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

Student's Name: E.M.

Date of Birth: [redacted]

ODR No. 13245-1213AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Lower Moreland Township School District 2551 Murray Avenue Huntingdon Valley, PA 19006	David T. Painter, Esquire Sweet, Stevens, Katz and Williams, LLP 331 E. Butler Avenue New Britain, PA 18901
Parents	Pro se

Dates of Hearing: December 5, 2012

Record Closed: December 19, 2012

Date of Decision: December 20, 2012

Hearing Officer: Brian Jason Ford

Introduction

The Lower Moreland Township School District (District) believes that [Student] (the Student) may be eligible for special education. The District wants to evaluate the Student to determine the Student's eligibility for special education and related services. The District argues that such an evaluation is appropriate in light of its Child Find obligations under both the IDEA and Section 504[1], and necessary to determine what services the Student may require. The Parents have refused to consent to the proposed evaluation. The Parents argue that the evaluation is not necessary, would violate the family's privacy, and would be traumatic for the Student.

Findings of Fact

1. For reference, the 2011-12 school year was the Student's 9th grade year and the 2012-13 school year is the Student's 10th grade year. The Student is [teenaged] as of the date of this decision.

2. The Parents registered the Student in the District on January 13, 2012. S-1. At that time, the Parents indicated that the Student had been suspended by the Student's prior school district sometime in 2011. *Id.* The Parents indicated that the suspension was the result of behavioral issues, but did not provide more specific information. *Id*.

3. The Student received disciplinary referrals for insubordinate conduct on March 21, 2012 and April 19, 2012. S-2 at pages 3-4.

4. On May 18, 2012, the District sent a Notice of Saturday Detention to the Parents. S-2, page 1. According to the Notice, the reason for the detention was the Student's insubordination and disrespect to a teacher during incidents on May 9 and 14, 2012. S-2 at pages 1-3.

5. The District sent a letter to the Parents in June of 2012 to tell the Parents that the Student failed a World Studies class, which appears to be made up of two separate classes: an English class and a Social Studies class. *See* S-3. The letter recommended summer school so that the Student would maintain credits to stay on track for graduation at the end of 12th grade. *See id*. The Student completed an English class in a neighboring district during the summer of 2012.[2] *Id,* NT at 33.

[1] The IDEA is the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. The IDEA's federal implementing regulations are found at 34 C.F.R. § 300.500 *et seq*. Pennsylvania's regulations implementing the IDEA are found at 22 Pa. Code § 14 (Chapter 14). Section 504 is Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* Pennsylvania's regulations implementing Section 504 are found at 22 Pa. Code § 15 (Chapter 15). Specific provisions of the forgoing laws and regulations that make up the District's Child Find obligation are discussed in greater detail herein.

[2] The District does not offer summer programming to regular education students, which is why the Student took English at a neighboring district in the summer of 2012.

6. Previously, the Student scored in the proficient range for Reading, Writing and Math on PSSAs. S-8. A summary of prior academic achievement tests also, generally, placed the Student in the average range for those same skills. S-9.

7. During the 2011-12 school year, the Student performed lower than the PSSAs and academic testing would suggest the Student was capable of performing (specifically, an F, two Ds, and four Cs – a B is an average grade in the District). This poorer-than-expected academic performance is a trend for the Student. S-7, S-11, NT at 32-33, 35-36, 50-51.

8. During the summer of 2012, the Student's family experienced an event that resulted in the Student's admission to an acute psychiatric hospital for children. The Parents did not share this information with the District at that time. To date, the Parents will not share any information about the event with the District.[3]

9. The Student was discharged from the hospital after an unknown period of time and returned to school at the start of the 2012-13 school year.

10. On September 7, 2012, the Student reported to another student that the Student had spent the summer at the hospital and was having thoughts [involving aggression toward family members].[4] NT at 24, 45.

11. The conversation was disturbing to the other student. The other student told a guidance counselor. That guidance counselor then informed the Student's guidance counselor, who implemented the District's crisis intervention protocol. *See* NT at 24-28.

