school, Ms. Ott developed a "draft" functional behavior assessment for Petitioner. The "draft" functional behavior assessment noted that "more data collection is necessary to determine this [the 'function' of Petitioner's behavior] more accurately."

15. At some point during Petitioner's first semester at the current school, Ms. Ott had to leave the current school due to her pregnancy. The "draft" functional behavior assessment developed by Ms. Ott was never completed.

16. At all times relevant to this proceeding, Vaishalee Wilson was a school psychologist, employed by the School Board. Ms. Wilson has worked as a school psychologist for nine years and is certified as a school psychologist in Florida and nationally.

17. In April and May 2007, Ms. Wilson conducted a psycho-educational re-evaluation of Petitioner. Ms. Wilson considered the re-evaluation to be for the purpose of determining if Petitioner has a learning disability. In accordance with the purpose of the re-evaluation, Ms. Wilson decided that two kinds of tests should be administered to Petitioner--an intelligence instrument and achievement tests.

18. Ms. Wilson reviewed Petitioner's school records and administered the intelligence test. The report of the



re-evaluation indicates that the achievement tests were administered by Ms. Owens, the exceptional education teacher at the current school.

19. Ms. Wilson summarized the results of the re-evaluation in a written report. The report indicated that there were behavioral issues with Petitioner that may have negatively impacted some of the scores. Specifically, the report notes the following: "The overall Written Language score of 84 may not be a valid representation of [Petitioner's] true ability in this area due to behaviors exhibited before the testing began and during the testing session."

20. In the "Summary and Recommendation" section of the report of the re-evaluation, Ms. Wilson notes that the achievement testing reveals low average scores in the area of written language, but states that "these results should be interpreted with caution due to [Petitioner's] behavior prior to and during testing sessions."

21. The report does not indicate the behavior in which Petitioner was engaging, prior to and during the achievement testing, that may have adversely impacted the scores in that area.

22. Ms. Wilson did not use any behavioral instruments or conduct any classroom observations of Petitioner as part of the re-evaluation. Ms. Wilson did not believe that those assessment

tools or methods were necessary, because the referral was initiated to rule out a learning disability.<sup>2/</sup>

23. Although she did not look at Petitioner's behavior as a possible cause of low achievement, Ms. Wilson acknowledged that behavior might be one of the non-learning disability causes of low achievement.

24. Ms. Wilson's re-evaluation did not conclude that Petitioner has a specific learning disability.

2007-2008 School Year (August 2007 through February 2008)

25. At the beginning of the 2007-2008 school year, Petitioner began to exhibit serious behavioral problems. As the school year progressed, the student's behavior deteriorated.

26. Due to her concern about Petitioner's behavioral problems, Petitioner's mother sought the school staff's assistance in addressing Petitioner's behavioral issues and helping Petitioner. For example, in October 2007, Petitioner's mother met with the current behavioral specialist and requested that a permanent functional behavior assessment be developed and implemented.

27. Petitioner's May 12, 2007, IEP, was updated on September 12, 2007. Notes from that meeting indicated that it was recommended that the functional behavior assessment be updated because it was completed in December 2006.

28. Despite the mother's request that the functional behavior assessment be developed and implemented and the recommendation made at the September 2007 meeting, a functional behavior assessment for Petitioner was never completed and implemented.

29. To update a functional behavior assessment, data must be collected and observations must be conducted. Based on the results of the data and the observations, a plan is developed and implemented for the student for a period of time. Thereafter, additional data is collected to determine if the plan is working or if it needs to be readjusted. This entire process may take several weeks to complete.

30. Petitioner's behavioral problems were communicated to Petitioner's parents by school staff through point sheets, verbally, and in writing. The more serious behavioral issues, which resulted in in-school suspensions or out-of-school suspensions, were reported in writing.

31. In November 2007, Petitioner was suspended from the current school three times. On or about November 9, 2007, Petitioner was suspended (in-school suspension) for disruptive behavior on the playground. Less than one week later, on November 15, 2007, Petitioner was suspended (in-school suspension) for aggression in a classroom. Almost two weeks later, on November 27, 2007, Petitioner was suspended (out-of-

school suspension) for bullying and for kicking and scratching administrators in the cafeteria.

32. On December 7, 2007, Petitioner was suspended (out-of-school suspension) for bullying. The incident occurred during recess.

33. On February 7, 2008, Petitioner was suspended (out-of-school suspension) for aggressive behavior during recess.

34. Petitioner's most recent suspension was the day before this proceeding. No evidence was presented as to the reason for the suspension or if the suspension was an in-school or out-of-school suspension.

