

DOCKET NO. 188-SE-0406

DESOTO INDEPENDENT SCHOOL	§	BEFORE A SPECIAL EDUCATION
DISTRICT,	§	
Petitioner	§	
	§	
VS.	§	HEARING OFFICER FOR
	§	
Student B/N/F ***AND ***,	§	
Respondent	§	THE STATE OF TEXAS

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**DECISION OF THE HEARING OFFICER**

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DESOTO INDEPENDENT SCHOOL DISTRICT, Petitioner	§ § § §	BEFORE A SPECIAL EDUCATION
VS.	§ §	HEARING OFFICER FOR
Student B/N/F *** AND*** Respondent	§ §	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner, DeSoto Independent School District (hereafter “DeSoto ISD”) brought this action against student by his next friend, \*\*\* and \*\*\* pursuant to the Individuals with Disabilities Education Improvement Act (hereafter IDEIA), 20 U.S.C. §1400 *et seq.*, seeking authority to override the lack of parental consent for a psychological evaluation of student.

Procedural History

Petitioner filed this request for a due process hearing on April 19, 2006. A telephone prehearing conference was held on May 8, 2006, wherein the issue for hearing was identified. The hearing was held on May 18, 2006. DeSoto ISD was represented by its legal counsel, Ms. Jan Watson, with the law firm of Walsh, Anderson, Brown, Schulze, and Aldridge. Student was represented by his parents, \*\*\* and \*\*\*. Based upon the evidence presented and admitted into the record of this proceeding, I make the following findings of fact and conclusions of law:<sup>1</sup>

Findings of Fact

1. Student is a \*\*\*-year-old \*\*\* grade student who resides with his parents within the jurisdictional boundaries of DeSoto ISD.
2. DeSoto ISD is a political subdivision of the State of Texas and a duly incorporated independent school district.
3. Student had been determined eligible for special education services as a student with speech impairments and during the 2004- 2005 school year, while in the \*\*\* grade, he received special education speech services.
4. Toward the end of student’s \*\*\* grade year, concerns arose regarding his behavior and academic abilities. Although student’s parents did not report any behavioral concerns at home, at school, student behaved impulsively and unpredictably, ignored the consequences of his behavior, exhibited extreme mood changes, lied or distorted the truth and destroyed school and other student’s property. [P. Exh. #2; Hearing Transcript, page 17, hereafter T. \_\_\_ ]. Academically, he was not completing his classwork or homework, was unable to perform assignments independently, did not follow written directions, and rushed through his work. [P. Exh. #2].

<sup>1</sup> Findings of fact and conclusions of law are also contained in the Discussion section of this decision.

5. On April 5, 2005, an ARD Committee meeting was held to address concerns regarding student's academic difficulties, his distractibility in the classroom and his behavior. The ARD Committee sought a reevaluation of student including a psychological evaluation. Student's father agreed to further academic and speech testing and consented to those components of the reevaluation, but refused to consent to a psychological evaluation. [Petitioner's Exhibit #1, hereafter P. Exh. #\_\_\_]. The ARD Committee agreed to proceed with the reevaluation while continuing to seek consent for the recommended psychological evaluation.
6. The ARD Committee sought as part of student's reevaluation, the psychological evaluation to gain information as to the underlying causes of student's behavior and to assist in planning appropriate behavior intervention strategies to improve his behavior.
7. A full and individual reevaluation of student was completed on May 24, 2005. It included both a sociological and emotional component that identified behavioral concerns, but the multi-disciplinary team did not recommend his eligibility for special education as a student with an emotional disturbance. Instead, their eligibility recommendations were for speech impairments and learning disabilities in the areas of written expression, reading comprehension and math reasoning. [P. Exh. #2].
8. On May 26, 2005, a functional behavioral assessment of student was completed by school personnel. It reflected that student was verbally and physically aggressive toward his peers and adults on a daily basis and that his misbehaviors happened frequently without warning. His teacher reported that it was difficult to determine what preceded his misbehaviors, indicating he could just be sitting there quietly when they occurred. [P. Exh. #3].
9. Also, on May 26, 2005, an ARD Committee meeting was held to review the results of student's full and individual evaluation and functional behavioral assessment. Student's parents participated by telephone. The ARD Committee confirmed that student, in addition to his speech impairment, also qualified for special education services as a student with learning disabilities. The ARD Committee changed student's educational placement to a partial resource setting to assist him academically and developed a behavior intervention plan, including a token economy system, to address his in-school behaviors. School personnel again sought consent to complete the psychological evaluation from student's parents, but they refused. [P. Exh. #3].
10. Another ARD Committee meeting was held on January 13, 2006, at the request of student's parents. They felt they had been misled by school personnel when they consented to placing student in special education, and in particular, the resource setting. They requested that he be removed from special education. No consensus was reached at this meeting, except that the ARD Committee agreed to make revisions to student's behavior intervention plan. Parental consent for a psychological evaluation of student was again requested by school personnel, but rejected by his parents. [P. Exh. #4].
11. In the \*\*\* grade, during the 2005-2006 school year, student had \*\*\* office referrals for misbehavior. The first occurred on August 22, 2005, when he disrupted class with his talking, noise and dancing and displayed defiant behavior towards his teacher resulting in a verbal warning and telephone call to his parents. The next referral occurred on August 31, 2005, when he repeatedly was disrespectful to his teacher and aide and made the comment to his aide. "Do you want me to cut off your hand?" This resulted in another

