BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of the Dispute Between: CHULA VISTA ELEMENTARY SCHOOL DISTRICT, Petitioner, v. STUDENT, Respondent.	OAH No. N2005120778

DECISION

Robert D. Iafe, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on March 14, 2006, in Chula Vista, California.

Petitioner Chula Vista Elementary School District (District), was represented by attorney Brian R. Sciacca of Atkinson, Andelson, Loya, Ruud & Romo. Deborah L. Wenbourne, Coordinator of Special Education/Pupil Services for District, Patricia Ludi, Executive Director of Pupil Services for District, and Carlos Gonzalez, law clerk for Atkinson, Andelson, were present throughout the hearing.

Respondent Student (Student) did not appear for the hearing. There was no parent and no representative for Student present during the hearing.

The record of this Due Process Hearing was opened on March 14, 2006. Testimony was taken and evidence was offered and received. The record was closed and the matter was submitted on March 14, 2006.

ISSUE

Does the District have the right to assess Student pursuant to an October 20, 2005, assessment plan in order to gather information crucial to providing Student with a free appropriate public education?

FACTUAL FINDINGS

1. Student is a five and a half-year-old girl who is eligible for special education and related services as a child with autistic-like behaviors. At the time District filed its due process hearing request on December 21, 2005, Student had not attended District's school during the regular school day since April 18, 2005, a period of eight months. Though not attending the regular school day, Student did obtain some orthopedic therapy services at the school site in the Fall of 2005.

2. The most recent Individualized Education Program (IEP) proposed by District was marked "for attendance only" and signed on October 20, 2005, by the parent (Parent) of Student. This most recent IEP proposal for the 2005-2006 school year would have placed Student in a Kindergarten special day class at District's Rogers Elementary School located in Chula Vista, California. However, in view of the fact that Student had not regularly attended any District school for over six months, District desired to conduct assessments for this annual review meeting and for the upcoming triennial review which would become due in 2006.

3. At the IEP team meeting convened on October 20, 2005, District presented Parent with a document entitled Chula Vista Elementary School District Evaluation Plan (assessment plan)[1] proposing numerous areas for assessment. These included Academic Achievement, Psycho-Motor Development/Perceptual Functioning, Language/Speech Communication Development, Cognitive Functioning, and Social/Emotional Adaptive Behavior. The assessment plan also provided for observation, records review, interviews with parent and relevant specialists, and a review of Goals 1-22 on Student's IEP dated August 18, 2004.

4. The District's request to assess Student was based on the District's need to gain an understanding of student's current conditions and needs so that the district could fulfill its obligation to provide an appropriate educational program to student. The assessment plan was designed to update information essential to identify the then-current levels of performance and the goals and objectives for Student. Among the areas to be assessed under the "Additional or Alternative Assessment" paragraph of the assessment plan were Goals 1-22 as identified on an earlier IEP dated August 18, 2004, which was the last agreed upon IEP. These Goals were based on assessments conducted over a year before October 20, 2005.

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[1] California law refers to the "assessment" of a pupil (Ed. Code §56320) while federal law refers to the "evaluation" of a child (20 U.S.C. §1414(a)). These terms mean the same thing. (See express reference to "Section 1414 of Title 20 of the United States Code" in Education Code section 56320.)

5. District determined that Student warranted reassessment because of several factors which include the following. Student has cognitive deficits and with her developmental age, her cognitive abilities and developmental levels may be changing. Student has global developmental delays which span across communication, motor skills, and adaptive behavior. District needs to determine current levels of performance in the areas of delay already identified for Student. District also needs to determine whether Student has regressed as a result of not being in the school setting for over six months. Student has not had continuing training with occupational therapy, or with speech, or with any academic pre-readiness for Kindergarten for over six months.

6. The proposed IEP dated October 20, 2005, provided for services to cover the period from October 21, 2005, through December 9, 2005, to allow time for the completion and reporting upon all the assessments in the assessment plan.

7. During the October 20, 2005, team meeting, Student's Parent stated her verbal agreement to the assessment plan. To confirm this agreement, Parent also gave her signed written consent to the assessment plan dated October 20, 2005. Parent's signature appears on the second page of the assessment plan in a box entitled PARENT ACKNOWLEDGMENT. The box contains the following statements and blank areas for a parent, guardian, or surrogate to fill out:

PARENT ACKNOWLEDGMENT

Are there any other areas of suspected disability that you would like to be evaluated? ☐ No ☐ Yes
If yes, please specify _____.