35. Petitioner has two siblings at home, one younger and one older, but Petitioner has not exhibited any of the behavioral issues at home that Petitioner exhibits at school.

36. During the time Petitioner was having behavioral problems at school, Petitioner was also experiencing serious emotional problems and physical reactions to the situation at school. The physical reactions Petitioner had, and continues to have, include the following: (1) throwing up; (2) complaining of headaches and stomach aches; (3) sleeping three or four hours after getting home from school; (4) having an upset stomach; and (5) having difficulty going to sleep on Sunday nights, the night prior to a school day. Petitioner did not experience any of the physical symptoms described above during holiday breaks

(Thanksgiving and Christmas of 2007) when Petitioner was not in school.

37. Petitioner's pediatrician ruled out any physical reasons for Petitioner's symptoms, conditions, and/or complaints. Rather, it appeared that Petitioner's physical symptoms were caused by stress related to school.

38. An IEP meeting for Petitioner was scheduled for January 8, 2008, the first day of school after the Christmas break. Petitioner's parents were notified of that IEP meeting in December 2007, on the last day of school before the holiday break. However, upon the parents' request, the IEP meeting was postponed and rescheduled for January 22, 2008.

#### Parent-Initiated Evaluation of Petitioner

39. On or about December 27, 2007, Petitioner's parents retained Tashawna Duncan, Ph.D., to provide counseling services to Petitioner and to conduct a psycho-educational evaluation of Petitioner. Petitioner's parents retained the services of Dr. Duncan, because they were concerned about the current behavioral functioning at school.

40. Petitioner's parents wanted Dr. Duncan to complete the evaluation before the January 22, 2008, IEP meeting. Petitioner's mother wanted the information from the evaluation report to be used in developing an educational plan for Petitioner.

41. Dr. Duncan has a doctorate degree in school psychology, is certified and licensed as a school psychologist in Florida and nationally, and holds Florida educator certificates in school psychology and special education. By virtue of her education, licensure, certification and training, Dr. Duncan is qualified to do psycho-educational evaluations. Dr. Duncan has also completed training which qualifies her to do neuro-psychological testing. Over the years, Dr. Duncan has taught classes at the university level and has published numerous articles, including several on the collection of behavioral data in schools.

42. Dr. Duncan has worked as a school psychologist in the Pinellas County School District and is now in private practice in Bradenton, Florida, working exclusively as a pediatric and school psychologist.

43. During this proceeding, the School Board stipulated that Dr. Duncan is an expert in the area of school psychology.

44. Dr. Duncan determined that the physical symptoms Petitioner was experiencing (throwing up, headaches, stomach aches and, generally, not feeling well) were secondary to Petitioner's anxiety.

#### Components of Parent-Initiated Evaluation

45. As part of the psycho-educational evaluation of Petitioner, Dr. Duncan decided to administer a neuro-

psychological instrument for children Petitioner's age level. Dr. Duncan also determined that she needed to administer measures of achievement in areas that were not covered by Ms. Wilson's re-evaluation. Finally, Dr. Duncan determined that she needed to administer another intellectual battery because Ms. Wilson's re-evaluation did not include one portion of her cognitive evaluation, the "working memory assessment."<sup>3/</sup>

46. In reviewing Ms. Wilson's re-evaluation report, Dr. Duncan noted that Ms. Wilson stated that Petitioner's scores on the achievement battery were suspect due to Petitioner's behavioral problems during the testing.<sup>4/</sup>

47. As part of her psycho-educational evaluation, Dr. Duncan sent a standardized teacher's questionnaire to Petitioner's teachers to complete. Initially, the forms were returned to Dr. Duncan, without the teachers' completing them. However, later, the School District's concerns with the questionnaire were resolved in a meeting between the parties' attorneys, and the teachers completed the form. This informal assessment instrument is an acceptable method of obtaining information about Petitioner from the teachers.

48. Dr. Duncan does not always request a classroom and/or in-school observation when she is conducting an evaluation. However, in this case, Dr. Duncan's opinion was that she needed

to conduct an observation of Petitioner in the school setting in order to do a complete psycho-educational evaluation.

49. Dr. Duncan's decision that there was a need to observe Petitioner in the school setting was influenced by Petitioner's mother's reasonable concerns about Petitioner. Petitioner's mother was concerned about Petitioner's behavioral functioning at school based on the student's reported behaviors and numerous suspensions from the current school. Petitioner's mother was also concerned about Petitioner's emotional functioning (i.e., Petitioner's coming home from school upset every day and the physical symptoms caused by stress).

50. There were several specific reasons Dr. Duncan determined that it was necessary to conduct an observation of Petitioner in a school setting. First, Dr. Duncan needed to observe Petitioner in a school setting because that is where the behavioral issues were occurring. Second, in reviewing Petitioner's school records, Dr. Duncan found no evidence that any behavioral data or other such information had been collected since the "draft" functional behavior assessment in December 2006. Third, Dr. Duncan intended to use the BASC Student Observation System to conduct the classroom observations. This student observation system is required to be used only by trained clinicians while conducting classroom observations. Finally, Dr. Duncan believed that the data obtained during the



observation would provide information and/or the basis for her to make appropriate recommendations for Petitioner's educational plan, including supports and accommodations.

51. Dr. Duncan estimated that her observations of Petitioner in the school setting would take a total of about one and a half to two hours. Also, in view of the varied school settings in which Petitioner's behavioral problems have occurred (i.e., the cafeteria, the playground, and the classroom), Dr. Duncan indicated that the observations may need to cover several different school environments.

#### Attempt to Obtain Permission to Conduct In-School Observations

52. Dr. Duncan initially contacted the principal at Petitioner's current school about doing a classroom observation. However, the principal told her that policy did not allow outside practitioners to perform classroom observations.

53. Petitioner's mother signed all the necessary releases and finally obtained the services of Mark S. Kamleiter, Esquire, to seek permission for Dr. Duncan to conduct the school observations of Petitioner and to obtain Petitioner's student records.

54. Between January 10 and January 17, 2008, Mr. Kamleiter wrote several letters to the School District requesting that Dr. Duncan be allowed to observe Petitioner in the classroom and other school settings.

55. The School Board's counsel responded to the letters from the parents' attorney on January 21, 2008, the day before the scheduled IEP meeting. The letter from the School Board denied the request to allow Dr. Duncan to conduct classroom observations and stated that parents do not have a right to have a private psychologist present in the classroom as part of the private evaluation.

School Board's Policy Regarding Private Psychologists Conducting In-School Observations

56. The School Board has an "unwritten" policy that prohibits a private psychologist, who is paid by parents to conduct an IEE, from conducting observations in the classroom as part of that IEE or private evaluation. Mr. Russell testified that this "unwritten" policy is based on the School Board policy that prohibits private vendors hired by parents from coming on the School District campuses and in School District classes.

57. The "unwritten" School Board policy applies to all private psychologists or other qualified evaluators who are not employed by or under contract with the School Board and who are providing a service for profit (i.e., being paid by the parents or others to conduct the observations).

58. Mr. Russell testified that this "unwritten" policy was in place when he became the ESE director,<sup>5/</sup> but that Dr. Duncan's

request to conduct in-school observations was the first time such a request had come across his desk.

59. Patricia Bernhart is the supervisor of Student Services for the School District. Ms. Bernhart earned a degree in school psychology in 1981 and is a certified school psychologist. As a certified school psychologist, Ms. Bernhart is trained to conduct psycho-educational evaluations. In her supervisory position with the School District, Ms. Bernhart is involved in hiring psychologists employed by the School Board and also trains, supervises, and evaluates those psychologists.

60. Ms. Bernhart first learned about the School District's "unwritten" policy against allowing private psychologists or outside observers to conduct observations in or about January 2008, when Dr. Duncan requested that she be allowed to conduct classroom observations of Petitioner.

Non-School Board Employed Professionals Allowed to Conduct In-School Observations

61. Notwithstanding the School Board's "unwritten" policy, the School District allows certain persons not employed by the School Board to conduct in-school observations. For example, representatives of the Center for Autism and Related Disorders (hereinafter referred to as "C.A.R.D.") are allowed to conduct in-school observations of students.

62. The C.A.R.D. representatives may be doctorate level or non-doctorate professionals, including psychologists, behavioral analysts and others trained in autism and behavioral observation, but they are not School Board employees. According to Mr. Russell, representatives from C.A.R.D. are allowed to conduct in-school observations because he "believes" that C.A.R.D. is a governmental agency that provides services to parents at no cost.

63. The School District establishes protocols and parameters for C.A.R.D. representatives who conduct school observations of students. As a result of these protocols and parameters, the School District does not have concerns about the C.A.R.D. representatives conducting observations of students at school, even though they are not School Board employees. The School District believes the protocols and parameters it has established for C.A.R.D. representatives give the School District control over those representatives while they are on school premises and minimize disruptions in the classroom during the observations.

