

MESQUITE INDEPENDENT
SCHOOL DISTRICT,

Petitioner,

V.

STUDENT, *B/N/F*
PARENT,

Respondent.

§ BEFORE A SPECIAL EDUCATION
§
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§
§
§ HEARING OFFICER
§
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§
§
§ FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

I. STATEMENT OF THE CASE

Petitioner, Mesquite Independent School District (“MISD”), requested a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 *et. seq.*, requesting an order from the undersigned Hearing Officer overriding the lack of consent for evaluations of Respondent, Student *b/n/f* Parent (“Student”). MISD specifically requested evaluations related to 1) other health impaired (“OHI”), based upon Attention Deficit Hyperactivity Disorder (“ADHD”), and 2) emotional disturbance (“ED”) to determine whether Student qualifies for special education under these handicapping conditions.

II. PROCEDURAL HISTORY

On April 27, 2007, the Texas Education Agency (“TEA”) received MISD’s Request for Due Process Hearing and assigned the case Docket No. 239-SE-0407. On May 1, 2007, the undersigned Hearing Officer issued the Initial Scheduling Order, setting forth all relevant deadlines pursuant to IDEIA. The undersigned scheduled the prehearing telephone conference for May 21, 2007, the Due Process Hearing for June 25, 2007, and reminded the parties of the July 11, 2007, Decision deadline.

On May 21, 2007, the parties convened for the prehearing telephone conference. In attendance were the following: 1) **, counsel for MISD; 2) **, Special Education Administrative Officer for MISD; 3) Student’s father; 4) the court reporter, who made a record of the telephone conference; and 5) the undersigned Hearing Officer. The parties agreed to the current schedule for the hearing. Accordingly, the Due Process Hearing

remained on the setting of June 25, 2007, and the Decision deadline remained July 11, 2007.

The Due Process Hearing convened on June 25, 2007. Student waived his right to a closed hearing. In attendance were the following: 1) **, counsel for MISD; 2) **, Special Education Administrative Officer for MISD; 3) **, Special Education Coordinator for ** School; 4) Student's father and step-mother; 5) the court reporter, who made a record of the hearing; and 6) the undersigned Hearing Officer. MISD called five (5) witnesses who were also cross-examined by Student; Student called nine (9) witnesses, who generally were not cross-examined by MISD, and recalled one (1) of MISD's witnesses. MISD introduced seventy-two (72) exhibits and Student introduced twenty-six (26). Both sides rested and the hearing concluded on June 25, 2007. At the conclusion of the hearing, the parties and Hearing Officer agreed to a post-hearing schedule. The parties' closing arguments would be due July 9, 2007, and the Decision deadline remained July 11, 2007.

Following the June 25, 2007, Due Process Hearing, Student filed a Motion to Dismiss, contending that MISD failed to convene an Admission, Review, and Dismissal Committee ("ARD Committee") prior to filing this Request for Due Process Hearing. MISD filed its Response to the Motion to Dismiss on June 29, 2007. Student's Motion to Dismiss is carried with the case and disposed of in this Decision.

III. FINDINGS OF FACT

1. Student is a ** who resides with his father and step-mother and siblings within the jurisdictional limits of MISD. Student attends ** school and will enter the ** grade in fall 2007. Student currently is not enrolled in MISD.
2. Student previously attended school in several school districts, including Garland ISD, Ennis ISD, and Waxahachie ISD.
3. Garland ISD performed a Full Individual Evaluation ("FIE") in 2000 and coded Student under the qualifying conditions of ED and speech impairment ("SI"). The ED qualification was based upon a 1999 psychological evaluation.

Ennis ISD: 2000 – 2005

4. Student transferred to Ennis ISD in fall 2000 where he was originally coded as OHI, ED, and SI. Student was educated under these codes until 2003, at which time Ennis completed an FIE and added the qualifying condition of severe learning disability ("SLD"). At that time, Student's 1999 psychological assessment and a 2001 Speech Impairment Disability Report were noted as "active."