12. Immediately, the Student's guidance counselor called the Student to her office. Simultaneously, the District called the Student's mother and a mobile crisis response unit operated by a county-level mental health agency. District administrators, including the District's Director of Special Education, also became involved at this time. *See,* NT at 25-28.

13. Through interviewing the Student, District personnel determined that the Student was in crisis and was having thoughts [involving aggression toward family

[3] The Student's mother refused to answer questions about the event under cross examination during the hearing.

[4] This finding, strictly speaking, is based on hearsay. The District's Director of Special Education was the only person who testified as to the content of the conversation between the students. As such, the testimony was admissible in this administrative proceeding, but cannot form the basis of this decision. This decision is in no way based on the reported content of the students' conversation. Importantly, even if testimony about the particulars of the conversation is assumed to be inaccurate, the sequence of events triggered by the conversation is not in dispute. This fact is, however, important to the case in that it was the trigger to a series of events resulting in the instant dispute and due process hearing.

members]. At the same time, District administrators saw some evidence of potential [self-injury]. NT at 25, 27.[5]

14. Ultimately, the Student was taken to an acute psychiatric hospital for children for crisis intervention. The hospital is, coincidently, the same hospital that the Student went to in the summer of 2012.

15. The Student was absent from school from September 7, 2012 through October 25, 2012. During this time, the Student was receiving treatment from the psychiatric hospital. S-4, S-5, NT 35-38, 74.

16. The Parents have withheld consent for the hospital to share non-educational records with the District. As a result, the District has no information about the Student's current diagnosis (if any) or treatment. Rather, the District received only cursory information through redacted documents indicating that the Student received some educational services while attending the hospital. S-4, S-5, NT 35-44, 74, 79.

17. The District issued a consent form seeking permission to evaluate the Student to determine whether the Student was eligible under the IDEA or Section 504. S-6, NT 45-49. The District also wishes to assess whether the Student is a danger to the Student's self or others. S-6, NT 45-49.

18. The Parents have withheld the consent that the District seeks.

Discussion

A major, if not primary, purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *see also Winkelman v. Parma City Sch. Dist.,* 550 U.S. 516, 523 (2007).

To ensure that students with disabilities receive the services to which they are entitled, the IDEA establishes "Chid Find" duties. *See* 20 U.S.C. § 1412(a)(3). Child Find requires that school districts identify, locate, and evaluate children with disabilities in need of special education and related services. 20 U.S.C. § 1412(a)(3)(A). An initial evaluation is required to determine whether a child has a disability. *See* 20 U.S.C. § 1414(a)(1)(A), (B). As such, when a school district suspects that a student may have a disability and may be in need of special education and related services, school districts must evaluate the student.[6]

[5] The evidence presented during the hearing does not enable me to conclude that the Student had actually engaged in self-injurious behavior. Rather, the evidence supports the conclusion that District personnel observed what might have been [evidence of potential self-injury].

[6] Many school districts appropriately try regular education interventions such as instructional support teams and response to intervention methodologies prior to an initial special education evaluation. The use and appropriateness of additional regular education supports was not raised as an issue in this case.

Although the Child Find obligations require school districts to evaluate potentially eligible students, the school district must also obtain parental consent prior to conducting an initial evaluation. 20 U.S.C. § 1414(1)(D)(i)(I). If such consent is not granted, the school district may pursue the initial evaluation of the child by requesting a due process hearing to override the parents' withholding of consent. 20 U.S.C. § 1414(a)(1)(D)(ii)(I).

In this case, the District's Child Find obligation was clearly triggered. The Student attended the District during the second half of the 2011-12 school year. Upon enrollment, the Parents notified the District that the Student had some amount of unspecified behavioral problems in the past. Then, between March 21 and May 14, 2012, the Student was written up four times for disrespect and insubordination towards teachers. At the same time, the Student was performing below expectations academically – failing and nearly failing some classes – even though some assessments suggested that the Student is academically capable.[7]

Next, just as the 2012-13 school year was starting, the Student went into crisis, vocalizing thoughts of [aggression] to District administrators. Those administrators also observed what could be evidence of [potential self-injury]. This crisis resulted in the Student's admission to an acute psychiatric hospital for children. Only then did the District learn that the Student had spent a portion of the prior summer in the same facility as the result of an unknown incident. That incident reached a threshold that required the Student's hospitalization, but no other information about the incident is known.