- verbal warning and telephone call to his parents. The third referral occurred on October 21, 2005, when student became involved in a scuffle. He received detention for this incident. The fourth referral occurred on October 21, 2005, when he threatened his teacher while in time-out, and refused to do his work. He was suspended from school for \*\*\* for this infraction. The fifth referral was on December 13, 2005, for repeated and continuing disruptions in class and hallways and for being openly defiant toward adults. He was again suspended\*\*\*. On January 19, 2006, he received an \*\*\* suspension for shoving and bothering others, not following directions, and not leaving another student alone. On January 21, 2006, he argued with his teacher, would not follow directions, and received a \*\*\* suspension. On February 29, 2006, he screamed repeatedly during center time, "I have to finish this for my teacher." He refused to go to the office and ran down the hall. He turned and said to his teacher, "That's not a human, it's a green monster." He received another \*\*\* suspension for this misbehavior. [P. Exh. #5].
12. On March 21, 2006, another functional behavioral assessment of \*\*\* was completed by school personnel. Student's problematic behaviors continued despite intervention and included off-task behavior such as making unusual noises, screaming, disrupting class, getting in other students' personal space and at times, shutting down. He displayed verbal and physical aggression, threatened students and adults, was defiant towards adults, and would shove and bother others. He would not complete his assignments or accept responsibility for his actions. [P. Exh. #5].
  13. An ARD Committee meeting was held on March 21, 2006 to review and revise student's behavior intervention plan. Again, student's parents refused to consent to a psychological evaluation on student.
  14. Prior to filing this request for a due process hearing, DeSoto ISD sought to gain cooperation from student's parents for a psychological evaluation and to work with them in trying various other strategies with student, such as implementation of a behavior intervention plan and changing student's educational placement \*\*\*. [T. 29].
  15. On April 19, 2006, DeSoto ISD filed this request for a due process student. without parental consent.
  16. DeSoto ISD's request to complete a psychological evaluation of student arises out of its May 24, 2005, reevaluation and is not an attempt to conduct a new reevaluation of student
  17. On May 8, 2006, student's annual ARD Committee meeting was held. The ARD Committee found student's behavior had improved in his regular education setting using a token economy system. Also, his teacher found that implementing positive reinforcers, including praise, improved student's behavior. [T. 97]. Despite this improvement, school staff continued to seek a psychological evaluation of student, but his parents refused to consent to such an evaluation and expressed their desire that he receive less special education services. [P. Exh. #6; T. 48-49].
  18. Student's behavior did not improve in content mastery and his resource class. His parents contend this was due to a personality conflict between students. and his resource teacher.

19. Student's parents expressed concern about a perceived breach of confidentiality by his \*\*\* teacher when she allegedly told student that his parents did not have confidence in her. [T. 84-85].
20. Student's parents have a perception that an overall negativity exists toward student at the school and believe this atmosphere is a proximate cause of his misbehavior. His parents cite to a statement allegedly made by the Assistant Principal that student was "a moron" and a statement made by an aide that student did not want to behave for him "because he was \*\*\*." [T. 86-90, 93-94].
21. His parents further believe they have been misled by school officials regarding student's change in placement into the resource setting and believe that student's resentment towards the resource setting and resource teacher is partially the cause of student's behavior problems. [T. 56-65; P. Exh. #4].
22. Student's parents acknowledge that student has behavioral problems and that his misbehaviors in the classroom are in total opposition to how he has been taught to behave. [T. 111]. However, they do not see the need for a psychological evaluation. They do not believe student has an emotional disturbance, but believe his acting out is for attention. [T. 111].
23. Student's parents believe his defiance toward his resource teacher has been exacerbated by adverse comments he has overheard made by other teachers towards his \*\*\* teacher and that, as a student, he should not be privy to such comments. [T. 112- 113].
24. Student's parents have recently implemented a token economy system at home in conjunction with the system at school and believe this has benefited student [T. 112].
25. Student's behavior adversely affects his educational performance and those of his classmates.

