

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman St., Denver, CO 80203	▲ <b>COURT USE ONLY</b> ▲
<b>DOUGLAS COUNTY SCHOOL DISTRICT RE-1</b> Complainant,  vs.  <b>[Mother] and [Father]</b> Respondents.	
<b>AGENCY DECISION</b>	

On November 27, 2017, the Colorado Department of Education, Exceptional Student Services Unit, received a due process complaint (“Complaint”) filed by Douglas County School District RE-1 (“District”) seeking an order authorizing the District to proceed with a psychological evaluation of [Student] without the consent of his parents, [Mother] and [Father] (collectively “Respondents”), in accord with the Individuals with Disabilities Education Act (“IDEA”) and its implementing regulations at 34 C.F.R. § 300.300. The complaint was forwarded to the Office of Administrative Courts and assigned to Administrative Law Judge (“ALJ”) Alice Hosley for an impartial due process hearing. Hearing was held in Denver, Colorado on December 28, 2017. The District was represented by [Counsel for the District], Esq., Deputy General Counsel for the District. Respondents appeared on their own behalf. [Father] was present in the courtroom and designated to present and cross-examine witnesses on behalf of the Respondents. [Mother] appeared by telephone. At hearing, the ALJ admitted into evidence the District’s Exhibits A, B, C, and F. Respondents did not submit a prehearing statement, witness list or exhibit list prior to hearing. Respondents did not testify at hearing or call any witnesses to testify on their behalf; as such, no exhibits or other evidence were admitted into the record on behalf of the Respondents.

### ISSUE PRESENTED

Whether the District can proceed with a psychological evaluation of [Student], by an evaluator of the District’s choice, without the consent of the Respondents.

### FINDINGS OF FACT

1. [Student] is a student in the District who has been identified and as served as a child with a disability under the Individuals with Disabilities Education Act for at least three years during his attendance at a middle school in the District.

2. [Student] entered the ninth grade at the beginning of the 2017-2018 school year.

3. The Individualized Education Plan (“IEP”) that was in place at the time [Student] attended middle school in the District, through the end of the 2016-2017 school year, identified [Student] as eligible for services under the IDEA for two categories: Serious Emotional Disability (“SED”) and Specific Learning Disability (“SLD”). [Student] has anxiety in the school setting.

4. While in middle school, [Student] attended school in the general population up to seventy-nine (79%) of the school day.

5. [Student] has continuously been on a Response Management Safety Plan (“Safety Plan”) since elementary school.

6. During the transition from middle school to high school, a matriculation meeting was held on May 23, 2017 with members of [Student]’s IEP team to discuss his placement for high school. Exhibit F.

7. As a result of the May 23, 2017 IEP team meeting, the recommendation from the school administration was that [Student] should have an out of district placement for high school.

8. When the District administrators received this recommendation, questions arose regarding the [Student]’s programming needs in attempt to find the best out of district placement for [Student].

9. As a result, an IEP team was assembled again in June 2017 and a determination was made, with Respondents’ consent, to re-evaluate [Student] in order to accurately identify all the programs and services he is currently eligible to receive under the IDEA and ensure that his high school placement offered the necessary programming and interventions to meet his needs and meet the requirements of free appropriate public education (“FAPE”) mandated by the IDEA.

10. The scope of the reevaluation was intended to be the whole body of evidence, including but not limited to, a review of [Student]’s entire school record, previous IEPs, grades, attendance, and teacher feedback. The District’s goal was to ensure a comprehensive evaluation of [Student] was conducted in order to determine his eligibility, placement and programming needs in order to create an IEP for his high school education.

11. During the summer of 2017, [Student] was evaluated in the areas of academics, social/emotional, speech language and cognitive ability.

12. On August 3, 2017, an IEP meeting was held. The evaluators who conducted [Student]'s evaluations presented their findings to the whole IEP team, which included Respondents.

13. The individuals who conducted the evaluations in the summer of 2017 were also qualified to interpret the results of those evaluations.

14. During the presentations of [Student]'s evaluations during the August 3, 2017 IEP meeting, the District determined that the evaluations had not been comprehensive enough to make the necessary decisions about [Student]'s eligibility and programming needs. Specifically, the District identified remaining issues and determined that further evaluations relating to autism, occupational therapy and [Student]'s psychiatric functioning were necessary before [Student]'s high school placement could be established or an accurate IEP created.

15. The evaluations presented at the August 3, 2017 meeting revealed that [Student] has atypical behaviors that include violent thoughts, verbalizations and ideations. Further, [Student] reportedly uses the graphic violent thoughts and verbalizations to calm himself, which was determined to be an atypical coping skill. Evaluators reported during the August 3, 2017 IEP meeting that [Student] made specific comments during the evaluations that raised red flags to them, including that some people deserve to die, a pervasive interest in what the dead skin looks like on people and animals, and the shape of dead mice and rabbit bodies when killed by a trap.<sup>1</sup>

16. Respondents participated in the August 3, 2017 meeting, and were allowed to ask questions of the evaluators regarding their findings and interpretations of the data collected.

