

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: John Doe

Date of Birth:
Redacted

ODR No. 01842-1011 AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent(s)

Pro Se

North Penn School District
401 East Hancock Street
Lansdale, PA 19446-3690

Kyle J. Somers, Esquire
Dischell, Bartle, Yanoff & Dooley
1800 Pennbrook Parkway, Suite 200
Lansdale, PA 19446-0107

Date of Resolution Meeting:

January 4, 2011

Dates of Hearing:

February 9, 2011; March 21, 2011

Record Closed:

April 22, 2011

Date of Decision:

May 6, 2011

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student at all relevant times resided within the North Penn School District (District). (NT 29-16 to 30-5, 31-20 to 25.) The Student is identified with Other Health Impairment and Specific Learning Disability under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 31-14 to 16; S-3 p. 13.)¹ The District brought this request for due process, seeking an order authorizing it to proceed with a psychiatric examination of the Student as part of an educational reevaluation, due to asserted behaviors and statements that cause concern to its staff. Parent(s) oppose(s) this request, asserting that it is unnecessarily intrusive into the Student's privacy.

The hearing was conducted and concluded in two sessions and the record closed upon receipt of written summations. I find for the District and order the requested relief.

ISSUES

1. Is it appropriate under the IDEA that the District seek to evaluate the Student through a psychiatric examination?
2. Should the hearing officer order that the District is permitted to proceed with a psychiatric examination of the Student without parental consent?

FINDINGS OF FACT

1. In 2007, a licensed child psychiatrist evaluated Student and found that Student presented with a complex combination of disabilities. (S-2.)

¹ All documents offered in evidence by the Parent(s) were admitted by stipulation. (NT 517-8 to 13.) I allowed the Parent(s) some time after the hearing to review the District's offered documents, (NT 517-14 to 518-5); by email message, Parent(s) objected to only one of them, and I overruled the objection, (HO-9 p.2); thus, all District documents are admitted in evidence.

2. Student presented with significant emotional difficulties and needs at that time; Student was diagnosed with various disorders including disorders of learning. (S-2.)
3. Student's diagnoses were found to be related to serious learning problems in reading, mathematics and writing, as well as notable difficulties with self-regulation, executive functions, attention, organization, impulsivity, perseverance, transition difficulties, and short term memory. The evaluator noted mood problems and reality testing difficulties. (S-2.)
4. The evaluator noted that the Student's symptoms could be misinterpreted easily and that it was important that those who work with Student know Student's "diagnostic profile" and how the disabilities interact with and exacerbate each other. The evaluator recommended special education services. (S-2.)
5. In 2005 and 2008, Student was identified as Emotionally Disturbed. (S-3.)
6. A Behavior Assessment System for Children, second edition, administered to Student, Parent(s) and teachers in 2010, and reported in May 2010, reported no clinically significant ratings in depression, conduct, aggression or anxiety. (S-3.)
7. Student's academic performance was poor in the 2009-2010 and 2010-2011 school years. (S-3.)
8. The District provided an evaluation report in May 2010. (S-3.)
9. The May 2010 ER concluded that additional data were not needed. Student was identified with Other Health Impairment and Specific Learning Disability. (S-3.)
10. In October, November and December 2010, the District conducted a Functional Behavioral Assessment. The classroom observers and teachers reported disengaged behavior. (S-5.)
11. On October 18, 2010, the District sent a Permission to Evaluate, seeking permission to provide the Student with a psychiatric evaluation. The Parent(s) refused this request for permission. (S-6.)
12. From September 2010 to January 2011, Student displayed behaviors of concern at school. (NT 58-64, 93-96, 143-149, 192-195, 202-205, 280-283; S-8, 9, 11, 12, 14, 15, 16, 17, 33, 34, 36; P-21, 22, 33.)
13. In October 2010, Student reported being depressed and requested nursing assistance. The school counselor offered the school's Student Assistance Program (SAP), but Parent(s) declined the offer. Parent(s) continue(s) to refuse the offer of the SAP program. Parent(s) also declined to permit school officials to

seek information from Student's private behavioral therapist. (NT 361; P-24, 36, 62.)