Do you have any independent assessments you would like to have considered? ☐ No ☐ Yes

If yes, please specify and provide a copy of the assessment for your child's file which will be considered by the IEP team.
_____.

Please initial the appropriate responses and sign below.
( ) I understand the proposed evaluation plan.
( ) I give permission for the evaluation as indicated.
( ) I give my permission for the following assessments_____.
( ) I will make my child available for the evaluation.
( ) If an evaluator feels additional tests are needed, she/he may contact me to obtain verbal permission at (____) _____.
( ) I have received a copy of the NOTICE OF PROCEDURAL SAFEGUARDS.

_____ _____
Parent/Guardian/Surrogate Signature Date

8. The "Yes" box was checked for each of the two questions in the Parent Acknowledgment. The line to specify any other areas of suspected disability included the handwritten words: "Developmental Optometric Evaluation." The line to specify any independent assessments for consideration identified, also in handwriting, several assessments including a progress report.

9. Parent also placed her initials within the parentheses for each of the responses in the Parent Acknowledgment indicating the following: Parent understood the proposed assessment plan; Parent gave permission for the evaluation as indicated; Parent gave permission for assessments; Parent will make her child available for the evaluation; and Parent received a copy of the Notice of Procedural Safeguards from District. Parent also initialed the response that if an evaluator felt additional tests were needed, she/he could contact Parent to obtain verbal permission but did not give any telephone number.

10. In spite of Parent's verbal and written agreement with the assessment plan, Parent has never made Student available to District for any evaluation or assessment.

11. District made several attempts to conduct the assessments agreed to by Parent. District described a letter dated November 3, 2005, from Parent stating that Parent was "dis-enrolling" Student from Rogers Elementary School and would enroll Student in a private school. By letter dated November 4, 2005, District reminded Student's Parent that the assessment plan signed by Parent was still open and requested Parent to contact the District office to set up an evaluation schedule for Student. District also offered an Individual Service Plan (ISP) which provided consultation services to students who are parentally placed in private school settings. A current assessment of Student would be needed to determine target goals under an ISP for Student.

12. On December 2, 2005, District sent a written Notice of Individualized Education Program Meeting to Parent giving notice of a meeting set for December 8, 2005. Student's Parent did not sign or return any acknowledgment of this notice. This letter was not returned to the District by the postal service. The December 8, 2005, meeting was discussed at the October 20, 2005, IEP team meeting and Parent had agreed orally to the future date. Moreover, Parent also had an educational advocate from the Regional Center and another parent for support at the October 20, 2005, meeting and no one objected to the December 8, 2005, meeting date.

13. On December 5, 2005, District sent a letter by certified mail to Student's Parent. This letter again reminded Parent of the open assessment plan which was scheduled to be completed by December 9, 2005, and again invited Parent to attend the IEP meeting scheduled for December 8, 2005.

14. A meeting was held on December 8, 2005, with most of the IEP team members present, but Parent did not attend the meeting. By letter dated December 8, 2005, sent via overnight mail, District notified Parent of the meeting of some of the team members on December 8, 2005, the inability to assess Student, and the agreement of those present to extend the IEP recommendations made at the October 20, 2005, meeting to January 31, 2006. After District received no response to this letter and phone calls to Parent, District filed its request for a due process hearing to implement the assessment plan.

LEGAL CONCLUSIONS

1. A child with a disability has the right to a free appropriate public education (FAPE). (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in pertinent part as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.)

2. A school district must provide "a basic floor of opportunity . . . [consisting] of access to specialized instruction and related services which are individually designed to provide educational benefit to the [child with a disability]." (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 (*Rowley*).) The intent of the Individuals with Disabilities Education Act (IDEA) is to "open the door of public education" to children with disabilities; it does not "guarantee any particular level of education once inside." (*Id.* at p. 192.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Id.* at pp. 197, 200; *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is required to provide an education that confers some educational benefit upon the child. (*Rowley*, *supra*, 458 U.S. at p. 200.) In addition to these substantive requirements, the Supreme Court recognized the importance of adhering to the procedural requirements of the IDEA. However, there were no allegations that the District failed to comply with any procedural requirements.

3. An IEP must include a statement of the student's present levels of educational performance; a statement of measurable annual goals; a statement of the special education and related services and supplementary aids and services to be provided; and a statement of how the child's progress toward the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i), (ii), (iii) and (vii)(I); 34 C.F.R. § 300.347(a)(1), (2), (3) and (7)(i); Ed. Code, § 56345, subd. (a)(1), (2), (3) and (9).)

