

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

FINAL DECISION AND ORDER

Student's Name: L.S.

Date of Birth: [redacted]

ODR No. 14583-1314KE

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Pro se

Great Valley School District
47 Church Road
Malvern, PA 19355

David T. Painter, Esq.
331 E. Butler Avenue
New Britain, PA 18901

Dates of Hearing: February 19, 2014

Record Closed: March 7, 2014

Date of Decision: March 17, 2014

Hearing Officer: Brian Jason Ford

Introduction

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Great Valley School District (District) believes that 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 the IDEA, and necessary to determine what services the Student may require. The Parents have refused to consent to the proposed evaluation.

The District requested this hearing on January 9, 2014, to use the IDEA's parental consent override provisions, discussed in greater detail below, in an effort to evaluate the Student.

As a procedural point, testimony regarding allegations of the Student's sexually inappropriate behaviors was presented during the hearing. In their closing brief, the Parents requested a continuance so that the incidents could be fully investigated before this decision and order is issued. That request is denied for two reasons: First, I will not continue this matter after all evidence and testimony has been presented. Second, as explained herein, the incidents do not determine the outcome of this due process hearing, and I will not determine whether these incidents occurred.

Issue

May the District evaluate the Student to determine whether the Student is eligible for special education?

Findings of Fact

1. At the time of this decision, the Student is [of elementary school age].
2. The Student resides with the Parents within the District and attends one of the District's elementary schools.

Kindergarten

3. The 2010-11 school year was the Student's kindergarten year. The Student attended the District's kindergarten program during the 2010-11 school year. S-1.
4. The Student received satisfactory marks in all academic subjects in all three trimesters of the 2010-11 school year. S-1.
5. The Student received many satisfactory marks along with marks indicating a need for improvement in the non-academic "Qualities of a Learner" section of the 2010-11 report card. S-1. Notably, in the Qualities of a Learner section, the Student received

an “I” indicating a need for improvement¹, in all three trimesters for “Accepts responsibility for own behaviors” and “Follows directions.” S-1.

6. Teacher comments for the second and third trimesters of the 2010-11 school year indicate that the Student needed frequent reminders, resisted redirection, and struggled with self-control. S-1

First Grade

7. The 2011-12 school year was the Student’s first grade year.
8. On January 20, 2012, the Student was referred for an evaluation to assess the Student’s speech fluency and attentional needs. S-2, S-3.
9. The Student’s Child Study Team (CST), including the Student’s mother, met on February 28, 2012.² S-2.
10. The District issued a Permission to Evaluate (PTE) consent form either during or immediately after the CST meeting on February 28, 2012. S-2, S-3. Through that form, the District sought parental consent for a speech and language (S/L) evaluation to assess the Student’s speech fluency needs, and attention evaluations.
11. On March 14, 2012, with no response from the Parents, the District sent an email to follow-up on the PTE. S-2.
12. On March 16, 2012, the Student’s father contacted the District by phone and explained that the Parents would give consent to S/L testing, but not to attentional testing. The Student’s father requested revisions to the PTE form to reflect this change. S-2, S-3.
13. On April 10, 2012, the District sent another copy of the PTE to the parents. This copy continued to propose both S/L and attentional evaluations. However, this copy was sent with a letter acknowledging the Parents’ preference to conduct S/L testing only, and explained that the Parents could accept S/L testing and reject attentional testing. S-3.
14. On April 18, 2012, the Student’s mother spoke by phone with a District official. During that call, the Student’s mother indicated that the Parents would not consent to either S/L or attentional testing, but also refused to document that decision by completing and returning the PTE form. The District responded that it would

¹ According to a report card key, an “I” translates to “Working Toward Satisfactory.” See S-5 at 4. This is the third lowest mark out of four possible marks: “CO” for Commendable, “S” for Satisfactory, “I” for Working Toward Satisfactory, and U for Unsatisfactory. *Id.*

² The record does not indicate when the Student was first referred to a CST. CST intervention, generally, is a regular education intervention provided to students who struggle behaviorally or academically.

document the Parents' withholding of consent on its own paperwork, and did so. S-2, S-4.

15. With some exceptions outside of core subjects, the Student received satisfactory marks in all academic subjects in all three trimesters of the 2011-12 school year. S-5
16. The Student's Qualities of a Learner were generally satisfactory. However, the Student' received "I"s in all three trimesters for "Accepts Responsibility for own behavior" and "Practices self control." S-5.

Second Grade

17. The 2012-13 school year was the Student's second grade year.
18. On October 3, 2012, the Student's bus driver completed a Bus Safety and Misconduct Report regarding the Student's behaviors on the school bus that day. S-14. The bus driver reported that the Student violated safety procedures and refused to stay seated. *Id.* The bus driver wrote, "I continually need to ask [Student] to sit down and within minutes sometimes sooner [Student] is up again." S-14.
19. As a result of the October 3, 2012 bus incident, the Student was issued a warning and wrote an apology letter during recess. S-14.
20. On December 11, 2012, the Student's bus driver completed a Bus Safety and Misconduct Report regarding the Student's behaviors on the school bus that day. S-14. The bus driver reported that the Student refused to stay seated and engaged in inappropriate interactions with others. S-14.
21. Regarding the inappropriate interactions on December 11, 2012, the bus driver wrote that she (the bus driver) received complaints from the parents of another student. The other student, according to the bus driver, had "special needs" and was in an assigned seat. The parents of the other student reported that the Student was slapping their child, and that the other student was coming home upset daily. S-14.
22. The Student did not receive any discipline other than a warning as a result of the December 11, 2012 bus incident. However, the Student's bus seat was reassigned to separate the Student and the other student. S-14.
23. On January 30, 2013, the Student's bus driver completed a Bus Safety and Misconduct Report regarding the Student's behaviors on the school bus. S-14. The bus driver reported that the Student violated safety procedures, was inappropriate with other students and used "rude, annoying, or discourteous behavior." S-14.
24. On the January 30, 2013 bus report, the bus driver reported that the Student was a "huge distraction" on the bus, and that the Student negatively influences other students. S-14. Taken in context, this report indicates that the Student was routinely a "huge distraction" and that the behaviors on January 30, 2013 were not isolated incidents.

25. As a result of the January 30, 2013 bus incident, the Student received a suspension of bus privilege from February 4, 2013 through February 6, 2013. S-14.
26. Throughout the entirety of the 2012-13 school year, the Student's teacher observed that the Student was impulsive and lacked focus. The teacher was concerned about the amount of "specialized attention" the Student required. The teacher was also concerned that the Student's behaviors were impeding the Student's learning, despite the Student's academic success. These concerns were raised with the Parents during parent-teacher conferences in March of 2013. S-7
27. Following parent-teacher conferences, the Student's teacher wrote to school administrators advising the District to propose evaluations again. S-7. The teacher's email to school administrators noted the Student's impulsivity and lack of focus. The same email also noted the Parents historic refusal to consent to evaluations. The teacher also noted that the Parents suspected that the Student may be gifted. *Id.*
28. The District issued a PTE Consent form on April 1, 2013. Through this PTE, the District sought parental consent to evaluate concerns regarding the Student's speech fluency, attention/behavioral functioning, and eligibility for gifted education. S-8.
29. The April 1, 2013 PTE listed several types of evaluations that the District would conduct, if the Parents gave consent: review of records, parent and teacher input, classroom observation, S/L evaluation, functional behavioral assessment (FBA), intelligence testing, standardized achievement testing, and behavioral ratings scales. S-8.
30. Along with the April 1, 2013 PTE, the District also sent a Developmental History form and behavioral ratings scales (a BASC-2, a Conners-3, and a BRIEF) for the Parents to complete. S-8.
31. The Parents did not respond to the April 1, 2013 PTE. The District then sent the same PTE again, with a follow up letter, on May 6, 2013. S-9.
32. The Parents did not respond to the May 6, 2013 follow up letter. The District sent the same PTE again, with another follow up letter on June 10, 2013. S-11. Unlike the prior follow up letter, the June follow up letter states that if the Parents did not respond by July 10, 2013, the District would assume that the Parents were withholding consent. S-11.
33. The Student received satisfactory marks in all core academic subjects in all three trimesters of the 2012-13 school year. S-10.
34. The Student's Qualities of a Learner were generally satisfactory, and commendable in the areas most directly related to academics (e.g. "Demonstrates care in production" and "Consistently completes homework"). However, the Student again received "I"s in all three trimesters for "Accepts Responsibility for own behavior" and "Practices self control." S-10.

Third Grade

35. The 2013-14 school year is the Student's third grade year.
36. On October 2, 2013, the Student's bus driver completed a Bus Safety and Misconduct Report regarding the Student's behaviors on the school bus that day. S-14. The report indicated that the Student refused to stay seated and made rude gestures to other students on the bus. *Id.*
37. As a result of the October 2, 2013 bus incident, the Student was issued a warning, assigned a bus seat, and lost recess for one day. The Student's father was also notified. S-14.
38. On October 15, 2013, the Student's bus driver completed a Bus Safety and Misconduct Report regarding the Student's behaviors on the school bus that day. S-14. The Report indicates that the Student refused to stay seated, used inappropriate language or gestures, and would not listen to the bus driver. *Id.*
39. At the time of the October 15, 2013 Report, the Student has already been given an assigned bus seat. S-14.
40. The Student was kept out of recess for four days as a disciplinary consequence for the October 15, 2013 bus incident. S-14. The Student also wrote an apology. S-14.
41. In late November of 2013 and early December of 2013, the District received numerous reports from other students, parents of other students, teachers, and the Student's bus driver regarding the Student's behaviors. See S-15. More specifically, it was reported that, on the bus, the Student would taunt other students and push other students off of their seats. It was reported that, in school, the Student would taunt other students, use vulgar language, and instigate conflict. S-15.
42. In a letter dated December 9, 2013, the District sent a letter to the Parents summarizing the accusations against the Student, describing the District's efforts to confirm those accusations, reporting that the accusations were confirmed, and informing the Parents that suspension was very likely the next progression of discipline. S-15.
43. The confirmation of the incidents reported to the Parents in the letter of December 9, 2013, was the result of eye witness accounts from teachers and the bus driver, as well as interviews with other students. The Student was also interviewed about the incidents, and denied some of them.
44. In addition to all of the foregoing, the Student's teacher had tremendous difficulty managing the Student's behavior in school from the start of the 2013-14 school year and consistently thereafter. See, e.g. NT at 28-30, 39-44.
45. The Student's behaviors, which required constant teacher intervention and/or redirection, persisted throughout the school year (to date) despite the consistent

implementation of a regular education behavior intervention and anti-bullying program. See S-18, S-21, S-23; see e.g. NT at 28-30, 39-47.

46. On December 13, 2013, the District wrote to the Parents regarding several issues. One of those issues concerned the District's efforts between April and June of 2013 to obtain parental consent for an evaluation. In the letter, the District again requested the Parents' permission to evaluate the Student. The District also stated that it would consider any request for an independent educational evaluation (IEE), and would also consider requesting a due process hearing to proceed with the evaluations. S-22
47. The December 13, 2013 letter enclosed the April 1, 2013 PTE, along with the prior letters sent between May and June of 2013. S-22.
48. The District scheduled a meeting with the Student's mother to discuss the evaluation request. The meeting was scheduled for January 9, 2014. The Student's mother wrote to the District on January 8, 2014, saying that she was unable to attend the meeting.
49. The District requested this due process hearing on January 9, 2014.
50. The behaviors described above, in addition to allegations of inappropriate sexual behaviors that were brought to the District's attention by third parties, prompted the District to obtain a Personal Care Aide (PCA) for the Student. The District secured the aide on January 29, 2014. S-16, NT at 107.³
51. The PCA was assigned to the Student for the entirety of the school day for the purpose of supervising the Student's behaviors. S-16.
52. Teachers have noted behavioral improvement, and reports from other students have decreased since the PCA was introduced. NT at 69.

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

³ During the hearing, testimony was taken concerning behavioral incidents of a sexually inappropriate nature. There is some ambiguity in the record as to when the Parents learned of these incidents, and the Parents deny that these incidents occurred. The lack of documentary evidence concerning these alleged incidents, relative to their severity, was also striking. While these alleged incidents are of critical importance to the parties, they are not outcome determinative for this decision. I note the allegations only because notice of the allegations was one of the reasons why the District obtained a PCA for the Student.