#### Discussion

In April, 2005, DeSoto ISD sought permission from student's parents to conduct a reevaluation of student due to concerns about his behavior and academic progress. The school principal recommended obtaining a psychological evaluation of student as part of his reevaluation to determine a cause for his misbehavior. However, his parents refused to consent to a psychological evaluation.<sup>2</sup> Consequently, the ARD Committee authorized a reevaluation of

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<sup>2</sup> Section 29.0041 of the Texas Education Code provides: "(a) On request of a child's parent, before obtaining the parent's consent under 20 U.S.C. §1414 for the administration of any psychological examination or test to the child that is included as part of the evaluation of the child's need for special education, a school district shall provide to the child's parent: (1) the name and type of the examination or test; and (2) and explanation of how the examination or test will be used to develop an appropriate individualized education program for the child. (b) If the district determines that an additional examination or test is required for the evaluation of a child's need for special education after obtaining consent from the child's parent under Subsection (a), the district shall provide the information described by Subsections (a)(1) and (2) to the child's parent regarding the additional examination or test and shall obtain additional consent for the examination or test. (c) The time required for the district to provide information and seek consent under Subsection (b) may not be counted toward the 60 calendar days for completion of an evaluation under Section 29.004. If a parent does not give consent under Subsection (b) within 20 calendar days after the date the district provided to the parent the information required by that subsection, the parent's consent is considered denied.

student, without the psychological evaluation, while trying unsuccessfully to convince his parents to change their minds and consent to the psychological evaluation. Student's reevaluation was completed on May 24, 2005. It included both a sociological and emotional component that identified problem areas of his behavior, but the multi-disciplinary team did not recommend his eligibility for special education as a student with an emotional disturbance. Instead, their eligibility recommendations for student. were in the areas of speech and learning disabilities.

During the 2005-2006 school year, student continued to misbehave at school resulting in classroom disruptions, office referrals, detentions and suspensions. Various ARD Committee meetings were held to address his misbehavior and to try and convince student's parents to give consent for a psychological evaluation. They refused, resulting in DeSoto ISD initiating this action on April 19, 2006, seeking an order authorizing it to complete a psychological evaluation of student without parental consent.

The IDEIA, which became effective July 1, 2005, contains amended evaluation procedures. It continues to require local educational agencies to obtain informed parental consent prior to conducting any reevaluation of a child with a disability. *See*, 20 U.S.C. §1414(c)(3). Although these amendments specifically grant local educational agencies access to the due process hearing procedures when parents refuse consent for an *initial* evaluation (*see*, 20 U.S.C. §1414(a)(1)(D)(ii)(I)), they are silent as to the ability of a local educational agency to use the due process hearing procedures when parents refuse to consent to a reevaluation. *See*, 20 U.S.C. §1414(c)(3).<sup>3</sup>

The United States Department of Education has yet to issue the final federal regulations incorporating and interpreting the IDEIA. Consequently, the current federal regulations remain in effect to the extent they are not inconsistent with the IDEIA. The current federal regulations allow local educational agencies to pursue a reevaluation by using the due process procedures or mediation procedures when parents have refused to consent to a reevaluation. *See*, 34 C.F.R. §300.505(b). Accordingly, unless precluded by the final federal regulations, I find that local educational agencies may use the due process and mediation procedures of the IDEIA to pursue a reevaluation of a student with disabilities when parents refuse to consent to a reevaluation.<sup>4</sup>

The IDEIA also added a new limitation related to reevaluations. It provides that “[A] reevaluation . . . shall occur (i) *not more frequently* than once a year, unless the parent and the local educational agency agree otherwise . . . .” [emphasis added]. 20 U.S.C. §1414 (a)(2)(B). In the instant action, DeSoto ISD completed a reevaluation of student on May 24, 2005, yet seeks, within a one year period, to conduct a psychological evaluation. This raises a legal issue as to whether the one year limitation on reevaluations is applicable to the factual situation presented in

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<sup>3</sup> State law authorizes special education hearing officers in due process hearings brought under 20 U.S.C. §1415 to issue an order or decision that authorizes one or more evaluations of a student who is eligible for, or who is suspected as being eligible for, special education services and further provides that such an evaluation or order authorizes the evaluation without parental consent as if it were a court order for purposes of any state or federal law providing for consent by order of a court. *See*, TEX. EDUC. CODE §29.016.

<sup>4</sup> Congress prohibited the Secretary of Education from implementing or publishing in final form, any regulation that violates the Act or that procedurally or substantively lessens the protections provided to children with disabilities under the Act as embodied in regulations in effect on July 20, 1983. The regulation in effect on July 20, 1983, did not require parental consent for a reevaluation. *See, Carol v. Capallo*, 1982-83 EHLR DEC. 554.501 (D. RI. 1983). Parental consent was only required before “(i) [C]onducting a preplacement evaluation; and (ii) Initial placement of a child with a disability in a program providing special education and related services.” 34 C.F.R. §300.504(b)(1) (July 20, 1983).

this case and if so, whether DeSoto ISD can override this provision through the due process hearing procedures.

The IDEA generally defines what constitutes a full and individual evaluation or reevaluation. Such an evaluation consists of using a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether a child is a child with a disability and, if so, the content of the child's individualized education program, including information to enable the child to be involved in and progress in the general education curriculum. 20 U.S.C. §1414(b)(2). The evaluation is not to use any single measure or assessment as the sole criterion for determining whether the child is a child with a disability or determining the appropriate educational program for the child; and it must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 20 U.S.C. §1414(b)(2)(B) and (C). In addition to other requirements, the evaluation is to assess the child in all areas of suspected disability. 20 U.S.C. §1414(b)(3)(B). Local educational agencies must also provide notice to parents in accordance with the requirements of the Act that describes any evaluation procedures that the agency proposes to conduct. 20 U.S.C. §1414(b)(1).

The facts of this case conclusively establish that DeSoto ISD sought to include the requested psychological evaluation as part of student's May 24, 2005 reevaluation. It is not an attempt to complete a separate and distinct reevaluation of student within one year of his prior evaluation in contravention of the Act. The psychological evaluation is to be a component of his May 24, 2005 reevaluation, that is, it is one of the assessment tools needed to gather relevant developmental, emotional and behavioral information regarding student. Accordingly, I conclude that the IDEA's one year limitation on reevaluations is inapplicable to the factual situation of this case. Therefore, it is not necessary in this matter to decide whether the due process hearing procedures may be utilized by a local educational agency to override the lack of parental consent for a reevaluation that is requested within one year of the prior evaluation.

DeSoto ISD appropriately sought to include a psychological evaluation of student as part of its May 24, 2005 reevaluation because it suspected student may meet the eligibility criteria for special education as a student with an emotional disturbance and for purposes of determining whether any additions or modifications to his program were needed to enable him to meet his IEP goals and participate in the general education curriculum. Although student's parents raise some serious concerns regarding teacher misconduct and whether a negative atmosphere exists towards student on his campus - concerns that, if not already addressed, should be addressed by school officials - such concerns are ancillary to the behavior problems otherwise displayed by student at school. His in-class behavior is atypical, not just towards his teachers and other authority figures, but also students, and according to the evidence presented, significantly disrupts the educational setting. Although improvements in student's behavior have been noted of late, there still exist sufficient grounds to override the lack of parental consent and authorize DeSoto ISD to conduct a psychological evaluation of student. DeSoto ISD established by a preponderance of the evidence that it has legitimate concerns regarding student's behavior at school and needs to better understand its causes and obtain expertise in designing appropriate programming and behavior interventions strategies to address these concerns. Although a psychological evaluation is not necessary for the ARD Committee to make an eligibility determination regarding emotional disturbance, as this is an educational determination, not psychological, a psychological evaluation should provide additional insight into the source of student's behavior problems and provide information that an ARD Committee can use in planning appropriate strategies to address his problematic behaviors.