School District's Concerns About Private Evaluators Conducting School Observations

64. The School District has several concerns with Dr. Duncan or any private psychologist or other qualified evaluator conducting classroom observations of a student as part

of an evaluation being paid for by the parents. Those concerns are as follows: (1) the confidentiality of other students in the classroom might be violated; (2) the students in the classroom might behave differently when an "outsider" [the private evaluator] is in the classroom; (3) the private evaluator might be in the classroom to observe the teacher and not the student he/she is evaluating; (4) the private evaluator's presence in the classroom might be disruptive; and (5) once the private evaluators are on campus, the School District has no control over them.

65. The School District is concerned that the confidentiality rights of students in the classroom who are not being evaluated will be violated if private or "outside" psychologists are allowed to conduct classroom observations.

66. The School District acknowledged that licensed and certified school psychologists are obligated to adhere to the ethical and professional standards imposed on them by such licensure and certification. Among other things, these ethical and professional standards require licensed and certified school psychologists to keep confidential any information related to students they observe, while doing observations. The ethical and professional standards apply to all licensed and certified psychologists, regardless of whether they are in private practice or employed by the School Board.

67. Despite the School District's general concern about students' confidentiality being violated by allowing a private evaluator to conduct a school observation, School District administrators, who know and have worked with Dr. Duncan, testified that they have no reason to believe that she would fail to adhere to the ethical standards required by her licensure and certification.

68. Psychologists or other qualified evaluators employed by the School Board are allowed to conduct classroom and across-school-setting observations as part of doing student evaluations. In these situations, the School District does not attempt to obtain consent or permission from the parents of other children in the classroom or other school settings in order to conduct observations in the classrooms.

69. The School District is concerned that if it allows private psychologists or other qualified evaluators to conduct classroom observations, the students and teachers in the classroom might behave differently during such observations.

70. There is nothing that will absolutely keep teachers or students from behaving differently when any "outsider" comes into a classroom. However, this situation, particularly as it relates to the teacher, is minimized by the evaluator meeting with the teacher in advance of the observation.<sup>6/</sup> During that meeting, the evaluator should explain what he or she will be

doing (observing a particular student, not the teacher) and why and schedule the observation at a time mutually agreeable to the teacher and the evaluator.

71. Dr. Duncan uses the procedures described in paragraph 70 prior to going into a classroom to conduct an observation.

72. The School District is concerned that if private psychologists or other qualified evaluators are allowed to conduct classroom observations, instead of observing the students they are evaluating, they might be observing the teacher.

73. The concern described in paragraph 72 reflects the School District's distrust of private evaluators. That concern appears to be based on the School District's assumption that if it permits private evaluators to conduct classroom observations, they might go into the classroom under the guise of conducting an observation as part of evaluating a student, but would actually be there to observe or critique the teacher.

74. The School District's general concern that private psychologists may be observing teachers, instead of students, during classroom observations, may be addressed by the teachers and/or other appropriate School District staff meeting with the private psychologists prior to the observation.<sup>7/</sup> As noted above, during such meeting(s), the private psychologist should

explain the reason for the classroom or across-school-setting observations and what he/she will be doing during the observation and set up mutually agreeable times for such observations.

75. When Dr. Duncan conducts classroom and across-school-setting observations of students as part of evaluating such students, her sole interest and purpose is to evaluate that child. Nevertheless, to allay the School District's concerns, Dr. Duncan testified credibly that she has no problem with the School District sending in its own observer to observe all that she sees.

76. The School District is concerned that if private psychologists or other qualified evaluators are allowed to conduct classroom observations, their presence would be disruptive to the class.

77. Licensed and certified school psychologists are trained to conduct observations with as few distractions and disruptions as possible. As a certified school psychologist, Dr. Duncan has been trained to conduct observations in a manner that minimizes such disruptions.

78. It is impossible to ensure that there will be no distractions and/or disruptions during a classroom observation. However, the likelihood of such distractions/disruptions is reduced if reasonable protocols and parameters are established



for the classroom or across-school-setting observations. According to the School District, it established such protocols and parameters for C.A.R.D. representatives which have effectively minimized disruptions in classrooms during observations conducted by those representatives.

79. The School District is concerned that it has no control over private psychologists and other qualified evaluators who are allowed to come onto the school premises to conduct observations. The underlying basis for this concern appears to be that private psychologists and other qualified evaluators are not School Board employees.

80. The School District has addressed its concern about the "control" issue with C.A.R.D. representatives, who are not School Board employees, in a way which allows those representatives to conduct classroom observations in schools within the School District. The School District did so by establishing protocols and parameters for classroom observations conducted by C.A.R.D. representatives. As a result of these established protocols and parameters, the School Board has no concerns about its inability to control the C.A.R.D. representatives while they are on school premises to conduct observations.

