

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

In the Matter of:

SEQUOIA UNION HIGH SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. N 2008030439

DECISION

Administrative Law Judge Gregory P. Cleveland, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Woodside, California, on April 14, 2008, through April 16, 2008.

Throughout the hearing, Student was represented by her mother. The District was represented by John Nibbelin, Attorney at Law. Paralegal Marian Watson was present on behalf of the District on April 14, 2008, and April 15, 2008. Linda Common, Chief Administrator of Special Education, also attended the hearing on all days on behalf of the District.

A request for due process hearing was filed by Sequoia Union High School District (District) on March 12, 2008. At the hearing, the ALJ received sworn testimony and documentary evidence. OAH received a timely closing brief from the District, and did not receive any written closing argument on behalf of Student. On April 28, 2008, the record was closed and the matter was submitted.

ISSUE

May the District reassess Student pursuant to the assessment plan dated February 6, 2008, without parental consent?

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is a 16-year-old, 11th grader, who resides with her parents within the geographical boundaries of the District. Student presently qualifies for special education services in the category of speech or language disorder. She has qualified for special education under this category since kindergarten in 1997.

2. Since middle school Student has worked on a single speech and language goal in problem solving analysis. There has been no change in the goal or Student's designated instruction and services (DIS) since middle school because the District and the parents have not agreed on an Individualized Education Program (IEP) during Student's three years in high school. By November 2, 2007, the District concluded Student had met her speech and language goal but continued DIS consisting of 30 minutes per month of speech and language consultation.

3. Academically, Student has a D average and is presently deficient in credits needed for graduation in the fields of mathematics, English, safety education/driver education, and electives. In the fall semester of the 2007-2008 school year, Student failed classes in English, French, physics, and computer science, and received a grade of D in algebra and U.S. history. Student has passed the California High School Exit Examination (CAHSEE).

Prior Assessments

4. Student was last assessed in December 2005 and January 2006. Marian Welch conducted the speech and language assessment and issued her report on January 25, 2006. Ms. Welch administered the Adolescent Word test, the Adolescent Test of Problem Solving, and the Clinical Evaluation of Language Fundamentals IV (CELF IV). The Adolescent Word test is a semantic test of word meaning and inference, and Student's percentile score placed her in the average to above average range. The Adolescent Test of Problem Solving tests critical thinking skills in problematic social contexts, and Student again scored in the average to above average range. The CELF IV is a broad based test of both listening and speaking language, and Student scored in the above average range. Ms. Welch concluded that Student no longer qualified for DIS speech and language services.

5. Carole Grabiec administered an academic assessment of Student and issued her report on December 9, 2005. The assessment measured Student's academic levels in reading, mathematics and written language, based on various subtests from the Woodcock-Johnson III Tests of Achievement. In academic reading and mathematics Student scored at the average level while her written language skills were at the high average level.

6. Dr. Karen McGee administered a psychoeducational assessment and issued her report on January 19, 2006. Dr. McGee reviewed Student's records, interviewed Student, and administered the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), along with the Behavior Assessment System for Children (BASC). The WISC-IV measures cognitive ability and on that test Student's scores were within the low-average to average range. On the BASC, Student's performance revealed she experiences school as a stressful and anxiety provoking environment.

7. On November 19, 2003, Frank Marone, Ph.D., issued a report regarding Student, entitled "Positive Behavior Intervention Plan." The report was prepared as a tool to keep Student focused on her class work during class because Student had been drawing instead of attending to class content. It provided for assigned seating of Student by her classroom teachers, a point system for Student staying on task rather than drawing, and positive consequences for Student when she stayed focused on her class work. Dr. Marone issued a further report in June 2007. The June 2007 report was entitled "Revision of Behavior Intervention Plan" and within the body of that report Dr. Marone emphasized the need for "playing to (Student's) strengths" in creative writing, drawing, and music. To play to Student's strengths, Dr. Marone recommended Student be enrolled in all elective classes (with a waiver of certain graduation requirements), that Student not be assigned homework, and changes in the school schedule to do away with 90 minute block periods. Dr. Marone also recommended that any behaviors by Student which required the presence of law enforcement personnel, result only in contact by law enforcement with Student off school premises. On February 11, 2008, and again on February 12, 2008, Student's mother asked that Dr. Marone's report be adopted by the IEP team.

Need for Reassessment

8. Once a student is determined to be eligible for special education programs and services, that student must be assessed at least once every three years, and not more often than once yearly, unless the parents and the local educational agency otherwise agree to a different assessment schedule.