14. From October 2010 to February 2011, the District personnel convened an unusual number of meetings with staff and the parent(s) in an effort to address both academic and behavioral concerns based upon what the staff were observing in school with regard to the Student's apparent difficulty functioning successfully in school. (NT 173-4 to 174-12.)
15. Student experienced significant anxiety and distraction. (P- 33.)
16. Student's behaviors of concern and non-participation in school work due to distractibility and unresponsiveness interfered with Student's academic and social success in school. (NT 65-67, 99-101, 369-373.)
17. Student's counselor and teachers recommended a psychiatric evaluation so that they could receive guidance on how to intervene educationally and with related services to assist Student in light of Student's behaviors and emotional distress. (NT 66, 100- 101, 206, 230-231, 304-306, 369-371.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.² The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal. Thus, the moving

² The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

party must produce a preponderance of evidence³ that the District failed to fulfill its legal obligations as alleged in the due process Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

In Weast, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipose” – that is, where neither party has introduced a preponderance of evidence to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is preponderant (i.e., there is greater evidence) in favor of one party, that party will prevail. Schaffer, above.

Based upon the above rules, the burden of proof, and more specifically the burden of persuasion in this case, rests upon the District, which initiated the due process proceeding. If the District fails to produce a preponderance of the evidence in support of District’s claim, or if the evidence is in “equipose”, the District cannot prevail.

CHILD FIND

The IDEA and state and federal regulations obligate school districts to identify, locate and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. This obligation is commonly referred to as “child find”. Districts have an ongoing child find obligation and must fulfill that obligation within a reasonable time

³ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

after the district is placed on notice of behavior that is likely to indicate a disability.
W.B. v. Matula, 67 F.3d 484, 500-501 (3d Cir. 1995).

LEGAL DUTY AND AUTHORITY TO RE-EVALUATE

In the discharge of its Child Find obligations, the IDEA requires a local educational agency to conduct a “full and individual initial evaluation” 20 U.S.C §1414(a)(1)(A). In addition, the IDEA requires a re-evaluation when “the local educational agency determines that the educational or related services needs of the child warrant a re-evaluation; or if the parent of the child’s ... teacher requests a re-evaluation.” 20 U.S.C §1414(a)(2)(A). The re-evaluation is governed by the same standards that govern initial evaluations; these standards are incorporated into the statutory sub-section requiring re-evaluations as set forth above. Ibid. This includes a requirement to identify data that may be necessary to determine the child’s need for related services for educational purposes, and to administer “such assessments ... as may be needed to produce the data” 20 U.S.C. §1414(c)(1), (2).

Under these standards, the purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally” 20 U.S.C. §1414(b)(3)(A)(ii). The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes “social and emotional status” 34 C.F.R. §300.304(c)(4). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs” 34 C.F.R. §300.304(c)(6).

PARENTAL CONSENT

The standards for evaluation that are incorporated by reference in the sub-section requiring re-evaluation also contain a provision for parental consent. 20 U.S.C. §1414(c)(3). This provision in turn incorporates by reference a previous sub-section of section 1414 on parental consent. Ibid.⁴ The previous subsection on parental consent provides that, if a parent refuses consent to an evaluation sought by the local educational agency, then the agency may seek authorization by way of a request for due process. 20 U.S.C. §1414(a)(1) (D)(ii)(I). See also, 20 U.S.C. §1415(b)(6)(A)(permitting due process complaint by any party “with respect to any matter relating to the identification, evaluation [or placement] of the child”) Thus, due process is available to the local educational agency in order to “override” parental refusal to consent to a re-evaluation. 34 C.F.R. §300.300(c)(1)(ii); §300.300(a)(3). The District was within its rights to seek the order of this hearing officer that it proceed with a psychiatric evaluation in this matter. See, Kennett Consolidated Sch. Dist., 33 IDELR 54 (Pa. Appeals Panel 1999).

APPROPRIATENESS OF PSYCHIATRIC EVALUATION

I find by more than a preponderance of the evidence that the District’s request for a psychiatric evaluation is appropriate. There is uncontradicted testimony of several teachers, the assigned counselor, and the school principal, that all of them [were]

⁴ This incorporated sub-section refers to “initial” evaluation in its text. 20 U.S.C. §1414(a)(1) (D)(ii)(I). I do not interpret this language as limiting the section to initial evaluations, because this would defeat the express terms of 20 U.S.C. §1414(c)(3), which apply this section to re-evaluations as well.

concerned about the Student's emotional health. These facts constituted a red flag that compelled District officials under the IDEA to seek an evaluation of the Student's emotional well being. These officials tried several avenues for assessing the Student's emotional well being but the Parent(s) rebuffed all of the District's efforts. The District's most recent attempt was the request to conduct a psychiatric evaluation, and in light of this record, such a request was entirely appropriate.

