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PENNSYLVANIA

## Special Education Hearing Officer

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Child's Name: A. J.

Date of Birth: xx/xx/xx

File Number: 8563-07-08 KE

Date of Hearing: April 11, 2008

CLOSED HEARING

Parties to the Hearing:

Ms.

Date of Decision:<sup>1</sup>

School District of Cheltenham Township  
1000 Ashbourne Road  
Elkins Park, PA 19027

Representative:

Claudia Huot, Esq.  
Wisler, Perlstein  
484 Norristown Rd., Suite 100  
Blue Bell, PA 19422

Date Transcript Received:

April 19, 2008

April 22, 2008

Hearing Officer Name:

Gregory J. Smith

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<sup>1</sup> The record was kept open until receipt of the final transcript. Upon receipt of the transcript the record was closed. This decision was rendered within less than 15 days of the hearing and within 3 days of receipt of the transcript and the closing of the record.

## **Background**

Student is a xx-year-old (d.o.b. xx/xx/xx) fourth grade, regular education student who resides with his mother within the area served by the Cheltenham Township School District (District). Student enrolled in the District at the start of the 2007 – 2008 school year. Almost from the start of the school year Student exhibited both academic and behavioral difficulties. After making several attempts to gain permission to conduct an initial evaluation from Student's parent, the District requested the present due process hearing seeking an order to allow it to complete an initial evaluation.

## **Findings of Fact**

1. Student is a xx-year-old (d.o.b. xx/xx/xx) fourth grade student who resides with his mother within the area served by the Cheltenham Township School District (District). (N.T. at 29; S-21)
2. Student enrolled in the District at the start of the 2007 – 2008 school year. Student was initially assigned to a typical regular education class in the District's Elementary School (Elementary School). (N.T. at 30, 99; S-21)
3. On September 5, 2007 Student was administered the Group Reading Assessment and Diagnostic Evaluation. Student exhibited weaknesses in sentence comprehension, passage comprehension, listening comprehension, a comprehension composite, and the total test. Student scored in the average range on vocabulary. (N.T. at 34-35, 106-108; S-2)
4. Early in the school year Student began to exhibit inappropriate and aggressive behaviors. As a result of those behaviors, on September 6, 2007 Student's mother met with the principal at Elementary School. At that meeting Student's mother indicated that Student had exhibited both academic and behavioral difficulties in his prior schooling. Student's mother also requested that Student be placed in a classroom taught by a male teacher. (N.T. at 31, 63-65, 98-99; S-3, S-25)
5. On September 9, 2007 Student's mother requested an evaluation to address behavioral concerns. (N.T. at 30, 32, 100, 103, 129; S-1)
6. On September 11, 2007 Student was placed in a classroom taught by a male teacher. That classroom is co-taught by a regular education teacher and a special education teacher, who is in the classroom half-time. That classroom has a total of 15 students ranging in ability from students in need of special education to students in the District's gifted program. The two teachers are assisted by an aide in that classroom. (N.T. at 26-27, 30-31, 101-102; S-3)
7. On September 17, 2007 the Elementary School principal requested that Student's mother attend a conference with the principal and Student's teacher. (N.T. at 102; S-3)
8. On September 17, 2007 Student's mother notified the Elementary School principal that she did not see the need to meet with the principal and Student's teacher. She also informed the principal that she was withdrawing her request for an evaluation. (N.T. at 102-103, 129-130; S-4)
9. On September 26, 2007 the Elementary School principal requested that Student's mother attend a conference with the principal and Student's teacher to discuss academic and behavioral progress and to review school policies and classroom expectations. (N.T. at 36-37, 108; S-6)
10. On September 27, 2007 a District Title I staff member informed Student's mother that Student was eligible for and would begin receiving Title I support in math. Student's mother objected to Student receiving Title I math support, so those services were not provided. (N.T. at 36, 109; S-7)