81. Dr. Duncan's opinion is that the establishment of reasonable protocols and parameters for in-school observations

is appropriate. In view of that opinion, Dr. Duncan testified credibly that she would respect and adhere to any reasonable guidelines or protocols the School District wished to impose upon her classroom and across-school-setting observations.

82. Dr. Duncan has conducted numerous observations in schools as a school psychologist in public and private schools in Manatee, Sarasota, and/or Pinellas Counties. She has never had any complaints about her conduct during any of those observations.

School District Criteria and Rationale for Conducting Classroom Observations

83. The School District gave no educationally-based rationale for its "unwritten" policy.

84. Classroom observations are not necessarily required in order to complete a psycho-educational evaluation. Whether such observation is needed depends on the referral question. In this case, the referral question involves Petitioner's emotional and behavioral issues.

85. Environmental observations, including classroom observations and/or across-school-setting observations, are important and necessary parts of evaluating children, such as Petitioner, who have social, emotional, and/or behavioral issues. Data obtained from these observations can help validate the child's problem and may lead to interventions.

86. With respect to a child with behavioral issues, classroom, or across-school-setting observations, may help determine or explain the "function of the behavior" (i.e., why the behavior is occurring and what the child is trying to get through their behavior). Such observations also may help the psychologist or evaluator develop a hypothesis as to why the behavior might be occurring, if the psychologist has no hypotheses.

87. Even when in-school observations are necessary and appropriate, they need not always be conducted by the private psychologist. In some instances, it may be appropriate for a classroom teacher to conduct observations. For example, if the psychologist or qualified evaluator has carefully defined the behavior that is to be observed, the classroom teacher may be able to collect data around that behavior.

88. There are situations that require that classroom observations be conducted by the private psychologist who is doing the psycho-educational evaluation. Those situations include instances where (1) at least one of the primary areas of referral concern social, emotional and/or behavioral difficulties; (2) the behavior has not been carefully defined; (3) no behavioral data is available for review and/or the observation requires trained evaluations.

89. School psychologists are specially trained to conduct scientific, psychologically-based observations, which include methods of data collection. They are also trained to make interpretations and see connections relative to the behaviors they observe and to form hypotheses about the behavior they see and why it might be occurring.

90. Classroom and in-school observations by trained school psychologists, including private psychologists, can help the IEP team determine what is causing the behaviors and find solutions. Such psychological evaluations have a prominent place in IEP meetings by providing information for better educational planning for the student.

91. In situations described in paragraph 89, psychologists or other qualified evaluators employed by the School Board are allowed to conduct classroom and across-school-setting observations of students as part of psycho-educational evaluations.

#### Ultimate Findings

92. It is important that private school psychologists be able to conform to the same testing and evaluative criteria as those imposed upon school psychologists employed by the School Board. This may include a private psychologist's need to have information that can only be obtained from conducting school observations.

93. The "unwritten" policy bars all private psychologists and other qualified evaluators not employed by the School District from conducting classroom or across-school-setting observations as part of a student evaluation without regard for whether such observations are appropriate for a particular evaluation to be completed.

94. To date, Dr. Duncan has been unable to complete the private evaluation which Petitioner's parents retained her to perform due to the School District's "unwritten" policy.

95. If Dr. Duncan had been able to conduct the classroom and across-school-setting observations of Petitioner, she could have completed the psycho-educational evaluation of Petitioner. The completed evaluation would have provided Petitioner's parents with information that could be utilized at the IEP meeting for educational planning (i.e., developing an IEP that included appropriate interventions) for Petitioner.

96. Dr. Duncan's evaluation also may have assisted in determining whether Petitioner's behavioral issues were negatively impacting Petitioner's academic performance.

97. Dr. Duncan still meets with Petitioner for counseling and did so on the day before this proceeding. Based on her observations of and interactions with Petitioner, Dr. Duncan's opinion is that Petitioner is still suffering from anxiety about school and experiencing physical symptoms related to that

anxiety. Also, during that February 27, 2008, session, Dr. Duncan learned that Petitioner had been suspended from school earlier that week.

98. In order to address Petitioner's behavioral and emotional issues appropriately, School District staff must collaborate with Petitioner's parents and Dr. Duncan.

99. As of the date of the hearing, the School District has not conducted an "updated" functional behavior assessment of Petitioner, and the IEP meeting had still not occurred.

100. The School Board's implementation of the "unwritten" policy prevented Petitioner's parents from obtaining the evaluation they retained Dr. Duncan to perform. Without the completed evaluation, Petitioner's parents do not have the information they need to effectively participate in the development of an educational plan for Petitioner.