### Conclusion of Law

After due consideration to matters of record, matters of official notice, and the foregoing findings of fact, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following conclusions of law:

1. Local educational agencies must obtain informed parental consent prior to conducting any reevaluation of a child with a disability. *See*, 20 U.S.C. §1414(c)(3).
2. If parents refuse to consent to a reevaluation of their child with a disability, then local educational agencies may use the due process hearing procedures to seek authorization to conduct the reevaluation without parental consent. 34 C.F.R. §300.505(b).
3. A reevaluation cannot be conducted more frequently than one per year unless the parents and local educational agency agree otherwise. 20 U.S.C. §1414(a)(2)(B).
4. When a psychological evaluation is requested as a component of a reevaluation, but is not conducted as a result of parents' lack of consent, and when a local educational agency pursues the due process hearing procedures to complete the psychological evaluation within one year of completing the other components of its reevaluation, the psychological evaluation will be considered as part of that reevaluation and not a new reevaluation prohibited by the one year limitation contained in the IDEIA. 20 U.S.C. §1414(a)(2)(B).
5. A local educational agency seeking to override lack of parental consent for a reevaluation must establish an educational need for the reevaluation. A parent's refusal to consent for a reevaluation should be overridden whenever a local educational agency establishes that a reevaluation is necessary to determine: (1) whether a child with a disability continues to have such a disability and educational need; (2) the present levels of academic achievement and related developmental needs of the child; (3) whether the child continues to need special education and related services; or (4) whether any additions or modifications to the child's special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program ("IEP") of the child and to participate, as appropriate, in the general education curriculum. *See*, 20 U.S.C. §1414(c)(1)(B).
6. DeSoto ISD established by a preponderance of the evidence that the psychological evaluation of student is necessary to determine whether any additions or modifications to student's special education and related services are needed to enable him to meet measurable annual goals in his IEP and to participate, as appropriate, in the general education curriculum. *See*, 20 U.S.C. §1414(c)(1)(B).

ORDER

After due consideration of the record and the foregoing findings of fact and conclusions of law, I ORDER that DeSoto ISD is authorized to conduct a psychological evaluation of student without parental consent.

Finding that the public welfare requires the immediate effect of this Final Decision and ORDER, I hereby make it effective immediately.

SIGNED this 12th day of June 2005.

/s/James W. Holtz

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James W. Holtz  
Special Education Hearing Officer

DESOTO INDEPENDENT SCHOOL DISTRICT,	§	BEFORE A SPECIAL EDUCATION
Petitioner	§	
	§	
VS.	§	HEARING OFFICER FOR
	§	
Student B/N/F ***		
..	§	
Respondent	§	THE STATE OF TEXAS

SYNOPSIS

Issue: Whether school district may use the due process hearing procedures to override lack of parental consent for a reevaluation.

Held: For School District. Although the IDEIA specifically grants local educational agencies access to the due process hearing procedures when parents refuse consent for an *initial* evaluation (*see*, 20 U.S.C. §1414(a)(1)(D)(ii)(I)), they are silent as to the ability of a local educational agency to use the due process hearing procedures when parents refuse to consent to a reevaluation, or as in this case, a psychological evaluation as a component of the reevaluation. *See*, 20 U.S.C. §1414(c)(3). The current federal regulations allow local educational agencies to pursue a reevaluation by using the due process procedures or mediation procedures when parents have refused to consent to a reevaluation. *See*, 34 C.F.R. §300.505(b). Accordingly, unless precluded by the final federal regulations to be issued shortly, I find that local educational agencies may use the due process and mediation procedures of the IDEIA to pursue a reevaluation of a student with disabilities when parents refuse to consent to a reevaluation.

Cite: 34 C.F.R. §300.505(b).

Issue: Whether IDEIA’s limitation of no more than one reevaluation in one year is applicable in the situation where parents granted consent for the academic and speech components of a proposed reevaluation, but refused consent for a psychological evaluation requested as part of the reevaluation.

Held: For School District. When a psychological evaluation is requested as a component of a reevaluation, but is not conducted as a result of parents’ lack of consent, and when a local educational agency pursues the due process hearing procedures to complete the psychological evaluation within one year of completing the other components of its reevaluation, the psychological evaluation will be considered as part of that reevaluation and not a new reevaluation prohibited by the one year limitation contained in the Act.

Cite: 20 U.S.C. §1414(a)(2)(B).

Issue: Whether school district established an educational need for overriding lack of parental consent and authorizing a psychological evaluation?

Held: For School District. School District established by a preponderance of the evidence that the psychological evaluation of student was necessary to determine whether any additions or modifications to his special education and related services were needed to enable him to meet him

measurable annual goals in his IEP and to participate, as appropriate, in the general education curriculum.

Cite: *See*, 20 U.S.C. §1414(c)(1)(B)