11. In October 2007 a District reading specialist informed Student's mother that Student was eligible for and would begin receiving Title I support in reading. (N.T. at 36, 109-110; S-8)
12. During fall 2007 Student engaged in ongoing inappropriate and aggressive behaviors. He hit and pushed other children, jumped on other children, threatened to harm other children, threatened to kill other children, threw things at other children, took other children's clothing, bullied other children, was disruptive in class, and acted defiantly towards adults. As a result he was suspended for one day on November 5, 2007 and for one day on November 26, 2007. (N.T. at 31, 39-44, 55, 65-67, 69, 113; S-9, S-11, S-12, S-13, S-25)
13. To address Student's behavioral difficulties, the District developed a behavioral contract focusing on following directions, making good choices, and not distracting others or himself. That contract evolved during fall 2007 to include respecting peers and adults. (N.T. at 44-47; S-10)
14. On November 5, 2007 a conference was held to discuss Student's disruptive and aggressive behaviors that were affecting both his performance and the performance of his peers. At that conference strategies that had been tried were discussed, including small group instruction, behavioral contracts, one-on-one processing outside of the classroom, staying in for recess to address behavior, contacting Student's mother, and using a communication book. Up until that point the strategies had not been effective. (N.T. at 33-34, 37-39, 56, 67-68, 112; S-12)
15. On November 5, 2007 the District suggested that Student participate in a small group counseling session on a weekly basis to help Student transition and interact with his peers in a non-threatening way. The District also suggested that a functional behavior assessment (FBA) be completed. On November 9, 2007 Student's mother gave her permission for Student to participate in group counseling and for the FBA to be completed. (N.T. at 47-50, 70-72, 88, 112; S-11, S-15, S-17, S-25)
16. On November 20, 2007 the District requested permission to complete an evaluation consisting of parent input, teacher input, record review, observation by a school psychologist, cognitive assessment, achievement assessment, clinical interview, reading assessment, perceptual motor testing, FBA, and behavior rating scales. Student's mother did not provide the requested permission to evaluate. (N.T. at 76, 115-116, 130-132; S-18, S-25)
17. On November 27, 2007 the District reiterated its request to complete an evaluation. Student's mother did not provide the requested permission to evaluate. (N.T. at 116-117; S-19)
18. At the end of the first trimester Student's grade in reading was D-, his grade in mathematics was C, his grade in social studies was F, and his grade in science was D. While some areas of performance were marked as satisfactory or satisfactory minus, 61 percent of the areas of performance were marked as needs improvement, including areas of reading, writing, listening and speaking skills, mathematics, social studies, science, and skills for school success. (N.T. at 35, 51-52; S-24)
19. During the winter 2008 Student's behaviors continued to be problematic. He made sexual comments to other students, threatened to kill another student, threatened to harm other students, hit other students, hit another student in the head with a clipboard, bullied other students, continued to be disruptive in the classroom, and acted defiantly towards adults. Student was suspended for two days on January 15, 2008 and one day on January 31, 2008. (N.T. at 31-32, 55-56, 69, 77-81; S-14, S-19, S-20)
20. During the winter 2008 the District continued to provide academic support, including sessions with a reading specialist, completion of a FBA, implementing a positive behavior plan, and to use the behavior contracts developed for Student (N.T. at 53, 86-88; S-10, S-21, S-22)
21. Between December 2007 and March 2008 the District provided small group counseling to Student. The counseling was discontinued at Student's mother's request. (N.T. at 73-75, 91-93; S-17, S-21, S-22, S-23)

22. On February 11, 2008 the District again requested permission to complete an evaluation. In addition to the evaluation components already requested (parent input, teacher input, record review, observation by a school psychologist, cognitive assessment, achievement assessment, clinical interview, reading assessment, perceptual motor testing, FBA, and behavior rating scales) the District also sought permission to complete an ADD/ADHD screening and a psychiatric evaluation. Student's mother did not provide the requested permission to evaluate. (N.T. at 117-120, 132-133; S-20)

23. In February 2008 Student was admitted to a partial hospitalization program for several days. Student's mother never provided the District with any documentation about that partial hospitalization or records or reports from that partial hospitalization. (N.T. at 55, 77, 84-86, 89-90, 114, 117-118, 137-138; S-21)

24. On February 22, 2008 the District requested the present due process hearing to obtain an order allowing it to complete the previously requested evaluation. In its complaint the District cited supports and accommodations that have been provided to Student during the current school year, the fact that those supports and accommodations have not improved either Student's behavior or academic performance, and the fact of Student's partial hospitalization and the lack of documentation about the nature of that partial hospitalization. (N.T. at 120; S-21)

