

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: N.M.

Date of Birth: [redacted]

ODR No. 13612-1213KE

CLOSED HEARING

Parties to the Hearing:

Cumberland Valley School District
6746 Carlisle Pike
Mechanicsburg, PA 17050

Representative:

Mark W. Cheramine Walz, Esq.
Sweet Stevens Katz & Williams, LLP
331 Butler Avenue, P.O. Box 5069
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Parents

Pro se

Date of Hearing: April 15, 2013

Record Closed: April 26, 2013

Date of Decision: May 3, 2013

Hearing Officer: Brian Jason Ford

INTRODUCTION

This matter arises under the Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1400 *et seq.* The District has proposed to reevaluate the Student to determine the Student's educational needs.¹ The Parents have refused to consent to the evaluation. The District requested this due process hearing, seeking an order that it may evaluate the Student without the Parents' consent.

ISSUE

May the District evaluate the Student?

STATUTORY FRAMEWORK

1. Consent Override for Reevaluations

The IDEA is the federal law concerning the rights of students who require special education, and the responsibilities of educational agencies to those students. Both parties agree that the Student is IDEA-eligible, meaning that the Student has a disability recognized by the IDEA, and is in need of special education.

School districts must reevaluate IDEA-eligible students at least once every three years.² The obligation to reevaluate a student is triggered sooner "if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation."³

Reevaluations must follow most of the same statutory requirements as initial evaluations.⁴ In general, reevaluations must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent" to determine if a student continues to have a disability and what services the student needs.⁵

School districts must provide notice of any reevaluation, and obtain parental consent before conducting a reevaluation.⁶ However, if "the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures [for initial evaluations]."⁷ Therefore, if parents do not provide consent, the school district may, but is not required to, pursue the

¹ Except for the cover page of this Decision, the identity of the Student is omitted to the greatest extent possible.

² 20 U.S.C. § 1414(A)(2)(B)(ii).

³ 20 U.S.C. § 1414(A)(2)(B)(ii); 34 C.F.R. § 300.303(a)(1).

⁴ See 20 U.S.C. § 1414(a)(2)(A).

⁵ 20 U.S.C. § 1414(b)(2)(A)(i) and (ii).

⁶ 20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1414(a)(1)(D)(i)(I) (regarding consent for initial evaluations); 34 C.F.R. 300.300(c)(ii) (applying the initial evaluation consent requirements to reevaluations).

⁷ 34 C.F.R. § 300.300(c)(ii).

reevaluation of the child by utilizing the IDEA's dispute resolution procedures, including a due process hearing.⁸

2. The Burden of Proof

In special education due process hearings, the party seeking relief bears the burden of proof.⁹ In this particular case, the District is the party seeking relief and must bear the burden of proof. The District must prove entitlement to its demand by preponderant evidence, and cannot prevail if the evidence rests in equipoise.¹⁰

Although the District bears the burden of proof, the Third Circuit has not clearly articulated how that standard should be applied in IDEA consent override cases. With no binding precedent from the Third Circuit or Pennsylvania courts, 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."¹¹

FINDINGS OF FACT

1. There is a long and troubling history of the District attempting to evaluate the Student and the Parents refusing evaluations. To illustrate the extremity of these disagreements, in 2010 the District contacted Children and Youth Services when the Parents refused to consent to an evaluation because, in the District's view, "the parents were not acting in the best interests of [the Student by] ignoring the request for a functional behavioral assessment."¹² (NT 116-117)
2. The Student's current learning support teacher's testimony was highly credible. This teacher, who is properly certified and has 16 years of experience, was clearly troubled and genuinely frightened by the Student's in-school behaviors. (NT at 25, 37-38, 69).¹³
3. The Student's behaviors frequently include:
 - a. (NT at 30, 34, 39, 40-41, 44, 45, 48)

⁸ 20 U.S.C. § 1414(a)(1)(D)(ii)(I); 34 C.F.R. § 300.300(a)(3)(i).

⁹ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

¹⁰ See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

¹¹ *Shelby S. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450, 454 (5th Cir. 2006), *cert. denied*, 549 U.S. 1111 (2007).

¹² Although I cannot make a finding of fact in this regard, it is very likely that this poor choice on the District's part is a key factor in the Parents' extreme distrust of the District.

¹³ It is clear that this teacher is emotionally invested in the Student's wellbeing while, at the same time, fears that the Student will not only fail academically but hurt the Student's self or others – including the teacher. The conflict between the teacher's desire to help the Student, and need to maintain safety for herself and her class clearly has taken its toll.