There can be no doubt that the forgoing constellation of events triggered the District's Child Find obligations. Emotional Disturbance is a disability recognized by the IDEA. 20 U.S.C. § 1401(3)(A)(i). The Student's behaviors may be the result of an Emotional Disturbance, as defined at 34 C.F.R. § 300.8(c)(4)(i)-(ii). Similarly, the Student's poor grades relative to average PSSA scores and achievement testing could signify anything from a Specific Learning Disability (SLD) to an Other Health Impairment (OHI), both of which are also recognized by the IDEA. 20 U.S.C. § 1401(3)(A)(i); 34 C.F.R. § 300.8(c)(9), (10). It is also possible that the Student does *not* have a SLD, OHI, Emotional Disturbance or any other disability recognized by the IDEA. Regardless, it was clearly proper for the District to propose an initial evaluation to resolve these unknowns.

When the Parents withheld consent, it was also proper for the District to initiate these proceedings in accordance with 20 U.S.C. § 1414(a)(1)(D)(ii)(I). As a technical matter, the District was not obligated to request a hearing. *See id*. If the District had accepted the Parents' refusal, the evaluation process would have stopped, and the Student would likely be regarded as a regular education student.[8] As a regular education student, the

[7] The PSSAs are not designed to measure a student cognitive ability. Rather, the Student's performance on the PSSAs suggest that the Student can produce passing, grade level work.

[8] There can be some debate as to whether parental refusal of an initial evaluation terminates a student's thought-to-be exceptional status.

Student would have no special rights or entailments – including enhanced protections in disciplinary proceedings. This is particularly relevant given the Student's behavioral history in the District and in the prior school district. By requesting this hearing, the District has shown that it would rather take action to prevent the type of behavioral incidents that the Student has historically exhibited (to say nothing of what the Student has threatened) than discipline the Student in a reactionary way.

The District's concerns about the Student's academic performance relative to perceived potential is also legitimate. Had the District acquiesced to the Parents' withholding of consent, no effort would be made to determine the Student's right to special education, specially designed instruction and related services. Special education, provided by and through appropriate IEP, is designed to ensure that the Student is actually benefiting from school. Although the Student's academics may be a less pressing concern that the Students behaviors (both real and threatened), it was clearly proper for the District to address this concern by proposing an evaluation.

During the hearing, the Parents called into question both the underlying facts of the crisis incident at the start of the 2012-13 school year, and the severity of the Student's academic failures. For purposes of Child Find, I find the Parents' argument unpersuasive. Academically, the Student was performing poorly relative to perceived potential. Behaviorally, the Student was in crisis and required acute psychiatric hospitalization twice between the summer of 2012 and September 7, 2012. It would violate the Child Find duties for the District to simply ignore these red flags.

Establishing that the Child Find duties were triggered is not the same thing as establishing that the Parents' withholding of consent should be overridden. The District bears the burden of proof in this regard. *See Schaffer v. Weast,* 546 U.S. 49, 62 (2005). Although the Third Circuit has not clearly articulated how that standard should be applied in evaluation consent override cases, I agree with the standard articulated by the Fifth Circuit: if the District "articulates reasonable grounds for its necessity to conduct [the desired evaluation], a lack of parental consent will not bar it from doing so." *Shelby S. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450, 454 (5th Cir. 2006), *cert. denied,* 549 U.S. 1111 (2007). I find that the District has met the foregoing standard. An initial evaluation is necessary to determine whether the Student is eligible and, if so, what special education and related services the Student requires.