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 “Child 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, the school district must evaluate the student.

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 by the events leading up to the issuance of the February 28, 2012 PTE. The IDEA recognizes broad disability categories, like Other Health Impairment (which includes ADHD) and Emotional Disturbance, that tend to present in the form of behavioral manifestations. The Student’s persistent behaviors prior to February 28, 2012 clearly warranted the issuance of a PTE.

The record of this case also clearly indicates that from February of 2012 onward, the District has increased regular education behavioral supports for the Student. These increasing interventions were in response to the Student’s deteriorating behaviors. It is significant that everybody who testified on the District’s behalf, and especially the Student’s teacher, reported that the behavioral interventions attempted to date have not had the desired result. This includes the introduction and consistent use of a regular education behavior management and anti-bullying program. The record, as a whole, the record yields the conclusion that the District does not know why its efforts are not working, and wants to evaluate the Student to answer that question. The proposed evaluations, particularly the FBA and behavior ratings scales, go to the core of that issue. A special education evaluation will not only determine whether the Student is IDEA-eligible, but will also yield information necessary to form a hypothesis as to what specially designed instruction and related services (including an individualized positive behavioral support plan) are necessary to manage, and ultimately curb the Student’s behaviors.

It is also remarkable that the Student has maintained strong academic performance while exhibiting behaviors so pronounced and consistent as to warrant a PCA prior to an eligibility determination. The record includes some evidence that the Parents suspected that the Student is gifted. Assuming that the Student’s behaviors have a

negative impact upon academic performance, it is reasonable to suspect that the Student's currently satisfactory academic marks would be even stronger if those behaviors were brought under control. Strong academic performance, in and of itself, does not necessarily equate to giftedness, but some of the assessments proposed by the District would also yield information to determine if the Student may be gifted.

In sum, the District's Child Find obligations were triggered prior to February of 2012. The District acted appropriately at that time by attempting to obtain parental consent to evaluate the Student. The Student's behaviors since that time have only reemphasized the need for an evaluation. The District responded appropriately to those behaviors when it pressed for an evaluation between April and June of 2013. The District also acted appropriately in response to the Student's behaviors when it issued its final PTE in December of 2013 (technically, a re-issuance of the April 2013 PTE).

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.

Having found that the District may evaluate despite the Parents' objections, I am compelled to explain some of the consequences of this determination – particularly in light of the Parents' *pro se* status. As a technical matter, the District was not obligated to request this hearing. See 20 U.S.C. § 1414(a)(1)(D)(ii)(I). If the District had accepted the Parents' refusal, the evaluation process would have stopped, and the Student would be regarded as a regular education student. As a regular education student, the Student would have no special rights or entailments – including enhanced protections in disciplinary proceedings. This is particularly relevant given the Student's behaviors. Had the District not requested this hearing, the District could have simply imposed regular education discipline after each disciplinary infraction. Given the number of disciplinary infractions reflected in the record of these proceedings, the District's assessment that the Student was heading towards suspension is on point. By requesting this hearing, the District has shown that it would rather take action to prevent the type of behaviors that the Student exhibits, than discipline the Student in a reactionary way.

Currently, with an evaluation pending, the Student is a "thought to be eligible" student, and is entitled to the same protections that IDEA-eligible students receive. These protections extend though the evaluation and end under either of two circumstances: Either the multidisciplinary team determines that the Student is not IDEA-eligible and the Parents agree with that determination, or the multidisciplinary team determines that

the Student is IDEA-eligible and the Parents reject 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). Regardless of how the evaluation ends, the Parents can always refuse special education. The Student will be a regular education student, subject to regular education discipline, if that happens.

ORDER

Now, March 17, 2014, it is hereby **ORDERED** that the District may conduct the educational evaluation proposed in the PTE Consent Form dated April 1, 2013. This evaluation must comply with all provision of the IDEA and its implementing regulations, including but not limited to 20 U.S.C. § 1414.

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

/s/ Brian Jason Ford
HEARING OFFICER