The District has proposed reassessments in speech and language and academics, and a behavioral assessment including a functional analysis assessment, because Student regressed during the 2007-2008 school year academically and behaviorally. Her overall grade point averages in the two 2006-2007 semesters were 3.0 and 2.08 respectively, while her grade point average in the fall 2007 semester dropped to 0.848. Student's French teacher Gay Buckland-Murray offered credible testimony regarding Student's regression in behavior and class performance. Ms. Buckland-Murray knows Student well from teaching her for the past 2 and one-half school years and recalled Student received at least a C grade the first two years in her class. She did note Student had some behavioral challenges during the prior years, particularly with drawing in class, but in the fall 2007 semester Ms. Buckland-Murray constantly had to reprimand Student for drawing in class, and even those reprimands have not succeeded in altering Student's behavior. Ms. Buckland-Murray testified credibly that Student cannot keep up with the curriculum due to Student's drawing and lack of attention.

She also stated Student would benefit from a current behavioral assessment, because the information from the assessment would let her know Student's present potential and how to better tailor class curriculum to serve Student, so that she could achieve a passing grade.

9. Student's behavior has proven to be disruptive in her algebra class this year. Mr. Samer Malouf teaches Student's algebra class and he testified Student is a smart girl with the ability to do the work in class, but she does not pay attention, instead drawing during class. Student also did not complete or turn in assignments, and that resulted in poor test scores. Mr. Malouf stated a behavioral assessment of Student would be helpful so that he could determine Student's academic abilities. He specifically disagrees with the suggestion of Dr. Marone that Student not be assigned homework because homework is the tool for enforcing what his students learn in class.

10. On at least one occasion during the 2007-2008 school year, Student's behavioral issues rose to the level that law enforcement was summoned to the campus. Mr. Cliff Alire is a vice-principal at Student's school, and has served in that capacity since July 2001. Before his employment with the District, Mr. Alire worked for the Oakland Unified School District as a principal or vice-principal for 27 years, mainly dealing with safety issues. He is experienced in all kinds of discipline issues including discipline of special education students. He recalled an incident which occurred on January 31, 2008, when Student drew a poster showing blood dripping, along with the word "Acceptance." Mr. Alire interviewed Student and showed the poster to other staff members who all concurred that it expressed an imminent threat. Based on that perception of an imminent threat, Mr. Alire contacted law enforcement who came to the school and took the poster as evidence. Student's mother was also contacted and after she came to the school the situation became even more volatile, resulting in a call for back-up by the law enforcement officer. Based on his experience, Mr. Alire believed the poster was a cry for help as juveniles often act out rather expressing what is really going on inside. He states that a behavioral assessment of Student by the school psychologist is essential based on Student's increase in both severity and frequency of discipline problems during this school year.

11. Student's behavior in her computer science class supports the need for a behavioral assessment. Student's computer science teacher, Harvey Becker, testified that not only did Student draw in his class, she also cheated on the class final, resulting in a failing grade. Additionally, on January 11, 2008, he found Student trying to access a website entitled "Turning Explosives Into Art."

12. Both the parents and the District stipulate that Student is in need of an assessment covering speech and language issues and behavioral issues, including a functional analysis assessment, including the documents prepared by Dr. Marone. The stipulation is not an admission that Dr. Marone's reports are valid assessments; rather, as discussed further below, the District disputes a number of the recommendations of Dr. Marone. Student's mother wants Dr. Marone's report accepted as a behavioral assessment by the IEP team, and behavioral goals based on his recommendations.

13. Dr. Linda Common became the chief administrator of special education for the District on January 7, 2008. She is credentialed in both special education and administration and has attended additional seminars in special education law. Before January 7, 2008, she served as principal of the high school Student attends. She has reviewed Dr. Marone's report and disagrees with his analysis along with several of his conclusions. For instance, Dr. Marone's recommends that Student only take electives. This would preclude Student from graduating and pursuing her goal of attending a four-year college. Dr. Common also strongly disagrees with Dr. Marone's conclusion that use of a resource specialist for Student would be counterproductive. Most significantly, Dr. Common explained that Dr. Marone's recommendation that law enforcement only contact Student off campus revealed a fundamental lack of understanding of a school environment by Dr. Marone, because waiting for Student to leave campus before calling in law enforcement could potentially jeopardize the safety of other students or staff. Dr. Common's expertise, her experience at Student's school, and her very straightforward manner of testifying made her a particularly credible and convincing witness, and her testimony established that the assessments the District proposes are needed at present regardless of the existence of Dr. Marone's reports.