17. [Director of Special Education], Director of Personalized Learning – Special Education for the District, was present at the August 3, 2017 IEP meeting and testified on behalf of the District at the hearing.

18. [Director of Special Education] participated in the discussion at the August 3, 2017 IEP meeting with Respondents and explanation as to why the District determined that additional evaluations were necessary before a high school placement for [Student] could be made.

19. Prior written notice was sent to Respondents on August 11, 2017, seeking parental consent for the additional evaluations proposed by the District. Exhibit A.

20. Respondents ultimately consented to the autism and occupational therapy testing, which has been initiated by the District.

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<sup>1</sup> The specific statements allegedly made by [Student] are not found by the ALJ to be true, but rather the basis for the District's determination that further evaluations were necessary. Notwithstanding, there was no evidence presented to dispute the statements.

21. On September 21, 2017, [Father] consented to all of the proposed evaluations, including psychological testing of [Student], by his signature on the Prior Notice and Consent for Reevaluation form provided by the District. Exhibit A.

22. The District did not have a qualified individual on staff to conduct the psychological testing it had identified as necessary. As a result, identification of an outside evaluator was necessary to complete the testing.

23. Based upon [Father]'s consent to the psychological testing, the District sought participation from the Respondents to identify a mutually agreeable evaluator. Respondents participated in the selection of the evaluator and scheduled the evaluation for [Student].

24. The selected evaluator conducted an initial meeting with Respondents prior to conducting the evaluation of [Student]. At that initial meeting, [Father] continued to consent to the psychological evaluation but [Mother] informed the evaluator that she did not consent.

25. After consultation with legal counsel, the evaluator informed the parties that she would not conduct the evaluation without the consent of [Mother] unless provided with a court order authorizing her to do so.

26. At some point after the initial meeting with the evaluator, the ALJ finds that [Father] withdrew his consent for the psychological testing. This was not done in writing or by any formal process, but is based upon the representations made in Respondents' Answer to the Complaint.

27. [Student] has not undergone any psychological testing relating the requests by the District from the August 3, 2017 IEP meeting.

28. At the beginning of the 2017-2018 school year, pending parental consent and the additional evaluations, the District offered [Student] an interim placement at [High School] so that [Student] could continue to have access to the educational environment. This interim placement was never intended by the District to be permanent; it was intended to be a temporary placement for [Student] pending the results of the additional evaluations and until an accurate permanent placement could be identified.

29. [Principal], Principal at [High School], testified on behalf of the District at hearing. [Principal] has a master's degree and doctorate in educational leadership. [Principal] also participated in the August 3, 2017 IEP meeting.

30. [High School] is a high school with a primary focus on providing an educational setting primarily for students with identified mental health disabilities. A

student gains admission into [High School] through the District's IEP process. [High School] services all nine traditional high schools in the District.

31. [High School] is an educational setting. There is no nurse on site, no medications are administered at the school and no psychiatric needs are addressed by the staff. The staff at [High School] does not diagnose or treat mental illness.

32. [High School] students receive academic and mental health instruction and guidance. Generally, students are enrolled in an Effective Skills course and receive four hours a week of mental health services in a group setting. This course is not designed to treat an individual's diagnosed mental illness.

33. [Student] does not have a current IEP due to the District's determination that it cannot recommend an accurate high school placement, determine the services [Student] is eligible to receive, identify the appropriate programming or establish an IEP for [Student] until all additional testing, including psychiatric functioning evaluations, have been completed.

34. [High School] currently provides [Student] with individualized programming in the center-based SED program. [Student] does not participate in a general education population at [High School]. All of his academic instruction is conducted one-on-one with a staff member.

35. [High School] does not typically provide the level of programming that [Student] is temporarily receiving. The level of programming [Student] is receiving is more typical of out of district placements. The level of support [High School] is currently providing to [Student] is not sustainable.

36. [Student] attends two periods a day, Resource to target academics and Integrative Math II. In addition, he meets with the mental health provider at [High School] in regards to how to keep safe and have safe thoughts. Exhibit B.

37. [Student] continues to be on a Safety Plan at [High School] that requires a daily check-in system; he is placed on a Level System; he has increased supervision and one-on-one supervision throughout his day within the school setting.

38. The following goal was also added to [Student]'s Safety Plan for implementation during his attendance at [High School]: [Student] will refrain from using violent thinking, talking and behaving as a calming strategy when feeling anxious or overwhelmed at school and be redirected to a school appropriate calming strategy<sup>2</sup> with one or less prompt in 4/5 trials. Exhibit B.

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<sup>2</sup> School appropriate calming strategies could include: listening to calming music, stating positive mantras, seeking conversations with an adult, taking a brain break, removing himself from his environment. Exhibit B.

39. At the August 3, 2017 IEP meeting, the school and district IEP team members determined that the evaluations presented had indicators of autism not previously addressed for [Student]’s programming and interventions. In addition, the evaluations indicated possible paranoia and psychotic features that had not been previously identified. The IEP team determined that the additional indicators identified during the evaluations may have specific types of interventions not previously identified in [Student]’s educational programming that needed further exploration.

40. The school and district administrators participating in the IEP meeting were extremely concerned that [Student] was using the violent thinking and verbalizations as a coping and calming mechanism.

41. In the time that [Student] has been receiving services at [High School], [Principal] testified that [Student] is showing success by having less anxiety; however, his violent thoughts, verbalizations and ideations have not correspondingly decreased.

42. [Principal] believes [Student]’s violent thoughts, ideations and verbalizations are related to his ability to be safe at school, to himself and others.

43. The District believes that the psychiatric evaluations it requested as a result of the August 3, 2017 IEP meeting will help to identify a targeted intervention and the function of the behavior that will allow the District to accurately identify [Student]’s eligibility for services under the IDEA as well as appropriate programming to meet the requirements for FAPE.

44. The District deems it necessary to conduct the psychiatric evaluations identified at the August 3, 2017 IEP meeting to comprehensively determine the extent of [Student]’s disabilities. The District is seeking answers from the psychiatric functioning evaluation as to why [Student]’s violent thoughts, verbalizations and ideations are so prevalent and perseverative, and why they do not decrease with a decrease in [Student]’s anxiety.

## **CONCLUSIONS OF LAW**

1. The IDEA was enacted to ensure that all children with disabilities have access to “a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.” 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education (“FAPE”) is defined as “special education and related services . . . provided in conformity with an individualized education program.” 20 U.S.C. § 1401(9).

2. The individualized education program (“IEP”) is the basic mechanism through which the school district’s obligation of providing a FAPE is achieved. *Murray by & Through Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10<sup>th</sup> Cir. 1995). The local school district is required to develop, implement and annually revise an IEP that is calculated to meet the student’s specific needs and educate that student

in the “least restrictive environment”, meaning that, “[t]o the maximum extent appropriate,” disabled children should be educated in public school classrooms alongside children who are not disabled.” 20 U.S.C. §§ 1414(d) and 1412(a)(5)(A).

3. The District must obtain informed parental consent prior to conducting any reevaluation of a child with a disability. 34 C.F.R. 300.300(c)(1).

4. If the parent refuses to consent to the reevaluation, the District may pursue the reevaluation by using the consent override procedures described in paragraph 300.300(a)(3). 34 C.F.R. 300.300(c)(2).

5. The consent override procedures include the procedural safeguards, including the due process procedures under §§ 300.507 through 300.516. 34 C.F.R. 300.300(a)(3)(i).

6. The District must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. 300.304(c)(4).

7. In order for the District to determine the appropriate special education needs and related services a child requires in order to comply and provide FAPE is a comprehensive evaluation of the student. The evaluation process is the procedure to determine whether a child has a disability, as well as the nature and extent of the child's needs for special education and related services. 34 C.F.R. 300.304(b)(1).

## **DECISION**

The ALJ concludes that the District is entitled to seek a due process hearing for a determination by the ALJ that the psychiatric function testing the District has identified is necessary in order for [Student]'s reevaluation to be sufficiently comprehensive, without Respondents' parental consent.

The ALJ concludes that the District has sufficiently demonstrated that the psychiatric function testing it has requested is necessary to determine [Student]'s eligibility for services under the IDEA; [Student]'s programming needs and targeted interventions in the educational environment; an accurate high school placement for [Student]; and a comprehensive IEP that represents [Student]'s unique needs.

The ALJ concludes that the evaluations previously conducted do not satisfy the requirement of a comprehensive reevaluation, given the indicators of additional disabilities not previously identified and addressed.

The ALJ concludes that the District cannot make an accurate recommendation for educational programming, high school placement or create a current IEP until the

psychiatric function testing has been completed, analyzed and presented to the IEP team.

The ALJ concludes that if the Respondents fail to make [Student] available and facilitate the psychiatric function testing, the Respondents will lose any right to seek action against the District for the denial of FAPE under the IDEA.

This Decision is the final decision except that any party has the right to bring a civil action in an appropriate court of law, either federal or state, pursuant to 34 C.F.R. 300.516.

**DONE AND SIGNED:** January 9, 2018

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Alice Q. Hosley  
Administrative Law Judge