4. The Student has been in crisis twice this school year. The District has enacted its crisis protocol, which calls for an ambulance and police to arrive at the school and to immediately notify the Parents. The Parents have refused crisis intervention, and testified that the presence of police has exacerbated the Student's anxiety.
5. The Student has demonstrated a need for sensory breaks during the school day.
6. Very infrequently, the Student will have a "good day" in which the Student can participate in instruction. The Student had only one good day in the month preceding the hearing. (NT at 43).
7. Most days, the Student has bad days, during which the Student exhibits the behaviors described above. During those days, the Student does not derive any benefit from instruction. (NT at 43).
8. The Student is currently falling behind in all academic areas. (NT at 43).
9. A February 2013 report from the Student's independent psychologist states that the Student has been "demonstrating progressively worsening oppositional and defiant reactions in the home and school setting." (S-10)
10. According to the Student's mother, the Student has been diagnosed with attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD). (NT at 202, 208).
11. The District suspects that the Student may have an undiagnosed autism spectrum disorder (ASD).¹⁴ (NT at 65-66).
12. The District last evaluated the Student in 2009 (2nd grade).
13. The District sought consent to reevaluate the Student in 2010. Specifically, the District sought to conduct social/emotional rating scales, a functional behavior assessment (FBA), achievement testing, and a classroom observation. (S-5; NT at 119).
14. The Parents withheld consent to reevaluate, and so the proposed reevaluation was not conducted. *Id.*

¹⁴ The Student's mother gave conflicting testimony as to whether the Student may have an autism spectrum disorder. Specifically, the testimony reveals that the Student's independent psychologist either provided a "rule out" diagnosis for an ASD – meaning that additional testing may be required to determine whether an ASD diagnosis is appropriate – or affirmatively concluded that the Student does not have an ASD. To whatever extent this conclusion was reduced to writing, it was not shared with the District. Moreover, educational services must be driven by the Student's needs, not any particular diagnosis. Therefore, the particular question of whether the Student has an ASD is irrelevant to this matter.

15. The District completed a reevaluation report (RR) of the Student on January 20, 2012. This RR includes only a review of records, teacher input, and a classroom observation. (S-7)
16. The District currently seeks an Order that would allow it to complete the following assessments as part of a reevaluation, some of which are rating scales that should be completed by both the Parents and teachers:
 - a. Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV);
 - b. Subtests from the Woodcock Johnson Cognitive Assessment;
 - c. Wechsler Individual Achievement Test, Third Edition (WIAT-III);
 - d. Autism Diagnostic Observation System (ADOS-2);
 - e. Childhood Autism Rating Scale (CARS-2);
 - f. Behavior Assessment System for Children (BASC-2);
 - g. Attention Deficit Disorder Evaluation Scale, Third Edition (ADDES-3);
 - h. Behavior Rating Inventory of Executive Functioning (BRIEF);
 - i. Social Skills Inventory Scale (SSIS);
 - j. Functional Behavior Assessment (FBA) consistent with the model provided by the Pennsylvania Training and Technical Assistance Network (PaTTAN);
 - k. A speech/language pragmatics screening assessment. (NT at 165-170, 172-176, 180; S-11, S-14, S-18).
17. The Parents specifically challenge the validity of three of these assessments: the ADDES-3, BRIEF, and "Pragmatics Profile." (P-3).
18. To support their contention that some of the currently proposed evaluations are inappropriate, the Parents reference a document called the "Mental Health Yearbook Test in Print" by the Buros Center for Testing, University of Nebraska, Lincoln. (P-3).
19. Excerpts from the Mental Health Yearbook were presented as part of Exhibit P-3. The authenticity of those excerpts was not challenged.
20. The Mental Health Yearbook provides critical reviews of assessments. The review of the ADDES-3 raises concerns about the assessment's normative sample, and concludes: "with a variety of other more reliable and valid instruments available for the assessment of ADHD, neither the home nor school current version of the ADDES is recommended at this time." (P-3).
21. The Mental Health Yearbook urges caution in using the BASC-2 in isolation and, in essence, advises that the BASC-2 should be used in conjunction with an FBA in order to obtain information about treatment (or, in context, educational programming) decisions. (P-3)
22. The Mental Health Yearbook discusses a generic "Pragmatics Profile" that may or may not be the assessment that the District intends to administer. Although the Mental Health Yearbook notes that development of a pragmatics profile is not a statistically valid assessment *for research purposes* (in the sense that it is not

normative), the Yearbook concludes that it “would be highly useful in getting to know the child, but less useful as a diagnostic or evaluative tool.” (P-3)

23. Historically, the Parents will not share information with the District regarding the Student’s medications, and will actively prevent the District from communicating with the Student’s doctors, including the Student’s psychiatrist.

24. Recently, the Parents have decided to enroll the Student in a partial hospitalization program. The Parents anticipate the student will receive a number of evaluations upon admission to that program. The Parents are not sure what those evaluations will be. The Parents have not yet decided whether they will share those evaluations, or any information from the partial hospitalization program, with the District. (NT at 220-221). The Parents have not yet decided whether they will allow the partial hospitalization program to communicate with the District. *Id.*

DISCUSSION

The Parents have no trust for the District, and the District holds the lion’s share of the responsibility for that lack of trust. Equating the withholding of consent for an evaluation to child abuse is plainly wrong. The requirement to obtain parental consent, which necessarily implies that parents may withhold consent, is enshrined in the IDEA – along with the legitimate options available to school districts when consent is withheld. Regardless, the District’s past, potentially retaliatory conduct is not at issue in this case. Further, the District’s right to use the IDEA’s consent override procedures and, moreover, its burden of proof in this case, has nothing to do with the level of trust between the parties.