The Student's behaviors in the Fall of 2010 were appropriately of concern.

Any one of these behaviors might be attributed reasonably to adolescent emotional highs and lows. However, taken together, these behaviors compelled District personnel to take action; this was the only reasonable, responsible response on the part of responsible educational professionals.

Compelled by prudence and legal obligation to act, staff attempted to utilize resources already available. Staff offered the District's Student Assistance Program (SAP), in which there would have been an opportunity to both intervene and assess the Student through counseling sessions. However, the Parent(s) refused to allow this. Thus, the next available avenue of action for District staff was a request for psychiatric evaluation. Given the nature of the concerns for Student, I see nothing inappropriate in turning to psychiatry, which would be the primary profession with expertise in evaluating and treating emotional disorders.⁵

EXPLANATIONS FOR STUDENT'S BEHAVIOR AND STATEMENTS

The Parent(s) argue(s) against the District's request in three basic ways. Parent(s) seek(s) to explain each incident as either factually inaccurate or easily explained in

⁵ This is not to conclude that the Student had or has an emotional disorder. It is only to recognize that it was appropriate for District personnel to raise the question and seek an answer – indeed it was their duty.

context. Parent(s) assert(s) that the allegations are part of a conspiracy among school staff and officials to drive Student out of the District because Student has disabilities. Parent(s) argue(s) that the United States Constitution forbids a school district from conducting a psychiatric evaluation over parental objection. The record does not support Parent(s)' assertions by a preponderance of evidence, and I conclude that the Constitutional arguments are misplaced.

In the Fall of 2010, the record is preponderant that the Student's performance at school was deteriorating.

I do not find that the Parent(s) description of the origins and aggravating factors for this behavior were incorrect. Indeed, it is clear to me from the testimony that District staff and officials do not reject Parent(s)' explanations either. These explanations, on the contrary, bolster my conclusion and that of District staff, that a psychiatric evaluation is especially necessary.

Even if all agreed that the Student's behavior and distress had the origins the Parent(s) articulate(s) so compassionately, that would not render a professional evaluation unnecessary. Thus, far from dissuading me of the need for evaluation, Parent(s)' sincere and credible recitation only adds to the weight of the evidence in favor of an evaluation.

Parent(s) paint(s) the concern felt by District staff as a kind of exaggeration and misunderstanding of the behaviors, an overreaction that itself was a form of stigma. I listened carefully to the testimony in light of Parent(s)' arguments, and find no evidence to support Parent(s) characterization of the concerns expressed by District staff. On the contrary, I find that the manifestations they observed, when considered together,

constituted a red flag obligating them in all prudence to intervene. Even if Student's behavior in a given instance can be explained as typical rather than atypical, District staff were not free to pull each thread in the behavioral fabric that they were observing. Parent(s) suggest(s) that Student's behavior was no proper business of the school unless it rose to the level of criminality. I respectfully but strenuously disagree. Nothing in the record suggests that District staff had concluded that Student's behavior was criminal in nature. In my evaluation of the evidence, I rely upon my finding that the District's witnesses all were credible and reliable. Parent(s) vigorously tested their credibility on cross examination and I was impressed by the responses that they mustered. In all cases, both teachers and the counselor (as to whom Parent(s) was/were particularly harsh) maintained a professional demeanor, responded non-defensively, and continually sought to persuade Parent(s) to join in an educational alliance with them for the good of the Student, even during their cross examination by Parent(s). Among all of the witnesses whom I have observed in the past several years, these were among the least defensive, and I detected no hostility or self-serving in the testimony of any of them. I became convinced of their sincerity.

This is in contrast to the picture that Parent(s) sought to paint of these professionals. Parent(s) sought to depict a wide ranging conspiracy to exclude Student from the District because the staff did not want to deal with Student or be inconvenienced by Student's presence. I find no evidence in the record to support these claims or this characterization.

Parent(s) in summation seek(s) to attribute Student's behavior to a failure by the District to properly implement the Student's IEP. I find this to be irrelevant. Even if the

IEP were not implemented appropriately, this would not absolve the District of the obligation to correct the problem. The psychiatric evaluation that the District seeks would be a necessary and appropriate first step to remediation. Thus, this argument, even if true, would not detract from the weight of the evidence in favor of an evaluation.