5. In spring 2004, Student's ARD Committee coded him as SLD and SI only. Ennis had not re-tested Student for ED and OHI and those codes had lapsed. The Committee requested assessments in these areas but Student's father refused to allow the assessments.
6. In August 2004, Student's ARD Committee met and again coded him as SLD and SI. Student's father reported a neuropsychological evaluation had been conducted but the evaluation was not found in the records of this ARD Committee meeting. There is insufficient evidence to establish that the Ennis ARD Committee dropped the ED classification based upon the neuropsychological evaluation Student's father mentioned. There was no psychological evaluation performed by a Licensed Specialist in School Psychology ("LLSP") upon which Ennis ISD based its decision to drop the ED classification.
7. Student attended Waxahachie ISD during part of school year 2005-2006.

Mesquite ISD: 2006-2007

8. Student transferred to MISD in January 2006 when he was in the ** grade. Student attended ** Elementary. Student's transfer ARD Committee meeting convened at MISD in January 2006. An evaluation plan was completed calling for re-evaluation by February 2006. The Committee requested medical information to evaluate the OHI disability. The ARD Committee was concerned that the ED classification had been dropped without proper documentation by Ennis ISD. School personnel reported behavior problems.
9. The ARD Committee convened on February 24, 2006, and March 10, 2006. The Committee coded Student as SLD and SI and again requested medical information related to, and parental consent for, the OHI evaluation. This information and consent were never provided by Student's father.
10. In fall 2006, Student attended ** School and was enrolled in the **grade. Student's father requested an ARD Committee meeting for September 22, 2006. MISD informed Student's father that he needed to complete the agreement for ED and OHI assessments. Student's father did not provide the requested consent and cancelled the ARD Committee meeting for September 22, 2006. School personnel at ** reported behavior problems.
11. Student's annual ARD Committee meeting convened on March 1, 2007, and, based upon a request by Student's father, recessed until March 8, 2007. The ARD Committee requested consent for OHI and ED evaluations. Student's father refused to give consent for the ED evaluation but stated he would allow the OHI assessment. The ARD Committee recessed and re-convened on March 22, 2007. Student's father still refused to provide consent for the ED evaluation.

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12. On March 26, 2007, MISD sent Student's father the Notice of Proposal to Provide/Change Services, informing Student's father that the ARD Committee was not removing the request for the psychological evaluation.
13. On March 29, 2007, the Notice of Evaluation was sent to Student's father, requesting the OHI/Medical Information. On April 3, 2007, MISD sent Student's father an additional request that he complete and return the OHI/Medical Information consent. Student's father failed to provide the requested consent.
14. Since enrolling in MISD, Student has manifested problem behaviors. Specifically, Student has difficulty developing and maintaining appropriate peer relationships. Journal entries and written class work indicate possible depression and self-harming thoughts. Student expressed persistent unhappiness at home and school. Most alarming was Student's statements of death.
15. Student's father also expressed to school personnel that he was concerned about Student's erratic behavior, impulsivity, aggression, and preoccupation with death and killing.
16. Student's ARD Committee made the decision to re-evaluate Student under the OHI and ED classifications. Student's father refused to provide written consent for these evaluations.
17. MISD filed its Request for Due Process Hearing on April 27, 2007, seeking an order to override the failure to consent to the OHI and ED assessments.
18. MISD's use of the override provision of IDEIA and the federal implementing statutes was appropriate.
19. The evidence established that MISD's efforts in obtaining consent for the OHI and ED evaluations from Student's father were reasonable.

IV. DISCUSSION

34 C.F.R. 300.300(c) requires a school district to obtain parental consent prior to conducting a re-evaluation of a child with a disability. If the parent refuses such consent, the school district may either 1) pursue the re-evaluation by using the consent override procedures set forth in Section 300.300(a)(3) or 2) decline to pursue the re-evaluation. Section 300.300(c)(ii) & (iii). See also 20 U.S.C. 1414(a)(1)(D). In this case, MISD chose the consent override procedures.