4. Measurable annual goals enable the student, parents, and educators to monitor progress and to revise the IEP to consistent with the student's instructional needs. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12471 (Mar. 12, 1999).) While the required elements of the IEP further important policies, "rigid 'adherence to the laundry list of items [required in the IEP]' is not paramount." (*W.G. v. Bd. of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, citing *Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186, 1190-1191.)

5. Before any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment of the pupil's educational needs shall be conducted in all areas of the suspected disability. (20 U.S.C. § 1414(a)(1); Ed. Code, § 56320.) When developing a pupil's IEP, the IEP team must consider the results of this initial assessment, or the most recent assessment, of the pupil. (20 U.S.C. § 1414(c)(1)(A); Ed. Code §56341.1, subd. (a)(3).) Regarding the reassessment of a student with an IEP, Education Code section 56381, subdivision (a) [2] provides:

> (a)(1) A reassessment of the pupil, based upon procedures specified in Section 56302.1 and in Article 2 (commencing with Section 56320), and in accordance with subsections (a), (b), and (c) of Section 1414 of Title 20 of the United States Code, shall be conducted if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment .
>
> (2) A reassessment shall occur not more frequently than once a year, unless the parent and the local educational agency agree otherwise, and shall occur at least once every three years, unless the parent and the local educational agency agree, in writing, that a reassessment is unnecessary.
>
> If the reassessment so indicates, a new individualized education program shall be developed. (Emphasis added.)

6. The reassessment of Student under the October 20, 2005, Assessment Plan falls squarely within the mandate of Education Code section 56381, subdivision (a). District has met the requirements of both the substantive and procedural prongs of this statute.

7. District personnel determined that Student, who had not been attending school for over six months, needed reassessment in a variety of areas. Such areas include cognitive, functional, and behavioral abilities. For this five and a half-year-old student, the areas of assessment also include communication, motor skills, and adaptive behavior. Moreover, since Student had not attended District's school for

[2] Under federal law, the circumstances under which a "reevaluation of each child with a disability" must be conducted are the same. *See*, 20 U.S.C. section 1414(a)(2)(A) for the substantive, and 20 U.S.C. section 1414(a)(2)(B) for the procedural, requirements.

more than six months at the time the assessment plan was created, District also needed to determine whether Student has regressed in any area including motor skills, speech, and academic pre-readiness for Kindergarten. This satisfies the substantive requirements of Education Code section 56381, subdivision (a)(1).

8. Moreover, District had not conducted an assessment of Student within one year before the October 20, 2005, assessment plan was created and a triennial review was not due until 2006. This satisfies the procedural requirements of Education Code section 56381, subdivision (a)(2).

9. If this was the only evidence presented at this hearing, the District would be entitled to an order directing implementation of the assessment plan. However, there is more to this proceeding. The Parent of Student gave express written consent to the assessment plan. If Parent believed the assessments became unnecessary some time after signing the October 20, 2005, assessment plan, the time to present evidence to support that belief was at the due process hearing conducted in this matter. However, no parent or representative of Student appeared at the hearing to provide any reason to dispute the need for the assessment plan. It is undisputed that the educational and related services needs of Student warrant a reassessment at this time.

10. There is a great likelihood that the levels of performance and the educational needs of a five year old would change after six months of not attending school. Assessment information is essential to determine eligibility and to identify strengths and weaknesses to determine programming for a particular student. Since District is required to meet the unique needs of Student it is both logical, and legally required, that District reassess Student.

11. These conclusions are based on Factual Findings paragraphs 3, 4, 5, 7, 8, 9, and 10.

ORDER

District's petition is granted. District shall assess Student in conformity with the October 20, 2005, Evaluation Plan. District shall provide written notice to Student's Parent at least five calendar days in advance of the assessment advising Parent of the types, dates, times, locations and approximate duration(s) of the assessment(s). Parent shall make Student available for the assessment(s) pursuant to the October 20, 2005 Evaluation Plan on the dates, at the times and locations, and for the approximate duration(s) specified by the District. The Evaluation Plan shall be completed within 120 days from the date of this decision.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code § 56505, subd. (k).)

Dated: May 17, 2006

ROBERT D. IAFE
Administrative Law Judge
Office of Administrative Hearings
Special Education Division