#### CONCLUSIONS OF LAW

101. The Division of Administration has jurisdiction over the parties and the subject matter of this case. § 1003.57(5), Fla. Stat. (2007); Fla. Admin. Code R. 6A-6.03311(5)(e); 20 U.S.C. § 1401, et seq.; and the regulations promulgated to implement IDEA.

102. IDEA, 20 U.S.C. Section 1400, et seq., was enacted to ensure that children with disabilities receive a free and appropriate education (hereinafter referred to as "FAPE") that

meets federal statutory requirements. The federal regulations implementing the IDEA are codified in 34 C.F.R. Part 300.

103. IDEA provides states with federal funds to help educate children with disabilities if they provide every qualified child with a FAPE that meets federal statutory requirements. To qualify for federal funding, states and local agencies are required to develop plans and policies to carry out the intent of IDEA. Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 180-81, 102 S. Ct. 3034, 3037-38, 73 L.Ed.2d 690, 696 (1982).

104. 20 U.S.C. Section 1415(a) provides that states receiving assistance under IDEA must establish and maintain procedures that guarantee procedural safeguards for children with disabilities and their parents with respect to the provision of a FAPE. Pursuant to 20 U.S.C. Section 1415(b)(1), these procedures must include the opportunity for parents to examine all records concerning the child, to participate in all meetings with respect to the child, and to obtain an IEE of the child. See 34 C.F.R. §§ 300.501(b) and (c); and 300.502(a)(1).

105. This case concerns whether Petitioner's parents' right to obtain an IEE includes the right to have their private psychologist conduct in-school observations of Petitioner.

106. Both the federal regulations and Florida rules address IEEs. 34 C.F.R. § 300.502; and Fla. Admin. Code R. 6A-6.03311(7).

107. 34 C.F.R. Section 300.502 provides in pertinent part:

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

\* \* \*

(3) For the purposes of this subpart--

(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question;

\* \* \*

(b) 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. . . .

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, with 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 . . . 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 pursuant and the final decision is that the agency's evaluation is appropriate, the parent still has a right to an independent evaluation, but not at public expense.

\* \* \*

(5)(c) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation--

(1) Must be considered by the public agency, if it meets the agency criteria, in any decision made with respect to the provision of FAPE to the child;

\* \* \*

(e) Agency criteria.

(1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

108. Florida Administrative Code Rule 6A-6.03311(7) provides in pertinent part, the following:

(7) Independent educational evaluation.

(a) The parents of a child with a disability have the right to obtain an independent educational evaluation for their child . . . .

(b) Independent educational evaluation is defined to mean an evaluation conducted by a qualified evaluation specialist as prescribed in paragraph (4)(a) of Rule 6A-6.0331, F.A.C., who is not an employee of the district school board.

\* \* \*

(d) Whenever an independent educational evaluation is conducted, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the evaluation specialist, shall be the same as the criteria prescribed by paragraph (4)(a) of Rule 6A-6.0331, F.A.C., for use by the school district when it initiates an evaluation to the extent that those criteria are consistent with the parent's right to an independent educational evaluation.

\* \* \*

(f) A parent 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 evaluation at public expense, the school district must, without unnecessary delay either:

1. Ensure that an independent evaluation is provided at public expense; or

2. Initiate a hearing under subsection (11) of 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 independent educational evaluation obtained by the parent will be at private expense.

\* \* \*

(i) Evaluations obtained at private expense. If the parent obtains an independent educational evaluation at private expense:

1. The school district shall consider the results of such evaluation in any decision regarding the student if it meets the appropriate criteria described in paragraph (7) (d) of this rule; . . . .

109. The parents of a child with a disability have a right to obtain an IEE. 34 C.F.R. § 502(a); and Fla. Admin. Code R. 6A-6.03311(7) (a).

110. Parents have a right to obtain an IEE at public expense if they disagree with an evaluation obtained by the school district. In such cases, the school district can either agree to the IEE at public expense or request a due process hearing to demonstrate that the school district's evaluation is appropriate. 34 C.F.R. § 300.502(b) (1) and (3); and Fla. Admin. Code R. 6A-6.03311(7) (f) and (g). If the result of the hearing is that the school district's evaluation is appropriate, the

parents still have the right to an IEE, but not at public expense. 34 C.F.R. § 300.502(b)(3).

111. Parents also have the right to obtain an IEE at their own expense, irrespective of whether they disagree with an evaluation done by the school district. 34 C.F.R. § 502(c); and Fla. Admin. Code. R. 6A-6.03311(7)(i).

112. In this case, Petitioner's parents' right to obtain an IEE at their own expense is not in dispute.

113. The issue in this case is whether Petitioner's parents' right to obtain an IEE includes the right to have their privately-retained school psychologist conduct classroom and other in-school observations of Petitioner as part of the IEE.

114. 34 C.F.R. Section 300.502 and Florida Administrative Code Rule 6A-6.03311 do not specifically address the issue of whether "qualified evaluation specialists" conducting IEEs should be allowed to conduct in-school observations. However, both federal regulations and the Florida rules provide that an IEE be obtained using the same criteria used by the school district when it initiates an evaluation, to the extent those criteria are consistent with the parents' right to an IEE. 34 C.F.R. § 300.502(e), and Fla. Admin. Code R. 6A-6.03311(7)(d).

115. The requirement that an IEE be obtained under the same criteria as a school district evaluation is imperative if

the IEE is to be considered by the school district in making any decision about the student with respect to a FAPE. 34 C.F.R. § 300.502(c)(1); and Fla. Admin. Code R. 6A-6.03311(7)(i)1.

116. The agency criteria for the evaluations includes not only the location of the evaluation and the qualifications of the evaluator, but also the procedures and criteria used for the identification and eligibility of students with disabilities and for the determination of the special education and related services the child needs.<sup>8/</sup>

117. Petitioner's parents assert that their right to an IEE includes the right to have their privately-retained school psychologist conduct in-school observations as part of the IEE that she is doing.

118. The School Board argues that its "unwritten" local policy "is to not open up campuses and classrooms to private for-profit vendors hired by parents." The School Board interprets this "unwritten" policy to prohibit any private psychologist or other qualified evaluation specialist retained by a parent from conducting class or in-school observations of a student as part of an IEE.

119. In accordance with Florida Administrative Code Rule 6A-6.03311(7)(d), the School District criteria is the basis for determining whether a privately-retained school psychologist should be permitted to conduct in-school observations as part of

an IEE. If the School District criteria requires or allows for such observations, the parent-initiated IEE should be done using this same criteria.

120. The issue relative to the right of an independent evaluator to conduct an independent observation is addressed in Letter to Wessels, 16 IDELR 735 (OSEP 1990). That opinion stated in part:

In general, 34 CFR § 300.503(e) [now 34 C.F.R. Section 300.502(e)] provides that "[w]henver an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation." EHA-B [Education of the Handicapped Act, now IDEA] neither requires nor precludes observation of [a] child in the regular classroom setting by an independent evaluator. However, if the purpose of the evaluation is to determine whether a child has a specific learning disability, then observation of the child's academic performance in the regular classroom setting by a team member other than the child's teacher is a required component of the evaluation. 34 C.F.R. § 300.542. If a public agency observed a child in conducting its evaluation, or if its assessment procedures make it permissible to have in-class observation of a child, the independent evaluator has the right to do so. (Emphasis supplied.)

121. The evidence established that Dr. Duncan, the school psychologist retained to conduct the IEE determined that she

needed to conduct in-school observations of Petitioner to complete the evaluation. The evidence also established that Dr. Duncan came to this conclusion based on: (1) Petitioner's mother expressed concerns about Petitioner's significant and increased behavioral problems at school between September and December 2006; (2) Petitioner's emotional problems (school-related anxiety); (3) an absence of any behavioral data in Petitioner's student records since December 2006; and (4) the need to have a trained observer use the observation system Dr. Duncan planned to use.

122. The evidence established that data collected from such observations can assist the school psychologist conducting the IEE in developing and recommending appropriate interventions and supports and providing information to parents. The parents can then use this information to assist in educational planning for Petitioner.

123. The evidence established that in-school observations are necessary and appropriate and should be included in evaluations of students in instances where: (1) the referral question relates to Petitioner's emotional and behavioral functioning; and (2) no recent behavioral data has been collected.<sup>9/</sup>

124. The evidence established that in situations described in paragraph 123, School Board-employed psychologists and other

qualified evaluation specialists are permitted to conduct in-school observations of students as part of School District evaluations.

125. Based on this established practice, the foregoing is the School District's criteria. Consistent with the School District's criteria, it is not only necessary, but appropriate for Dr. Duncan to conduct classroom and across-school-setting observations as part of the IEE. See Fla. Admin. Code R. 6A-6.03311(7) (e)

126. Notwithstanding situations described in paragraph 125, where school observations are necessary and appropriate, the School Board relies on Letter to Mamas, 42 IDELR 10 (OSEP 2004), as support for its position that it is authorized and has the right to develop local policy that determines who has access to its campuses and classrooms. As stated above, the subject "unwritten" policy effectively bars independent evaluators retained by parents to conduct IEEs from conducting classroom observations.

127. Mamas addresses the issue of whether IDEA guarantees parents and their representatives a reasonable opportunity to observe their children's classrooms and proposed placement options. The School Board correctly quotes the following excerpt from the OSEP opinion in Mamas:



While the IDEA expects parents of children with disabilities to have an expanded role in the evaluation and educational placement of their children and to be participants, along with school personnel, in developing, reviewing, and revising IEPs for their children, neither the statute nor the regulations implementing IDEA provide a general entitlement for parents of children with disabilities or their professional representatives, to observe their children in any current classroom or proposed educational placement. The determination of who has access to classrooms may be addressed by State and/or local policy.

128. Based on the above quote, the School Board argues that the local policy of the School Board is "precisely the subject of this due process hearing" and "that local [unwritten] policy is" to not open up campuses and classrooms to private for-profit vendors hired by parents.

129. The School Board's reliance on Mamas ignores the following language in that opinion which immediately follows the language quoted in paragraph 128 above:

However, we encourage school district personnel and parents to work together in ways that meet the needs of both parents and the school, including providing opportunities for parent to observe their children's classrooms and proposed placement options. In addition, there may be circumstances in which access may need to be provided. For example, if parents invoke their right to an independent educational evaluation of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement. (Emphasis supplied.)

130. Based on Mamas, there are circumstances where access may need to be provided to the representative of the parent, specifically an independent evaluator. This is one of those circumstances. Here, Petitioner's parents have invoked their right to an IEE.

131. Under the facts established by the evidence in this case, the parents' right to an IEE includes the right for their independent evaluator to conduct reasonable in-school observations of Petitioner.

132. In the instant case, the School Board's "unwritten" policy, which bars private psychologists or other qualified evaluators from conducting in-school observations, regardless of the need or appropriateness of such observations, effectively denies Petitioner's parents' right to an IEE.

#### ORDER

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

ORDERED that:

1. Respondent, Manatee County School Board, permit Dr. Duncan to conduct an in-school observation of at least two hours. Such observation may include several school settings as deemed necessary by Dr. Duncan;

2. The School Board may require Dr. Duncan to affirm in writing that she will respect the confidentiality of all students; and

3. The School Board and Dr. Duncan shall agree on reasonable and appropriate guidelines and protocols for the subject observations.

DONE AND ORDERED this 26th day of June, 2008, in Tallahassee, Leon County, Florida.

*Carolyn S. Holifield*

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of June, 2008.

ENDNOTES

<sup>1/</sup> On March 27, 2008, the School Board filed a letter dated March 26, 2008, advising the undersigned that the cover page of the Transcript and the court reporter's certificate page were enclosed and that the "entire original [hearing] transcript" was being sent to the Division of Administrative Hearings "by U.S. mail today [March 26, 2008]." On March 27, 2008, the Division of Administrative Hearings docket noted that the Transcript, not the School Board correspondence, was filed on that date. Since that time the DOAH website has been updated to accurately reflect that the date the Transcript was filed is March 31, 2008.

2/ Federal regulations and Florida rules require that observations be conducted when evaluating a child for a specific learning disability. See 34 C.F.R. Section 300.310, which provides that the public agency "must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty." See Florida Administrative Code Rule 6A-6.03018(3)(a)3., which requires "at least two (2) observations of the student's behavior which indicate the learning problem" shall be conducted by a member of the multidisciplinary evaluation team. Also see Florida Administrative Code Rule 6A-6.03018(5)(c)3. and 4., which requires a written report of the findings of the multidisciplinary team that includes "the relevant behavior noted during the observation of the student" and the "relationship of that behavior to the student's academic functioning."

3/ Dr. Duncan called Ms. Wilson to determine her reason for not including that portion of the evaluation and to obtain scores if they were available. Dr. Duncan reported that Ms. Wilson indicated that portion was not administered because Petitioner had performed badly in the past.

4/ See paragraphs 19 and 20 in the Findings of Fact.

5/ The record does not reflect how long Mr. Russell has been the School District's ESE director. The record established only that Mr. Russell has worked in the special education area for 22 years in the School District.

6/ The private psychologist may need to obtain appropriate parental consent prior to such meeting.

7/ See Endnote 6.

8/ 34 C.F.R. Section 300.15 defines "evaluation" as procedures used in accordance with Sections 300.304 through 300.311, Florida Statutes (2007), to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.

9/ Dr. Duncan and Ms. Bernhart, licensed, certified and experienced school psychologists, both testified credibly that under the foregoing circumstances, classroom and in-school observations are necessary.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(e), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(e) and 120.68, Florida Statutes.