In making this determination, I have carefully considered the Parents' arguments against the evaluation. The Parents intended the move to the District to be a fresh start for the Student. The Parents also strongly desire to maintain the confidentiality of the incident in the summer of 2012, and fear that the evaluations would force the Student to re-experience that incident at a time when the family is trying to leave it in the past. Although I ultimately find in favor of the District, there is some legitimacy to the Parents' concerns.[9]

[9] In addition to the concerns discussed herein, the Parent also argued that the Student should be evaluated by an independent evaluator if the Student must be evaluated at all. Parents are entitled to an independent educational evaluation (IEE) at public expense in some circumstances under the IDEA.

Regarding the confidentiality of the incident in the summer of 2012, I have no authority to compel the Parents (or the Student) to share information about the incident with the District.[10] To the extent that records about the incident may be medical in nature, there is a well-established right to privacy of medical records. The Parents' concern about sharing such information with the District, however, was not explained or substantiated during the hearing. Moreover, it is exceedingly likely that the Student would benefit if the School and the hospital were allowed to share information. This exchange could help the District program for the Student regardless of IDEA eligibility. Even so, in recognition of my lack of authority in this regard, I can only note that the District cannot be held accountable for failing to act on information that the Parents are actively withholding.

Regarding the potential trauma of the evaluation, no evidence was presented to suggest that the evaluation would be traumatic. It is likely that the evaluator will explore (or try to explore) the Student's background and history. Should this happen, nothing suggests that the evaluator will proceed with anything but the utmost care and professionalism. I note, however, that the evaluator may be able to obtain sufficient historical information from the hospital (as opposed to the Student and Parents) if the Parents would consent to communication between the two entities. There is, therefore, a strong possibility that the Parents could further reduce the already very small chance of harm that the evaluation itself could cause by letting the hospital speak freely with the District.

Having found that the District may conduct an IDEA evaluation of the Student over parental objection, I turn to Section 504. Section 504 has its own Child Find mandate, and the District has requested this hearing under both the IDEA and Section 504. *See* 34 C.F.R. §104.35. The eligibility threshold under Section 504 is lower than the IDEA's eligibility criteria. All students who are protected by the IDEA are also protected by Section 504; and compliance with IDEA also satisfies Section 504 for IDEA-eligible students. *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009). If the Student is IDEA-eligible, all of the District's obligations under Section 504 may be satisfied through the IDEA. If, however, the Student is not IDEA eligible, the District still must consider eligibility and accommodations under Section 504. The District may proceed with such consideration for all of the reasons detailed herein.

Finally, in the most literal way, I cannot compel the Parents or the Student to cooperate with the District's efforts to evaluate. All evidence forces me to conclude that an evaluation is in the *Student's* best interest. Ultimately, even if the District concludes that the Student is eligible for special education, **the Parents have an absolute right to refuse the initial provision of special education services** – a decision that the District cannot challenge. 20 U.S.C. § 1414(a)(1)(D)(ii)(II). I hope that this protection

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However, the Parents entitlement to an IEE was not raised as an issue in any pleading or pre-hearing document. I may not address issues that are not properly raised, and so I will not address the Parents' request for an IEE at public expense in this decision. *See* 20 U.S.C. § 1415(f)(3)(B).

[10] The psychiatric hospital may have records about the incident and does have information about the incident. The Parent has not provided consent for the hospital to share and discuss that information with the District.

gives the Parents confidence to openly and cooperatively participate in the evaluation, knowing that they are not required to accept special education regardless of the evaluation's outcome.

Conclusion

In conclusion, I find that the District has met its burden and may proceed with an initial educational evaluation of the Student to determine eligibility under both the IDEA and Section 504. If eligible under either statute, the evaluation must also yield information that the District and Parents can use to develop appropriate programming and accommodations.

An order consistent with the forgoing follows.

ORDER

And now, December 21, 2012, it is hereby ordered as follows:

1. The District may conduct an initial special education evaluation of the Student.

2. Any such evaluation shall comply with all initial evaluation criteria set forth in the IDEA (including those criteria found at 20 U.S.C. § 1414, 34 CFR § 300.301 and 22 Pa. Code § 14.123).

3. Any such evaluation shall also comply with evaluation criteria set forth in Section 504 (including 34 C.F.R. §104.35).

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER