STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-0552E
	)	
[redacted],	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference at sites in Tallahassee and Lauderdale Lakes, Florida, on February 22, 2011, before Administrative Law Judge Edward T. Bauer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Barbara J. Myrick, Esquire
Broward County School Board
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

For Respondent: Ms. [redacted], parent
(Address of record)

STATEMENT OF THE ISSUE

Whether Petitioner should be permitted to conduct initial psycho-educational and psychiatric evaluations of [redacted] over the objection of the parent, where the parent has unequivocally declined all special education services.

PRELIMINARY STATEMENT

On February 2, 2011, Petitioner Broward County School Board filed a request for a due process hearing after [redacted] [redacted]'s mother, refused to grant Petitioner consent to conduct psycho-educational and psychiatric evaluations of [redacted] Petitioner's request was promptly forwarded to the Division of Administrative Hearings and transferred to the undersigned for further proceedings.

Pursuant to notice, the due process hearing was held on February 22, 2011. At the hearing, Petitioner called the following witnesses: Denise Reed; Lauren Rubenstein; Lydia Rodriguez; and Dr. Beth Pomerantz. Petitioner's Exhibits 1, 2, 3, 4, 5, 6, 8, 10, 11, 13, 17, 18, 19, 20, and 21 were offered and received into evidence. [redacted] testified on [redacted]'s behalf, but offered no exhibits.

The final hearing transcript was filed on March 9, 2011. Petitioner timely[1] filed a Proposed Final Order that has been considered in the preparation of his order. [redacted] did not file a proposed final order.

For stylistic convenience, the undersigned will use masculine pronouns in this Final Order when referring to [redacted] The masculine pronouns are neither intended, nor should be interpreted, as a reference to [redacted]'s actual gender.

Unless otherwise noted, citations to the Florida Statutes refer to the 2010 version.

FINDINGS OF FACT

1. [redacted] is a [redacted] who presently attends a high school in the Broward County School District.

2. [redacted] who has been continuously enrolled in the Broward County School District since 2001, has at no time received special education services.

3. Although [redacted] performed adequately during middle school and graduated on schedule with [redacted] peers, [redacted] was apprehensive about the prospect of starting high school. [redacted]'s fears were precipitated, at least in part, by the fact that all of [redacted] middle school friends would be attending a different high school.

4. Prior to starting high school in August 2010, [redacted] informed [redacted] mother that [redacted] intended to fail all of [redacted] classes. True to [redacted] word, [redacted] refused to apply [redacted] academically from the very beginning of the school year. Despite the best efforts of [redacted] teachers, [redacted]'s lack of effort continued throughout the semester, at the end of which [redacted] received final grades of "F" in six classes, as well as a "D" in one class.[2]

5. In addition to [redacted] poor academic performance, [redacted] has consistently exhibited a number of unusual behaviors, which are

well summarized by Ms. Rubenstein, [redacted]'s physical education teacher, who made the following observations:

> [redacted] wears the same outfit every day. [redacted] hair is un-kept and always in [redacted] face. More often than not, students will not sit near [redacted] because of [redacted] odor.
>
> [redacted] can be found in the crowded hallway of the PE area with [redacted] nose literally touching the corner of the wall and a column. [redacted] isolates [redacted] from all teen interaction and does not attempt to participate ever.
>
> [redacted] does not change [redacted] clothes on dress out days even though [redacted] was given alternative areas to do this, in case locker room changing was the issue. [redacted] also, does not participate in [redacted] clothes, which was also offered so [redacted] could earn points.
>
> As a result, [redacted] has a 7% in the class. [redacted] started listening to music while [redacted] is supposed to be engaged in the class.
>
> There have been times[3] when [redacted] will have spit balls in [redacted] hair from other students. While most students do not mess with [redacted] I feel [redacted] is creating a target for [redacted]

6. Ms. Rodriguez, [redacted]'s English teacher, has expressed similar concerns with respect to [redacted]'s behavior. For example, [redacted]'s refusal to bathe regularly[4] has resulted in an odor so unpleasant that some students have asked to be moved to a different part of the classroom. In addition, Ms. Rodriguez has noted that [redacted] never interacts with other students. Further, when Ms. Rodriguez speaks with [redacted] [redacted] generally responds with

unintelligible grunts or noises. Also, Ms. Rodriguez noticed, on at least one occasion, that [redacted] was "staring" at her as she moved about the classroom. Finally, Ms. Rodriguez is troubled by portions of [redacted]'s journal entries, which include the following:

> Journal 11-22-10
>
> 5 things I am thankful for . . . . I know my really amazing music such as Big Lurch . . . . And cause Big Lurch is just so cool he should totally be freed from jail. Can't believe he got life in jail for eating his friend's lungs . . . . [O]h yeah my backpack. Backpack is so amazing and I love it like a best friend that is inanimate.
>
> * * *
>
> Journal 12-1-10
>
> This story might be offensive to dumb people . . . . Yeah, I'm not going to college cause its [sic] dumb and I ALREADY WASTED 15 YEARS of my life in this DUMB HELL and I will not waste any more . . . damn 3 more years 3 more years until nomad roaming the streets.
>
> * * *
>
> Journal 1-3-11
>
> If I could meet anyone it would be Anton Singleton (Big Lurch) because he is my hero to [sic] bad he is serving life in new folsom or I would meet up with him for real ah the questions I would ask Lurch would be What's it like being the greatest gangsta rapper to ever live? What's it like being in jail for life? Why don't you just poison the guards [sic] soup like you did in The . . . video?

* * *

> Journal 1-4-11
>
> My childhood > Everyone elses [sic] childhood
> It's cause I am better then [sic] all these peasants. HAHAHAHA these kids got some sad lives HAHAHAHAHAHAHAHAHAHAHA

* * *

> Journal 2-7-11
>
> [W]hats [sic] so great about [America]? Nothin [sic] this country sucks just a trashpile of sh [sic] if you ask me . . . . I will never pledge to the flag crossing my heart god damn to hell. That's like selling your soul damn.

7. Ms. Denise Reed, an assistant principal at the high school, has likewise observed [redacted] engage in unusual behavior. [redacted] first came to Ms. Reed's attention at the beginning of the academic year, when she was summoned to the auditorium to speak with [redacted] about [redacted] refusal to be photographed for a school identification card. Upon arriving in the auditorium, Ms. Reed observed [redacted] standing alone near the doors, while the other students were on stage having their photographs taken. As Ms. Reed spoke with [redacted] (in an effort to understand why [redacted] refused to be photographed), [redacted] kept [redacted] head down and repeatedly stated, in a barely audible tone, "no." Ultimately, Ms. Reed obtained [redacted]'s compliance after she assured [redacted] that [redacted] picture would not appear in the school yearbook.

8. Later in the school year, Ms. Reed issued [redacted] an administrative detention after [redacted] refused to serve a detention from one of [redacted] teachers. For reasons that are unclear, [redacted] affixed a used band-aid (that was covered in dried blood) to the administrative detention sheet.[5] Written in [redacted]'s handwriting on the detention form, next to the pre-printed language "Reason for Detention," was the statement, "Being superior to everyone in this pathetic excuse for a school."[6]

9. After conventional interventions failed to help [redacted] Petitioner decided that it should conduct initial psycho-educational and psychiatric evaluations to determine if [redacted] was eligible for special education services.

10. Petitioner requested consent to perform the evaluations from [redacted] [redacted]'s mother, which she denied. [redacted] also informed Petitioner that she is refusing any and all special education services for her child, a position that she reaffirmed during her final hearing testimony.

CONCLUSIONS OF LAW

A. Jurisdiction

11. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 1003.57(1)(b) and 120.57(1), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

B. Statutory Requirements Under the IDEA

12. Congress enacted the Individuals with Disabilities Education Act ("IDEA") to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); see also Winkelman v. Panama City Sch. Dist., 550 U.S. 516, 523 (2007). Of import to the instant case, the term "children with disabilities" includes, but is not limited to, children suffering from emotional disturbances. 20 U.S.C. § 1401(3)(A); Fla. Admin. Code R. 6A-6.03016.

13. To ensure that students with disabilities receive the services to which they are entitled, the IDEA requires that school districts enact programs to identify, locate, and evaluate children with disabilities in need of special education and related services. 20 U.S.C. § 1412(a)(3)(A). In particular, where it appears that a child may be eligible for special education services, and neither the parent nor child has requested a determination of eligibility, the school district may request that an initial evaluation be conducted to "determine if the child is a child with a disability." 20 U.S.C. § 1414(a)(1)(B); Fla. Admin. Code R. 6A-6.0331(3) ("Each school district must conduct a full and individual evaluation

before the provision of ESE. Either a parent of a student or a school district may initiate a request for initial evaluation to determine if the student is a student with a disability").

14. In situations where the school district is requesting an initial evaluation, it must first seek consent from the student's parent or guardian. 20 U.S.C. § 1414(a)(1)(D)(i)(I); Fla. Admin. Code R. 6A-6.0331(4)(a) ("[T]he school district proposing to conduct an initial evaluation to determine if a student is a student with a disability . . . must obtain informed consent from the parent . . . before conducting the evaluation"). If such consent is not granted, the school district may initiate proceedings before an impartial hearing officer to obtain an order that requires the student to be present for the evaluation, thereby overriding the parent's lack of consent. 20 U.S.C. § 1414(a)(1)(D)(ii)(I); Fla. Admin. Code R. 6A-6.0331(4)(e) ("If the parent of a student suspected of having a disability . . . does not provide consent for initial evaluation . . . the school district may, but is not required to, pursue initial evaluation of the student by using the mediation or due process procedures").

C. Limitations to Consent Override

15. The consent override procedure contained in 20 U.S.C. section 1414(a)(1)(D)(ii)(I) is not without limitation, as demonstrated by Fitzgerald v. Camdenton R-III School District,

439 F.3d 773 (8th Cir. 2006). In Fitzgerald, the school district had cause to believe that one of its students, S.F., was in need of special education services based upon his poor academic performance. Id. at 774. The school district requested, and was denied, consent from the S.F.'s parents to evaluate the child under the IDEA. Id. At that point, the parents withdrew S.F. from the school district and began to educate him at home, as well as privately. In addition, the parents expressly waived all benefits under the IDEA. Id. Nevertheless, the school district initiated a due process hearing under the "child find" provisions of the IDEA, at the conclusion of which an administrative panel authorized the district to evaluate S.F. Id. at 774-75. The parents attempted, unsuccessfully, to obtain relief in Federal district court. Id. at 775.

16. On appeal, however, the Eighth Circuit Court of Appeals concluded that the school district was not entitled to evaluate S.F. Id. at 775-77. In so holding, the court observed that pursuant to 20 U.S.C. section 1414(a)(1)(D)(ii)(II), the parents were free to waive all services under the IDEA, and that where such a waiver occurs, "school districts may not override their wishes." Id. at 775. The court further held that while 20 U.S.C. section 1414(a)(1)(D)(ii)(I) provides that a school district "may" pursue proceedings to obtain authority to conduct

an evaluation, the use of permissive language in the statute does not give a district absolute discretion to act if doing so would be inconsistent with the overall purposes of the IDEA. Id. at 776. Accordingly, the court reasoned that the overarching goal of the IDEA——ensuring that all children with disabilities have access to a free, appropriate education——was not furthered by forcing an evaluation on a student whose parents did not wish for him to receive special education services. Id. at 776.

17. Subsequently, in Durkee v. Livonia Central School District, 487 F. Supp. 2d 313 (W.D.N.Y. 2007), the court likewise addressed the issue of whether a school district, over a parent's objection, can require a student to undergo an evaluation to determine if the student is eligible to receive special education services where the parent has refused such services. Following the Eighth Circuit's decision in Fitzgerald, the court held:

> I find that the IDEA does not permit a school district to compel the evaluation of a student for determination of that student's eligibility for publicly-funded special education services where the student's parent has objected to such an evaluation and has refused to accept publicly-funded special-education services.
>
> * * *
>
> Accordingly, in cases where a parent has refused to accept publicly-funded special

> education services prior to completion of an evaluation, a literal reading of Section 1414(a)(1)(D)(ii)(I) would not only fail to further the primary goal of the IDEA, but would in fact run counter to the Act's stated purpose of protecting the rights of children with disabilities and their parents. A literal interpretation of Section 1414(a)(1)(D)(ii)(I) would compel a child to be subjected to an unwanted evaluation by a governmental entity for purposes of determining eligibility for benefits which the parent has already refused.

Id. at 317-18. (Emphasis added).

D. Analysis

18. As in Fitzgerald and Durkee, decisions which the undersigned finds persuasive, [redacted]'s mother has unequivocally and repeatedly stated that she will not allow [redacted] to receive special education services, regardless of any disability that the proposed initial evaluations may reveal.[7] However unwise that decision may prove to be, [redacted]'s mother is plainly within her rights to refuse IDEA services for her child. See 20 U.S.C. § 1414(a)(1)(D)(ii)(II); Fitzgerald, 439 F.3d at 775 ("[T]he IDEA allows parents to decline services and waive all benefits"); Durkee, 487 F. Supp. 2d at 316 ("The [IDEA] explicitly recognizes that a parent or guardian is free to refuse any publicly-funded special education services offered by the district"); G.J. v. Muscogee Cnty. Sch. Dist, 704 F. Supp. 2d 1299, 1310 (M.D. Ga. 2010) ("Plaintiffs are, of course, free

to decline services under IDEA for G.J. rather than submit him to the reevaluation"). In light of the complete waiver of special education services in this cause, compelling an examination to determine eligibility for such services——which is the only legitimate basis for conducting an initial evaluation of a student pursuant to 20 U.S.C. section 1414(a)(1)——would "have no purpose." Fitzgerald, 439 F.3d at 777.

19. Although Petitioner acknowledges that it cannot force [redacted]'s mother to accept special education services for her child, it contends that an initial evaluation of [redacted] is not pointless because "information gained from the evaluation could assist the school in making appropriate academic decisions for [redacted] See Pet. Proposed Final Order, p. 13. While it may be true that useful information could be yielded, conducting an evaluation solely for that reason is incompatible with the plain language of 20 U.S.C. section 1414(a)(1)(A) and (a)(1)(B), which provide that the purpose of an initial evaluation is to determine, "before the initial provision of special education and related services . . . if the child is a child with a disability." (Emphasis added).[8]

20. For the reasons detailed above, Petitioner is not authorized to conduct initial psychiatric and psycho-educational evaluations of [redacted] where the parent has unequivocally declined all special education services.[9]

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Respondent is not entitled to conduct initial psycho-educational and psychiatric evaluations of [redacted] over the objection of [redacted]'s parent.

DONE AND ORDERED this 18th day of March, 2011, in Tallahassee, Leon County, Florida.

S

Edward T. Bauer
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of March, 2011.

ENDNOTES

[1] At the conclusion of the final hearing, the parties agreed that proposed final orders would be filed no later than March 16, 2011.

[2] Petitioner conducted hearing and vision screenings of [redacted] which ruled out any possibility that [redacted] academic performance could be attributed to poor auditory or visual acuity.

[3] Ms. Rubenstein testified that notwithstanding her use of the word "times," she observed [redacted] with spitballs in [redacted] hair on only one occasion.

[4] [redacted]'s lack of bathing is not due to homelessness or sub-standard living arrangements. On the contrary, [redacted] resides at home with [redacted] mother, who is employed full time as a social worker. Although it appears that [redacted] is showering more regularly, [redacted] still refuses to use soap.

[5] Apparently, [redacted] had saved the band-aid, which had been given to [redacted] several months earlier to treat a bloody wound to [redacted] leg.

[6] During the final hearing in this cause, Dr. Beth Pomerantz, a psychologist employed with the Broward County School District, testified that [redacted]'s journal entries and behavior suggest that [redacted] "potentially at some point in the future could be harmful to [redacted] or others at [the high school]." See Final Hearing Transcript, p. 87 (emphasis added). The undersigned finds such testimony purely speculative, and would further note that Petitioner introduced no evidence that [redacted] has engaged in violent conduct or that [redacted] has expressed a desire to do so.

[7] Petitioner argues that Fitzgerald and Durkee are inapposite because the students in those cases, unlike [redacted] were home schooled. The undersigned is not persuaded that the difference in educational settings materially distinguishes the instant matter from those cases, as the reasoning of Fitzgerald and Durkee——that compelling an evaluation to determine eligibility for special education services is pointless and would run counter to the stated purpose of the IDEA where the parent has already declined such services——is no less applicable to a student attending public school. The undersigned's conclusion in this regard is supported by Oxnard Elementary School District v. Student, Case No. 2006-20772, 107 LRP 6594 (Cal. Office of Admin. Hear. Jan. 26, 2007), where the administrative law judge ruled, relying on Fitzgerald, that an initial assessment of the student (who attended a public school and had never been assessed to determine his eligibility for special education services) could only be required by the school district if the student's parents "wish[ed] to avail themselves of special education services from the District."

Petitioner also argues that Fitzgerald and Durkee are distinguishable because [redacted] is potentially dangerous. As noted previously, Petitioner presented no convincing evidence to that

effect, and Dr. Pomerantz's testimony regarding dangerousness was speculative. In any event, the purpose and goals of the IDEA are not furthered by conducting an assessment to determine if a student is eligible to receive special education services where, as here, the parent has already exercised her lawful right to refuse the services.

[8] In other words, the point of an initial evaluation is to make sure that a child is eligible to receive special education services before the services are provided.

[9] If not for the waiver of IDEA services by [redacted]'s parent, the undersigned would readily order the evaluations Petitioner seeks, as there is a reasonable basis to suspect, based upon the testimony and exhibits adduced during the final hearing, that [redacted] suffers from a behavioral or emotional disability.

COPIES FURNISHED:

Barbara J. Myrick, Esquire
Broward County School Board
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

S. B.
(Address of record)

Mr. James F. Notter, Superintendent
Broward County School District
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

Lois Tepper, Acting General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Kim C. Komisar, Section Administrator
Bureau of Exceptional Education
and Student Services
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(b), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(w); or

b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. section 1415(i)(2) and Florida Administrative Code Rule 6A-6.03311(9)(w).