The Parents also argue that the Student’s IEPs have provided inadequate behavioral support. (See, e.g. Parents’ Closing at pp. 10-13). This argument actually supports the District’s position that more information is required to determine what amount of what type of support the Student needs.

By law, I can only decide the issues raised in the District’s Complaint.¹⁵ The Parents did not file a complaint of their own, and so the only issue that I may address is the District’s use of the IDEA’s consent override procedure. The Parents made a number of arguments regarding the appropriateness of past IEPs, and about the District’s proper maintenance of the Student’s records. None of those issues are before me.

The Parents cite to *Wisconsin v. Yoder*, 406 U.S. 205 (1972). This famous case arises in the context of compulsory school attendance laws and recognizes the “fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Id.* at 232. In *Wisconsin v. Yoder*, the parents argued that compulsory school attendance laws conflicted with their religious beliefs. In this due process hearing, the Parents have not objected to the proposed evaluations on religious grounds, and so *Wisconsin v. Yoder* is not applicable. The Parents also cite to *Parham v. J.R.*, 442 U.S. 584 (1979) to stand for the proposition that Parents have broad authority over their

¹⁵ 20 U.S.C. § 1415(f)(3)(B).

children. *Id* at 602-606. In *Parham*, children were voluntarily committed to state mental hospitals upon application of their parents using a Georgia state procedure that the Court found to be Constitutional. There are virtually no factual similarities between *Parham* and this due process hearing.

The Parents raise what they characterize as a jurisdictional challenge to my authority to determine that the District may evaluate the Student without parental consent. In essence, the Parents argue that I have no authority to determine their fitness as parents. I agree. However, parental fitness is not the question at hand. The question of whether the District has proven reasonable grounds for the necessity of the evaluation has nothing to do with whether the Parents are fit. That question calls for a consideration of the Student's needs, not the Parents' desires. If parental decision-making authority controlled, the IDEA would have no consent override provision.

In this case, there can be no doubt that the Student must be evaluated. The facts concerning the Student's in-school behaviors are not in dispute. As it stands, the Student is deriving no educational benefit from the services that the District has in place. The District's statutory obligation to propose an evaluation has very clearly been triggered. The District satisfied that obligation by proposing the evaluation. The Parents' withholding of consent then triggered the District's right to bring these proceedings. I find that the District has proven the necessity of the evaluations. Only through careful, thorough evaluations can the Student's IEP team form a conclusion as to what services the Student needs. The Student's current program is not working, and a comprehensive evaluation is the first, necessary step in determining what the District must do next.

I further conclude that the District has proposed an appropriate evaluation. With the exception of the ADDES-3, all evidence and testimony stands for the proposition that the particular assessments were selected in conformity with 20 U.S.C. § 1414. For purposes of making program recommendations, the Parents' evidence shows that the BASC-2 should be interpreted in connection with an FBA, but the District is proposing an FBA. Regarding the pragmatics profile, even if I were to assume that the "Pragmatics Profile" challenged by the Parents is the same test selected by the District, the Mental Health Yearbook critiques that assessment for statistical research purposes, not for purposes of educational programming.

Regarding the ADDES-3, the Yearbook concludes that the ADDES-3 should not be used because there are better tests to assess ADHD. The comparative weakness of the ADDES-3 does not invalidate the test itself. Moreover, this assessment is one small part of a much broader evaluation. Ultimately, a clinical diagnosis of ADHD or any other condition is not the purpose of the reevaluation. Rather, the reevaluation is necessary to determine what educational services the Student needs. No evidence or testimony suggests that the ADDES-3 is invalid for that purpose.

Finally, I must address the issue of the evaluations that the Student may or may not receive during the partial hospitalization. I take notice of the fact that some of the tests proposed by the District cannot be re-administered until a certain period of time passes. This is usually spelled out in the testing material or on the test publisher's website.

Without knowing what tests the Student will receive at the partial hospitalization, the District may not know what tests it can or cannot administer as part of its own evaluation. I cannot compel the Parents to share information from the partial hospitalization program with the District, but I urge them in the strongest possible terms to do so. The Student need not sit through the same tests twice, especially if the District's tests become invalid due to the sequential administrations. That can be avoided if the Parents allow sharing.

CONCLUSION

The District has proven both that its proposed evaluation is necessary and that the evaluation itself conforms to all IDEA requirements. Therefore, the District is permitted to evaluate the Student even though the Parents have withheld consent. Given the strong likelihood that the Student will be evaluated by a third party, I urge both parties to share as much information as possible with each other.

ORDER

And now, May 3, 2013, it is hereby **ORDERED** that the District may conduct the proposed evaluation of the Student, including the assessments described herein at Finding of Fact 15a through 15k, and otherwise in conformity with all IDEA reevaluation requirements.

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

/s/ Brian Jason Ford
HEARING OFFICER