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

In the Matter of: POWAY UNIFIED SCHOOL DISTRICT Petitioner, v. STUDENT, Respondent.	OAH CASE NO. N2007030218

DECISION

Administrative Law Judge (ALJ) Susan Ruff of the Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter on April 5, 2007, in San Diego, California.

Justin Shinnefield, Esq., of Atkinson, Andelson, Loya, Ruud & Romo, represented Petitioner Poway Unified School District (District) at the hearing. Theresa Kurtz, Director of Special Education, and Emily Shieh, Assistant Director of Special Education, appeared on behalf of the District.

There was no appearance by or on behalf of the Respondent (Student). Service of the Notice of Hearing was made by OAH on March 7, 2007, to the address for Student and her mother on file with the District. This is the same address on the letterhead of the letter that Student's mother sent to the District on January 19, 2007. During the hearing, the District personnel confirmed that this is the address they have for Student and her mother. Counsel for the District attempted to contact Student's mother by telephone on the morning of the hearing, but received an operator-recorded message stating that the call did not go through and to call again later.[1]

The District's due process complaint was filed on March 6, 2007. At the close of evidence on April 5, 2007, the matter was taken under submission.

[1] This was the same as or similar to the recorded message that OAH received when OAH attempted to telephone Student's mother for the telephonic prehearing conference on April 2, 2007.

ISSUE

May the District assess Student pursuant to the proposed assessment plan that was sent to Student and her mother on January 24, 2007?

FACTUAL FINDINGS

1. Student is a 16-year-old girl who is in the 10th grade at Mt. Carmel High School, a school within the District. She has never been found eligible for special education.

2. On January 19, 2007, Student's mother faxed a letter to the District which stated, in part: "I am requesting that [Student] be assessed for a Specific Learning Disability, and understanding how her behavior is impeding her learning, and why she hates school. Additionally, [Student] has become very depressed over the District's case against me."

3. District personnel interpreted these two sentences to be a request for an assessment of Student. In order to assess a child to see if the child has a specific learning disability, a school district generally tests the child's academic achievement, cognitive functioning and processing of information. Because of the mention of depression in the letter from Student's mother, the District personnel determined that a social/emotional assessment was also necessary.

4. In addition to the letter from Student's mother, the District had other reasons to believe an assessment was warranted. During the school semester that ended just prior to the assessment request by Student's mother, Student's grades had dropped significantly. Prior to the start of the 2006-2007 school year, Student had received passing grades (Cs and Ds) in her classes. However, in the fall and winter of the 2006-2007 school year, Student failed (with grades of F or F-) all her classes except one. During that same time period, Student's number of absences from school (both excused and unexcused) increased greatly. These two factors – the sudden decline in Student's grades and the marked increase in her absence from school – provided separate cause for the District to assess Student.

5. The District formulated an assessment plan calling for assessments in the areas of academic achievement, processing (including auditory processing and attention), intellectual development, social/emotional functioning, and health, as well as a classroom observation and records review by the school psychologist.

6. The assessment plan called for the school psychologist to administer the Test of Auditory Perceptual Skills to test Student's auditory processing, the Cognitive Assessment System and the Kaufman Brief Intelligence Test to test Student's cognitive functioning, and the Achenbach Behavior Checklist, and the "Draw a Person Screening Procedure of Emotional Disturbance," to assess Student's social/emotional functioning. The behavior checklists and Cognitive Assessment System would also be used to assess whether Student

had any attention issues. All of these tests and checklists are valid and reliable to assess Student in her areas of suspected disability.

7. Sherrie Garceau was the school psychologist chosen to conduct these tests and assessment procedures. She was also assigned to conduct the classroom observation and records review called for in the proposed assessment plan. She is well qualified to engage in each of these activities. She holds a teaching credential, a California Professional Clear Pupil Personnel Services credential and a license as a Licensed Educational Psychologist. She has worked as a school psychologist for the District since approximately 1999, and has assessed hundreds of children. She is familiar with these tests and assessment procedures, and has personally administered each of the tests in question to other children on many occasions.

8. The assessment plan called for academic testing of Student to be conducted by a District resource specialist. Lisa Chohany was the resource specialist assigned to the task. Chohany is a credentialed teacher with a master's degree in education, with an emphasis in special education. The assessment plan called for Chohany to conduct the Test of Written Language, the Wechsler Individual Achievement Test, and the Woodcock-Johnson Achievement Battery. Chohany is well qualified to administer these tests. She is familiar with all three tests and has administered them many times before. These tests are valid and reliable to assess Student's academic functioning.

9. The assessment plan called for the District Resource Nurse Janet Speer to conduct vision and hearing tests of Student and to obtain an update of the Confidential Parent Health Questionnaire. A full questionnaire had previously been completed, so only an update was required for the District's assessment.[2] Speer has been a District Resource Nurse for more than 20 years and is well qualified to conduct these tests. Each of these tests and procedures is valid and reliable to assess Student in her areas of suspected disability.

10. Student's primary language is English, so the assessment plan called for the various tests and other diagnostic tools to be in English.