25. In March 2008 Student's mother requested that the District provide Student with an Individualized Education Plan (IEP). (N.T. at 122, 135; S-23)

26. On March 28, 2008 the District's Acting Director of Special Education sent to letter to Student's mother explaining that in order for Student to receive special education services through an IEP, the District must first complete an evaluation. The Acting Director requested that Student's mother sign and return a permission to evaluate form so that the needed evaluation may begin. Student's mother did not provide the requested permission to evaluate. (N.T. at 120-122, 135; S-23)

27. At the end of the second trimester Student's grade in reading was F, his grade in mathematics was F, his grade in social studies was F, and his grade in science was F. Few areas of performance were marked as satisfactory or satisfactory minus and 82 percent of the areas of performance were marked as needs improvement, including most areas of reading, writing, listening and speaking skills, mathematics, social studies, science, and skills for school success. (N.T. at 35, 52-53, 56; S-24, S-26)

## **Issues**

May the School District of Cheltenham Township complete the proposed evaluation of Student?

## **Discussion**

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) 20 U.S.C. §1400 *et seq.*, is the Federal Statute designed to ensure that "all children with disabilities have available to them a free appropriate public education," (FAPE) §1400(d)(1)(A). The implementing Regulations for the IDEA can be found at 34 CFR §300 *et seq.* In the Commonwealth of Pennsylvania special education is addressed in 22 Pa Code §14 *et seq.* Under the IDEA, school districts must create an individualized education program (IEP) for each child with a disability. 20 U.S.C. §1414(d). An appropriate program is one that is provided at no cost to the parents, is provided under the authority of a local educational agency, is individualized to meet the educational needs of the child, is reasonably calculated to yield meaningful educational benefit, and conforms to applicable Federal requirements. *Rowley v. Hendrick Hudson Board of Education*, 458 U.S. 176 (1982) The Third Circuit Court has interpreted *Rowley* as requiring school districts to offer children with disabilities individualized education programs that provide more than a trivial or *de minimus* educational benefit. *Polk v. Central Susquehanna*

*Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). Specifically, the Third Circuit defined a satisfactory IEP as one that provides “significant learning” and confers “meaningful benefit.” *Id* at 182-184. see also *Board of Education of East Windsor Sch. Dist. v. Diamond*, 808 F.2d 847 (3rd Cir. 1986); *J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996), *cert. denied*, 519 U.S. 866

In the present matter the School District of Cheltenham Township (District) requested the present due process hearing to obtain an order allowing it to complete an evaluation of Student to determine whether or not Student is eligible for special education and related services and to determine what specific needs Student has and what specific specially designed instruction, accommodations, and related services should be provided to Student so that it may comply with the requirements of the IDEA at 20 U.S.C. §1414(d). [Fact 24] The Supreme Court has held that the “burden of proof in an administrative hearing... is properly placed upon the party seeking relief... the rule applies with equal effect to school districts (as it does to parents)...” *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005) In so doing the Court found no reason to depart from “the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.” *Id* at 534 Although the scenario in *Schaffer* was one where the facts in evidence were *in equipoise*, or, as the Court phrased it the question of “which party loses if the evidence is closely balanced” (*Schaffer* at 533-534), the Court’s holding was not so limited. *J.N. v. Pittsburgh City School District*, 2008 U.S. Dist. LEXIS \_\_\_\_\_ (W.D. Pa. 2008)

Because it is the District that has requested the present hearing and has sought an order to be able to complete the evaluation of Student, it is the District that carries the burden of persuasion in this matter.

#### May the School District of Cheltenham Township complete the proposed evaluation of Student?

In November 2007, February 2008, and March 2008 the District requested permission to complete an evaluation. [Facts 16, 17, 22, 26] Originally that request was for an evaluation consisting of parent input, teacher input, record review, observation by a school psychologist, cognitive assessment, achievement assessment, clinical interview, reading assessment, perceptual motor testing, FBA, and behavior rating scales. [Fact 16] By February 2008, with Student’s behavioral and academic difficulties continuing, with sexual references being made to other students, with threats to harm or kill other students, and with the knowledge that Student had recently been admitted to a partial hospitalization program, the District added to the original evaluation a request to complete an ADD/ADHD screening and a psychiatric evaluation. [Fact 22] Student’s mother has either failed to respond to each of the requests for an evaluation or has rejected the District’s requests for an evaluation. Those actions by Student’s mother occurred in spite of the fact that in early September 2007, shortly after Student first enrolled in the District, Student’s mother herself had requested that the District complete an evaluation, [Fact 5] a request she subsequently withdrew, [Fact 8] and in spite of the fact that in March 2008 Student’s mother requested that the District begin to provide special education services to Student through an IEP. [Fact 25]

When a school district believes that a student may be eligible for and in need of special education, it must attempt to evaluate that student. 34 CFR §300.111; 22 Pa Code §14.121(a) Before conducting an initial evaluation, the school district must obtain informed consent to complete the evaluation from the student’s parent. 34 CFR §300.300(a)(1)(i); 34 CFR §300.301(b); 34 CFR §300.304(a) If a parent fails to respond to a request for an initial evaluation or fails to provide consent for an initial evaluation, a school district may, but is not required to, seek an order to complete the proposed initial evaluation from a due process hearing officer through standard due process procedures. 34 CFR §300.300(a)(3)(i); 34 CFR §300.507(a)(1); 34 CFR §300.511(a); 22 Pa Code §14.162(c) Even when, as in the present case, a parent requests special education services and the provision of an IEP, [Fact 25] a school district must first complete a full and individual initial evaluation before it may begin to provide special education and related services through an IEP. 34 CFR §300.301(a) Only after the completion of the initial evaluation may a determination of eligibility be made. 34 CFR §300.306(a) Only after the determination of eligibility is completed may an IEP team be convened, 34 CFR §300.321; 34 CFR §300.323(c)(1) and an IEP be developed. 34 CFR §300.323(c)(2); 34 CFR §300.324

Because the District has made repeated attempts to obtain permission to evaluate Student, [Facts 16, 17, 22, 26] and because Student's mother has either not responded to those attempts or has withdrawn or denied permission to evaluate Student, [Facts 8, 16, 17, 22, 26] the District's request for an order to allow it to complete the evaluation it proposed on February 11, 2008 is ripe for consideration by this hearing officer as allowed under 34 CFR §300.300(a)(3)(i).

The District sought an order allowing it to complete an evaluation consisting of the following: parent input, teacher input, record review, observation by a school psychologist, cognitive assessment, achievement assessment, clinical interview, reading assessment, perceptual motor testing, FBA, behavior rating scales, ADD/ADHD screening, and a psychiatric evaluation. Each component of the proposed evaluation will be considered below.

1. Parent input: Parent input is not only a required component of all evaluations, 34 CFR §300.304(b)(1) it is a necessary component to have a thorough understanding of the student and his or her needs. A parent can provide information about developmental milestones, academic and behavioral performance outside of the school, factors that may be affecting the child's academic and/or behavioral performance in school, and strategies that have been effective, as well as those that have not been effective, that have been tried by the parent in the past. In the present matter, because Student first enrolled in the District at the start of the current school year as a fourth grade student [Facts 1, 2] and early in the school year Student's mother informed the District that Student had experienced academic and behavioral difficulties in his prior schooling, [Fact 4] Student's mother may be the only informant capable of providing important information about Student's prior school experiences. She may also be the main source for information about Student's recent partial hospitalization. Because of all of the above, the request to include parent input in the evaluation is determined to be appropriate by this hearing officer.

The District cannot make Student's mother participate in the evaluation process and this hearing officer does not have the authority to order Student's mother to participate in the evaluation process. He can only encourage her to do so and to work collaboratively with District staff to determine Student's needs and to develop appropriate programming for Student

2. Teacher input: Teacher input is a required component of an evaluation. 34 CFR §300.305(a)(1)(iii) In addition, given Student's combined academic and behavioral difficulties that were evident almost from the moment he enrolled in the District [Facts 3, 4] and have continued through the current school year, [Facts 12, 18, 19, 27] it is the determination of this hearing officer that input from Student's teachers is not only appropriate, but necessary.

3. Record review: The review of records is a required component of an evaluation. 34 CFR §300.305(a)(1) In addition, given Student's combined academic and behavioral difficulties that were evident almost from the moment he enrolled in the District [Facts 3, 4] and have continued through the current school year, [Facts 12, 18, 19, 27] it is the determination of this hearing officer that the review of all available records is not only appropriate, but necessary. Student's mother is encouraged to work cooperatively with District staff in this regard and to make available to the District all records that may assist in determining Student's needs, including records regarding the recent partial hospitalization.

4. Observation by a school psychologist: Because of Student's ongoing behavioral and academic difficulties, [Facts 3, 4, 12, 18, 19, 27] because a school psychologist is a required member of the evaluation team, 22 Pa Code §14.123, and because an observation is a required component of an evaluation, 34 CFR §300.310(a) it is the determination of this hearing officer that an observation by a school psychologist is both appropriate and necessary.

5. Cognitive and achievement assessments: Early in the current school year an assessment showed that Student has weaknesses in sentence comprehension, passage comprehension, listening comprehension. [Fact 3] During the first trimester Student showed poor performance in all subjects and exhibited academic difficulties in

multiple areas. [Fact 18] By the end of the second trimester his performance had deteriorated in all subjects and he was exhibiting academic difficulties in even more areas. [Fact 27] Based on these facts there is enough evidence to suggest that Student may have a learning disability and therefore, it is the determination of this hearing officer that cognitive and achievement assessments are both appropriate and necessary. While these types of assessments are not the sole means of determining potential learning disabilities, they provide useful information in determining both the extent and nature of a student's disability and provide useful information for the development of appropriate and effective programming.

6. Clinical interview: Student's continued academic and behavioral difficulties, in particular his ongoing and repeated threats to others, including threats to kill other students, physical harm caused to other students, disruption in the classroom, and defiance towards adults, [Facts 3, 4, 12, 18, 19, 27] coupled with his recent partial hospitalization, [Fact 23] suggest possible emotional difficulties and support the need for a clinical interview. It is the determination of this hearing officer that a clinical interview is both appropriate and necessary.

7. Reading assessment: Early in the current school year Student was administered a screening for reading difficulties. [Fact 3] At that time Student exhibited weaknesses in sentence comprehension, passage comprehension, and listening comprehension. [Fact 3] In October 2007 Student began receiving Title I support in reading. [Fact 11] Even with the added support of working with a reading specialist Student earned a D- in reading in the first trimester [Fact 18] and a F in reading in the second trimester. [Fact 27] Given those facts, it is the determination of this hearing officer that a reading assessment is both appropriate and necessary.

8. Perceptual motor testing: The requirements under the law are that an evaluation be thorough, using a variety of assessment tools and strategies. 34 CFR §300.304(b)(1); 34 CFR §300.304(c)(4); 34 CFR §300.304(c)(4) The addition of perceptual motor testing to the evaluation will complement the other proposed components of the evaluation and, as such, it is the determination of this hearing officer that perceptual motor testing is appropriate.

9. FBA and behavior rating scales: Although an FBA was already agreed to by Student's mother, [Fact 15] and although an FBA was already completed by the District, [Fact 20] Student's ongoing behavioral difficulties [Fact 19], coupled with the lack of success of the District's attempts to provide services that address Student's behavioral difficulties, [Facts 20, 21, 24] suggest that a current FBA and current behavioral rating scales are necessary, in combination with the other evaluation components, to fully understand Student and his behavior. It is the determination of this hearing officer that a current FBA and behavioral rating scales are appropriate and necessary.

10. ADD/ADHD screening: Given the combination of academic difficulties that have been noted, [Facts 18, 27] and the behavioral difficulties noted, especially Student's disruptive behavior in the classroom, [Facts 12, 19] there is a strong suggestion that Student may be a student with ADD/ADHD. Because of that, it is the determination of this hearing officer that ADD/ADHD screening is both appropriate and necessary.

Considering the 10 components of the proposed evaluation discussed above, the District's proposed evaluation meets all of the requirements for an evaluation found in 34 CFR §300.304, 34 CFR §300.305, 34 CFR §300.307, 34 CFR §300.308, 34 CFR §300.310, 34 CFR §300.311, and 22 Pa Code §14.123. Moreover, the District has made repeated efforts to offer and provide accommodations and services for Student including instruction in a small classroom taught by a full-time regular education teacher, part-time special education teacher, and a teacher's aide; [Fact 6] Title I support in math; [Fact 10] Title I support in reading; [Fact 11] behavioral contracts; [Facts 13, 20] small group counseling; [Facts 15, 20, 21] small group instruction, [Fact 4] one-to-one discussion and processing of his behavior, [Fact 4] completion of a FBA; [Fact 15] and the provision of a positive behavior plan. [Fact 20] To date, those efforts have not resulted in improvement in either Student's academic performance [Facts 24, 27] or his behavior. [Facts 19, 24] Because this hearing officer has ruled that all the above components are appropriate for an evaluation of Student, because the proposed evaluation meets the requirements found in the law, and because the numerous accommodations and supports provided by the

District have not been effective to date, this hearing officer will grant the District's request to issue an order allowing it to complete the above components of its proposed evaluation.

While the District clearly met its' burden to prove that the above components of its' proposed evaluation are appropriate, it failed to meet its' burden regarding the proposed psychiatric evaluation. Even given the rather extreme and ongoing behavioral difficulties exhibited by Student and even given the reported partial hospitalization, the District failed to establish why a psychiatric evaluation, in addition to the other proposed evaluations, was necessary. The Appeals Panels in the Commonwealth have set a rather high bar for ordering a psychiatric evaluation. As noted in *In Re the Educational Assignment of M.B.*, Spec. Educ. Op. 1381 (2003):

The pertinent legal authority is limited but sufficient. First, the 6/9/01 removal of any mention of a psychiatrist participating in the determination of ED in the Pennsylvania regulations, to more closely conform to the pertinent provisions in the IDEA regulations,<sup>23</sup> suggests that a psychiatrist is not the standard, or *sine qua non*, for this purpose. It is not clear why the District considered it essential to add this classification any more than other health impairment ("OHI") in light of Student's AD/HD,<sup>24</sup> once the IEP team recognized and made provision for Student's behavioral problems.<sup>25</sup> However, if the District interpreted the evaluation regulation as requiring this determination,<sup>25</sup> why would the District not concomitantly need to determine whether Student additionally or alternatively qualified as OHI? In any event, OSEP has made clear that for purposes of OHI eligibility, a psychiatrist or other physician is not necessary despite the purported medical essence of AD/HD.<sup>26</sup> Although OSEP has not specifically addressed the same question for ED, by analogy its interpretation would appear to apply *a fortiori*.

Second, OSEP has clarified that a psychiatrist or other physician is necessary for medical treatment of AD/HD, which typically is in the form of medication.<sup>27</sup> At the same time, the law is clear that consent for medical treatment, including medication, is within the province of parents, not school officials or hearing officers.<sup>28</sup> Given the strong interest of parental liberty and familial privacy that is triggered by psychiatric and similar intrusions,<sup>29</sup> school officials should first opt for less restrictive alternatives.<sup>30</sup> In this case, for example, the District could have used the available behavioral consultant to not only check the internal alignment of its BIP<sup>31</sup> but also suggest additional or alternative strategies to improve its effectiveness.<sup>32</sup> Another illustrative option for the District would be to use a school psychologist, who is required for determining ED,<sup>33</sup> to examine underlying social-emotional issues and recommend appropriate educational strategies.<sup>34</sup> In contrast, psychiatrists not only implicate more severe stigma in terms of familial and personal privacy, but they typically use a medical model, rather than the distinct IDEA framework, for identifying and treating emotional impairments.

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<sup>23</sup> 22 PA. CODE § 14.123. Even in the prior regulation, 22 PA. CODE § 342.1(b)(serious emotional disturbance), the participation of a psychiatrist was permissive, whereas that of a school psychologist remains mandatory in Pennsylvania.

<sup>24</sup> Interestingly, the District exhibited no such rigor in terms of a medical diagnosis of AD/HD. See, e.g., NT at 387.

<sup>25</sup> 34 C.F.R. § 300.352(g)-(h)

<sup>26</sup> See, e.g., Letter to Williams, 21 IDELR 73 (OSEP/OCR 1994).

<sup>27</sup> Letter to Anonymous, 34 IDELR ¶ 35 (OSEP 2000).

<sup>28</sup> See, e.g., Letter to Hoekstra, 34 IDELR ¶ 204 (OSEP 2000).

<sup>29</sup> See, e.g., *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973).

<sup>30</sup> We are not requiring any one, much less all, of these alternatives, which illustrate an ample range for the District's discretion.



- 31 NT at 94 and 102.
- 32 In its answers to the exceptions, the District argued that “[t]here is simply nothing within the IDEA ... or the Pennsylvania regulations that require [sic] the use of a behavior specialist ...” The same can be said for a psychiatrist. Without intruding on the District’s prerogatives as to personnel decisions, we simply point out the countervailing parental prerogatives as to consent and privacy.
- 33 See supra note 23.
- 34 Consider, for example, the difference between the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders and the IDEA’s definitional criteria. See, e.g., Julie Fogt, David Miller & Perry Zirkel, *Defining Autism: Professional Best Practices and Published Case Law*, 42 J. SCH PSYCH. 201, 211 (2003).

*M.B.* at 5 - 7, footnotes maintained from original

Given the Panel’s ruling in *M.B.* and given the fact that the District failed to adequately demonstrate why a psychiatric evaluation is necessary, especially in light of all of the other components of the proposed evaluation, including both observations and interviews by a school psychologist, it is the conclusion of this hearing officer that the District may not complete the proposed psychiatric evaluation.

Although this hearing officer will enter an order that the District may complete an evaluation consisting of the 10 components discussed above, the District is not required to do so. Under 34 CFR §300.300(a)(3)(i), if a parent does not provide consent for an initial evaluation, the school district is not required to pursue an evaluation further. In the present matter, if the District were to make the choice not to pursue an evaluation it would be a most unfortunate situation indeed. First, Student would not receive the services he so clearly needs. Second, if Student were to remain a non-exceptional student, if he were to be treated like other regular education students, and if his behaviors continued on the current trajectory, it is likely that Student would be expelled from school soon. At that time the District would no longer be responsible for providing Student with any educational programming. At that time Student’s mother would be required to provide an education to Student through her own resources. To avoid such an unfortunate situation, this hearing officer again encourages Student’s mother to work cooperatively with District staff to complete this necessary evaluation and to develop appropriate programming for her son.

\* \* \*

In summary, above this hearing officer concluded that the District carried its’ burden to prove that the evaluation requested on February 11, 2008, with the exception of the requested psychiatric evaluation, was both necessary and appropriate. Since Student’s enrollment in the District in September 2007 his behaviors have been dangerous, they have threatened the health and safety of both other students and himself, they have been disruptive in the classroom, and they have likely contributed to his poor academic performance. In addition, without an evaluation it would be impossible for the District to determine whether or not Student’s poor academic performance was the result of some emotional difficulty and the potentially related problematic behaviors, or the result of some underlying learning disability or other difficulty, or the combination of all of those factors. The exception to the District’s request to complete the evaluation proposed on February 11, 2008 is the proposed psychiatric evaluation. There the District failed to prove the need to complete the psychiatric evaluation.

Student’s mother, as well as District staff, should note the advice given by the Appeals Panel in *In Re the Educational Assignment of S.B.*, Spec. Educ. Op. 1283 (2002):

...referral for evaluation should not be confused with outright decisions on (Student’s) educational program/placement. Evaluation is the beginning of the process to ensure Student has an appropriate program and placement. The scope, nature and details of that program and placement will be decided collaboratively with parents at a later date as the planning process continues.

Accordingly we make the following:

**ORDER**

The School District of Cheltenham Township may complete an evaluation of Student consisting of: parent input, teacher input, record review, observation by a school psychologist, cognitive assessment, achievement assessment, clinical interview, reading assessment, perceptual motor testing, a functional behavior assessment, behavior rating scales, and an ADD/ADHD screening. The School District of Cheltenham Township may not complete the proposed psychiatric evaluation.

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Signature of Hearing Officer