In *Andress v. Cleveland Independent School District*, 64 F. 3d 176, 178-179 (5th Cir. 1995) the court found that "there is no exception to the rule that a school district has a right to test a student itself in order to evaluate or re-evaluate the student's eligibility under

IDEA.”¹ The only additional requirement for using the consent override procedure is that the school district must document its reasonable efforts to obtain parental consent. Section 300.300(d)(5).

In the instant case, the evidence presented clearly established a need for MISD to re-evaluate Student under the OHI and ED classifications. This young man is alerting everyone that he is greatly troubled and that he is flirting with disaster in the form of harming himself or others. It is imperative that MISD ascertain whether such behavior and expressed depression are manifestations of ED and/or OHI and if so, to craft an educational program to specifically address these disabilities. MISD has sought permission to evaluate Student since he entered the district. ARD Committee minutes manifest the on-going debate with Student’s father over the necessity of the evaluations and his failure to provide the requisite consent.

In seeking an override, MISD has stepped up to the plate and taken on a burden it clearly did not have to shoulder. MISD may conduct the ED and OHI evaluations without the consent of Student’s father. It should be noted that even if the Student is shown to meet the ED and OHI criteria, MISD may only provide him with special education services under these classifications if Student’s father agrees. However, at the very least, all involved with Student would benefit from knowing what is causing his behavioral problems, his depression, and his preoccupation with death.

**V.
CONCLUSIONS OF LAW**

1. Student is eligible for special education services based upon his classifications of SLD and SI, as mandated under the provisions of IDEIA and its implementing regulations. 20 U.S.C. §1400 *et seq.*
2. MISD is allowed to conduct re-evaluations of Student related to OHI and ED despite lack of parental consent. 34 C.F.R. 300.300(a)(3); *Shelby v. Conroe ISD*, 454 F.3d 450 (5th Cir 2006), *cert. denied* (2007); *Andress v. Cleveland Independent School District*, 64 F. 3d 176 (5th Cir. 1995).
3. MISD expended reasonable efforts in obtaining consent from Student’s father prior to seeking a consent override. 34 C.F.R. 300.300(d)(5).

¹ This ruling was upheld in the recent case of *Shelby v. Conroe ISD*, 454 F.3d 450 (5th Cir 2006), *cert. denied* (2007), in which the court held that “where a school district articulates reasonable grounds for its necessity to conduct a medical evaluation on a student, a lack of parental consent will not bar it from doing so.”

**VI.
ORDER**

After due consideration of the record, the foregoing Findings of Fact, and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by MISD is GRANTED. Student's parents are ORDERED to fully cooperate in the scheduling and completion of the requisite evaluations regarding the ED and OHI classifications. It is further

ORDERED that the Motion to Dismiss filed by Student is DENIED.

Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED this 11th day of July 2007.

Deborah Heaton McElvaney
Special Education Hearing Officer

COPIES SENT TO

Petitioner's Counsel

Respondent's Parent

MESQUITE INDEPENDENT SCHOOL DISTRICT,	§	BEFORE A SPECIAL EDUCATION
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V.	§	HEARING OFFICER FOR THE
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PARENT,	§	
	§	
Respondent	§	STATE OF TEXAS

SYNOPSIS

ISSUE: *Whether MISD is entitled to re-evaluate Student under the ED and OHI classifications even though Student's parents refuse to provide consent for such evaluations.*

C.F.R. CITATION: 34 C.F.R. 300.300(a)(3) & 300.300(d)(5).

HELD: For MISD. Federal law and case authority clearly authorize the educational testing of a student over the objection of a parent or guardian when such testing is justified and the school district has exerted reasonable efforts to obtain consent.