14. Special education assessments shall be conducted by qualified persons. A person is qualified if he or she has met federal and state certification, licensing, or other comparable requirements which apply to the area in which he or she is providing special education or related services. The District employs credentialed staff who are adequately qualified to assess Student. Dr. Karen McGee is the psychologist at the school Student attends. She has worked for the District since 1972, first as a counselor, and then from 1983 onward, as a school psychologist. She has a Bachelor's degree and two Master's degrees from Stanford, and a Doctorate of Education from the University of San Francisco. She has been credentialed by the State of California to conduct psychoeducational assessments since 1983. One of her primary job duties consists of conducting assessments. She has conducted functional analysis assessments in the past, with the most recent in 2006. She is qualified to perform functional analysis assessments as her training at Stanford was focused on behaviorism, including observing behavior and consequences. She has a certificate as a Behavior Intervention Case Manager. Dr. McGee has known Student since transition meetings held with Menlo Park Elementary School District in June 2005, before Student entered high school. Dr. McGee also conducted the psychoeducational assessment of Student reported on January 19, 2006. In an earlier OAH proceeding, Case No. N2006050687, that assessment was determined appropriate because, among other reasons, Dr. McGee was a credentialed school psychologist qualified to administer the assessment.

15. Marian Welch is qualified to assess Student in speech and language. Ms. Welch received a Bachelor's degree in communication disorders in 1976, followed by a Master's degree in education in 1983. She also received three credentials in clinical rehabilitation and pupil personnel services. She has 22 years experience as a speech and language therapist, the last 20 employed by the District. Her job duties include assessing students to determine speech or hearing disabilities. Ms. Welch has known Student since she was in the ninth grade and has been Student's special education case manager throughout Student's high school years. In the earlier OAH proceeding, N2006050687, Ms. Welch was

determined to be qualified to assess Student in speech and language. Ms. Welch's testimony made clear that a new speech and language assessment would assist Student's teachers because, not only is behavior itself a form of communication, but the teachers should have updated information on how Student's speech and language difficulties affect Student's interactions with others.

Request for parental consent to reassess

16. In order to assess or reassess a student, a school district must provide proper notice to the student and his or her parents. The notice must include the proposed assessment plan and a copy of parental procedural rights under the Individuals with Disabilities Education Act (IDEA) and state law. The assessment plan must be in language that is easily understood, explain the assessments proposed, and provide that no assessments will be undertaken without the consent of the parents. The district must also allow at least 15 days for the parents to review, sign and return the plan. If the parents do not consent to the proposed assessment plan, the district can still conduct the assessment if the district prevails at a due process hearing regarding the need for the proposed assessments.

17. District personnel determined in January 2008 that assessments in the areas of speech, language, and behavior were warranted because those were areas of suspected disability for Student. At the IEP meeting held on November 2, 2007, the team members discussed Student's behavior. Student's teachers reported that Student fails to turn in assignments, and draws in class instead of paying attention. The team members also noted that Student had a physical altercation with another student during the 2006-2007 school year. The team members shared the opinion that Student's decline in grades was due to behavior rather than speech and language. Student was also said to have fulfilled her speech and language goal, which had been a carry-over goal from the last agreed upon IEP when Student was in middle school. The November 2, 2007, IEP team (without the parents who did not appear at the meeting and were not available by phone) recommended counseling services and a mental health assessment. The IEP team recommended Julie Robinson, a behavior specialist, consult and develop a functional analysis assessment.¹

18. The IEP team convened again on January 14, 2008, at the request of Student's mother. Although she requested the meeting, Student's mother did not attend the meeting and could not be reached via telephone. Student's teachers reported Student's grades were down to D or F level due to behavioral issues such as drawing in class, failing to complete assignments and tardiness. The team again recommended an assessment and a behavior support plan.

¹ No witness at the hearing provided any testimony about Julie Robinson's experience, training or credentials, nor was she identified further in other documentary evidence.

19. On February 6, 2008, the District's attorney, John Nibbelin, faxed a letter and an assessment plan to Student's parents, asking for their consent to conduct an assessment. The proposed plan called for Carole Grabiec to assess in academics, Dr. McGee to assess in intellectual development, social/emotional behavior status, functional analysis assessment, and psycho-motor development and Ms. Welch to assess in language/speech/communication. A health/vision/hearing assessment was to be performed by the school nurse, and self-help/vocational abilities were to be assessed by Ms. Grabiec, Ms. Welch and Dr. McGee.

20. On February 12, 2008, Student's mother replied in writing to the proposed assessment plan. She acknowledged receipt of the notice of parent's rights, and stated she did agree to the assessment plan, including the assessment proposed to be conducted by Carole Grabiec, but concurrently stated she would only agree to Julie Robinson or a psychologist licensed by the California Board of Psychology, and Susan Fan or a speech therapist licensed by the California Speech/Language Pathology Board², to conduct the remaining assessments.

21. On February 12, 2008, an IEP meeting was held with Student's mother in attendance via telephone. At that time, the District stated Dr. McGee would conduct the functional analysis assessment and Marian Welch would conduct the speech and language assessment, but they still wanted the parents to return a signed assessment plan. Dr. Common asked Student's mother to consent to the proposed assessments, but Student's mother refused, instead requesting a board-certified psychologist and speech pathologist. Student's mother followed up the IEP with a letter of dissent dated February 12, 2008, requesting the credentials and qualifications of the proposed assessors and a list of all tests the assessors would use.

22. On February 14, 2008, Student's mother wrote to the District Superintendent, Dr. Frank Gemma, asking for a list of psychologists and speech therapists hired or in contract with the District, and to again request that the assessments be conducted by a board-certified psychologist and speech therapist. At the hearing in this matter, Dr. Gemma provided a list of the District's speech and language therapists and school psychologists. Both Ms. Welch and Susan Fan are District-employed speech therapists, and Dr. McGee is one of four District-employed school psychologists. If a request was made for an outside, board-certified assessor, Dr. Gemma would defer that decision to the District's chief administrator for special education.

CONCLUSIONS OF LAW

1. As the petitioning party, the District has the burden of proof in this matter. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. A parent can not withhold consent as a means of forcing a school district to

² This appears to be a reference to the California Speech-Language Pathology and Audiology Board.

adopt the parents own evaluation. “Every court to consider the [Individuals with Disabilities Act’s] reevaluation requirements has concluded ‘if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation.’” (*M.T.V. v. DeKalb County School District* (11th Cir. 2006) 446 F.3d 1153, 1160, quoting *Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176, 178-179.) The Ninth Circuit held in *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1315 that “if the parents want [their child] to receive special education services under the [IDEA], they are obliged to permit [re-assessment] testing.”

May the District reassess Student pursuant to the assessment plan sent to the parents on February 6, 2008, without parental consent?

3. Under special education law, a re-assessment of a student must be undertaken by the district, if the re-assessment is requested by the parents, or is warranted by the student’s needs and performance (20 U.S.C. § 1414(a)(2)(A).) The re-assessment must occur at least every 3 years, and shall not occur more often than once per year, unless the parents and the district otherwise agree. (20 U.S.C. § 1414(a)(2)(B)(i)-(ii), 34 C.F.R. § 300.303(b).)

4. According to Factual Findings 4-6 Student was last assessed by the District over one year ago. Factual Findings 1-3, and 8-12, establish that Student’s present academic performance and behavior warrant re-assessment in the areas of speech and language, academics and behavior, including a functional analysis assessment.

5. In order to assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must be understandable, explain the assessments that the district proposes to conduct, and provide that the district will not implement an IEP based on the assessment without the consent of the parents. (Ed. Code, § 56321, subd. (b)(1)-(4).) A school district must give the parents and/or the student at least 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

6. Factual Findings 17-19 establish that the District provided the parents advance notice of their proposed assessment plan and the notice advised the parents of their procedural rights. Factual Findings 12 and 20-22 establish that the parents understood the plan even though they do not agree with the plan. Factual Findings 12 and 19-22 establish that the proposed assessments were explained to the parents and that the District advised the parents that no new IEP would be implemented based on the assessments without the parents’ consent.

7. Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(a)(1)(B)(i); Ed. Code, § 56321, subd. (a)(2).) A school district can overcome a lack of parental consent for an initial assessment or re-assessment if it prevails at a due process hearing regarding the need to conduct the assessment. (20 U.S.C. §§ 1414(a)(1)(D)(ii)(I), 1415(b)(6)(A) & 1414(c)(3); *Schaffer, supra*, 546 U.S. at pp. 52-53 [school districts may seek a due process hearing “if parents refuse to allow their child to be evaluated.”]; Ed. Code, §§ 56501, subd. (a)(3), 56506, subd. (e), 56321, subd. (c).) If a parent does not consent to an initial assessment or re-assessment, the school District may, but is not required to, file a request for a due process hearing. (34 C.F.R § 300.300(A)(3)(i); Ed. Code, §§ 56321, subd. (c)(2), 56506, subd. (e).)

8. Special education assessments shall be conducted by qualified persons. (Ed. Code, §§ 56320, subd. (g), 56322). A psychoeducational assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324(a).) A person is qualified if he or she has met federal and state certification, licensing, or other comparable requirements which apply to the area in which he or she is providing special education or related services. (Cal. Code Regs., tit. 5, §§ 3023, 3065.)

9. Factual Findings 14-15 establish that the District’s proposed assessors are qualified to conduct the assessments proposed in the assessment plan dated February 6, 2008.

ORDER

The District may assess Student as it proposed on February 6, 2008. Parents shall make Student reasonably available for assessment.

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. Here, the District prevailed on the sole issue presented.

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 ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: May 8, 2008



GREGORY P. CLEVELAND
Administrative Law Judge
Office of Administrative Hearings
Special Education Division