11. Garceau sent a letter to Student's mother on January 24, 2007, explaining the proposed assessment plan. Enclosed with the letter were the proposed assessment, a notice of proposed action, and a notice regarding procedural safeguards for parents. The proposed assessment plan was dated January 27, instead of January 24, because of a clerical error by Garceau, but the proposed assessment was actually prepared and mailed to Student's mother on January 24, 2007. This minor clerical error had no effect on the assessment plan or the statutory notice given to Student's mother. Garceau sent the letter both by first class mail and by certified mail with a return receipt requested. The school eventually received the

[2] Student had previously been assessed to see if she qualified for special education, most recently in the fall of 2005. Because she was not found eligible for services in the past, the assessment request by Student's mother in January 2007 is being treated as an initial assessment request for purposes of this Decision. Even if it was treated as a request for reassessment, the result of this Decision would not change.

signed return receipt card showing delivery to Student's mother. However, Student's mother did not sign or return the proposed assessment plan.

12. When the District still had not received the signed assessment plan from Student's mother by February 21, 2007, the District's Assistant Director of Special Education, Emily Shieh, sent another letter to Student's mother, once again enclosing the proposed assessment plan, notice of proposed action and notice of parental procedural safeguards. Student's mother did not sign the assessment plan or contact the District regarding the proposed assessment.

LEGAL CONCLUSIONS

Applicable Law

1. Petitioner has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Under the federal Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

3. Prior to making a determination of whether a child qualifies for special education services, a school district must assess the child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.)[3] The request for an initial assessment to see if a child qualifies for special education and related services may be made by a parent of the child or by a state or local educational agency. (20 U.S.C. § 1414(a)(1)(B).)

4. The assessment must be performed according to strict statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor(s). The district must select and administer assessment materials that appear in the student's native language and that are free of racial, cultural and sexual discrimination. (20 U.S.C. § 1414(b)(3)(A)(i); 34 C.F.R. § 300.304(c)(1); Ed. Code, § 56320, subd. (a).) The assessment materials must be valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) They must also be sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); 34 C.F.R. § 300.304(c)(6); Ed. Code, § 56320, subd. (c).) Trained, knowledgeable and competent district personnel must administer special education

[3] The federal code uses the term "evaluation" instead of the term "assessment" used by California law, but the two terms have the same meaning for these purposes.

assessments. (20 U.S.C. § 1414(b)(3)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.) A credentialed school psychologist must administer psychological assessments and individually administered tests of intellectual or emotional functioning. (Ed. Code, §§ 56320, subd. (b)(3), 56324, subd. (a).) A credentialed school nurse or physician must administer a health assessment. (Ed. Code, § 56324, subd. (b).)

5. In order to start the process of assessment the school district must provide proper notice to the student and his/her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under IDEA and companion state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must appear in a language easily understood by the public and the native language of the student, explain the assessments that the district proposes to conduct, and provide that the district will not implement an individualized education program without the consent of the parents. (Ed. Code, § 56321, subds. (b)(1)-(4).) The district must give the parents the proposed assessment plan within 15 days of the referral for assessment. (Ed. Code, § 56321, subd. (a).) The parents have 15 days after receipt of the assessment plan to make a response. (Ed. Code, § 56321, subd. (c).)

6. Normally, before a school district performs an assessment of a child with a disability, the district must obtain parental consent for the assessment. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321, subd. (c).) However, the district need not obtain informed consent if the district can demonstrate that it took reasonable measures to obtain such consent and the student and/or his or her parents failed to respond. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56321, subd. (c).) Instead, in the event that a parent or student does not provide consent, the district may bring a due process complaint seeking an order that requires the child to appear for the assessment. (20 U.S.C. § 1415(b)(6)(A); Ed. Code, § 56501, subd. (a)(3); *Schaffer, supra*, 546 U.S. at p. _____ ; 126 S.Ct. at p. 532 [school districts may seek a due process hearing "if parents refuse to allow their child to be evaluated."].)

Determination of Issues

The District is Entitled to Assess Student in Accordance with the January 2007 Assessment Plan.

7. As established in Factual Findings 1 – 12 and Legal Conclusions 1 – 6, the District has ample cause to conduct an assessment of Student. The request for an assessment by Student's mother by itself would be sufficient cause to assess. In addition, Student's sudden drop in grades and increase in school absences also provide justification for an assessment.

8. The District's assessment plan contains tests and other assessment tools designed to evaluate Student's areas of suspected disability. The assessment materials are free of racial, cultural or sexual discrimination and will be provided to Student in her primary language. They are valid and reliable for the purposes of evaluating Student in the areas of

concern. The individuals chosen by the District to conduct the assessment are trained, knowledgeable and competent to administer the tests and other assessment procedures. The assessment plan properly calls for the school psychologist to conduct the intellectual and psychological testing and for the school nurse to administer the health testing.

9. The District complied with notice requirements and other legal requirements when sending the assessment plan to Student's mother for signature. The District made two attempts to have Student's mother approve the plan, but there was no response from Student's mother.

10. The District has met its statutory obligations and is entitled to conduct the assessment in accordance with the proposed plan.

ORDER

The District's request to assess Student is hereby granted. If Student's mother wishes to have Student considered for special education services by the District, Student's mother is ordered to make Student available for assessment by the District, in accordance with the assessment plan which was first sent to Student's mother on January 24, 2007.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section the following finding is made: The 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 in accordance with California Education Code section 56505, subdivision (k).

Dated: April 12, 2007

SUSAN RUFF
Administrative Law Judge
Special Education Division
Office of Administrative Hearings