The parent(s) repeatedly characterize(s) the District's effort to evaluate as an effort to "demonize" Student and to blame Student for being bad in some way. I do not find a shred of evidence of this in the testimony. Similarly, Parent(s)' characterization of a psychiatric evaluation as a form of punishment to the Student has no support in the record. On the contrary, it is reasonable to expect that any mental health professional, especially a licensed psychiatrist, would treat Student delicately and would use professional clinical skills to elicit needed data in a painless way if at all possible. Parent(s)' contrary assumption that a psychiatric evaluation would be punitive has no basis in the evidence of record.

Parent(s) repeatedly characterized the testimony of the witnesses as being "against" the Student. While these District staff and officials were indeed seeking to take an action that the Parent(s) oppose(s), this hardly implies that the staff were or are "against" Student, or that their testimony was in some way hostile. The evidence, and my observations of demeanor, compel the contrary conclusion.

Parent(s) complain(s) that the District has disseminated information about the Student too broadly. Although I find no evidence to support the implication that District somehow violated Student's privacy by unnecessary disclosures of private information, I will address these concerns in my order, in view of the sensitive nature of psychiatric information.

CONSTITUTIONAL ISSUES

In Parent(s)' summation, Parent(s) assert(s) that the United States Constitution prohibits the hearing officer order sought by the District. Parent(s) claim(s) that an order for psychiatric evaluation would intrude on the sphere of privacy and substantive due process that protects parental decision making. Parent(s) also raise(s) several other constitutional rights that bar such an order. I do not find that these arguments are persuasive.

While an administrative hearing officer is bound to respect constitutional limitations upon the exercise of statutory authority, it is not with the hearing officer's province to apply constitutional principles speculatively. On the contrary, I am constrained to follow judicial interpretations that are binding in the Third Circuit, or in Pennsylvania based upon state court decisions. Thus, I have reviewed the cases cited by Parent(s) carefully, to determine whether or not there are any that bind me to decline the relief requested here.

I find no such authority. Parent(s) cite(s) Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000), but this case is clearly distinguishable; it involved a visitation order in favor of a grandparent, thus involving interests in the custody, care and nurture of children. There was nothing in the case to suggest that this right vests in parent(s) the absolute power to prevent an appropriate psychiatric evaluation ordered by a school district. Safford Unified School Dist. No. 1 v. Redding, ___ U.S. ___, 129 S.Ct. 2633 (2009) also is distinguishable as a case involving fourth amendment protections against

unreasonable administrative searches bearing no resemblance to a psychiatric evaluation. Parent(s) cite(s) no judicial authority binding in the Third Circuit that the authority of the hearing officer under the IDEA to order an evaluation violates any constitutional command.

CONCLUSION

For the reasons set forth above, I find that the District's request for an order authorizing the District to obtain a psychiatric evaluation is appropriate and that I am authorized to grant the relief requested. Therefore, I enter the requested order, with suitable limitations and protections against the broad dissemination of any results. In particular, I conclude that the IDEA's authorization of evaluation does not go so far as to authorize coercive methods to obtain cooperation with any psychiatric evaluation. If the Student refuses to cooperate, the District must honor that choice and remains free to obtain an evaluation through review of educational and medical records in its possession. Moreover, I will restrict the dissemination of any resulting report. Any claims not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District is hereby authorized to obtain a psychiatric evaluation of the Student for purposes of identification of all suspected disabilities under the IDEA, understanding of Student's educational needs pursuant to the IDEA, and provision of specially designed instruction and related services in order to provide Student with a reasonable opportunity to receive meaningful educational benefit with regard to all areas of Student's educational needs.
2. The District is not authorized to use any coercive means in order to obtain the Student's participation in any such evaluation. Should the Student refuse to participate, the District is authorized to obtain an

evaluation through a review of educational and medical records in its possession.

3. The District is ordered to maintain the confidentiality of any psychiatric report obtained through this evaluation; any such report shall be made available only to the Student's assigned school counselor, school psychologist, special education teacher, special education coordinator and to the principal of the school to which the Student is assigned. These persons shall not be permitted to disclose any such report to any other District staff, teacher or official. Any such report shall be kept in a locked container with access available only to the persons listed above.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

May 6, 2011