

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

TORRANCE UNIFIED SCHOOL
DISTRICT

v.

PARENT ON BEHALF OF STUDENT

OAH CASE NO. 2013030530

DECISION

Administrative Law Judge June R. Lehrman, Office of Administrative Hearings (OAH), State of California, heard this matter in Torrance, California, on June 18, 19, 20 and August 13, 2013.

Student's father (Father) represented Student. Father attended the hearing on all days, in-person on June 18, 19 and 20, 2013, and telephonically on August 13, 2013. Student's mother (Mother) attended the hearing on June 18 and 19, 2013.

Sharon Watt, Attorney at Law, represented Torrance Unified School District (District). Director of Special Education, Jacqueline Williams, attended the hearing on all days.

District filed the request for due process (complaint) on March 13, 2013. OAH continued the matter for good cause on March 28, 2013. On June 20, 2013, District requested, and OAH granted, a further continuance until August 13, 2013, to compel the attendance of Dr. Juan Mocega, Student's primary care physician who had been properly subpoenaed but refused to appear. District did not succeed in compelling the witness' attendance within the continued time, therefore the hearing concluded on August 13, 2013, without his testimony. Upon receipt of closing arguments on the last day of hearing, the record closed and the matter was submitted.

ISSUE

May the District conduct a triennial assessment of Student, or else Parents forego the right to the District's provision of special education to Student?

FACTUAL FINDINGS

2010 Triennial Assessments

1. Student is a 15 year old boy. For all relevant times he has been eligible for special education and related services under the eligibility category of autistic-like behaviors.

2. District's last comprehensive assessments of Student occurred in February 2010. At that time, Student was enrolled in a sixth grade special day class with speech and language therapy, adapted physical education (APE), and services provided by District's "Autism Spectrum Services/ Inclusion Support Torrance Team," known as "ASSISTT."

3. District's 2010 assessments included psychoeducational, academic, speech and language, and "ASSISTT" assessments.

February 2010 Psychoeducational Assessment

4. The psychoeducational assessment resulted in a report dated February 4, 2010. The report indicated that the assessor had conducted interviews, classroom observations and had reviewed Student's records. The interviews and classroom observations showed Student to be intelligent, with strong visual skills. Student enjoyed reading silently, playing on the computer, and engaging in visual activities. Student exhibited limited eye contact and social skills. He performed best in one-to-one settings.

5. The assessor provided Mother and Father (collectively Parents) with a rating scale to complete for the Vineland Adaptive Behavior Scales-II testing instrument, but Parents did not return it.

6. The assessor administered the Leiter International Performance Scale-Revised (Leiter-R), an individually-administered test designed to assess nonverbal intelligence. Student did not complete all subtests, due to absences from school. Student's scores, on the subtests he did complete, were in the average and borderline ranges. During the assessment session, Student appropriately sat in his seat, listened to the instructions, looked at the test materials, and provided responses. He was completely compliant and demonstrated appropriate attention, although eye contact and social interaction were limited. The partial test results indicated that Student's cognitive ability was in the low average range; he was independent with feeding and toileting skills in school; he exhibited autistic like characteristics of limited eye contact, limited social interaction, limited repertoire of interests, and stereotypical behaviors.

February 2010 Academic Assessment

7. Student's classroom teacher did not complete Student's academic assessment because Student had attended only eight days during a proposed 20-day assessment period. By report dated February 4, 2010, the teacher stated she had attempted seven testing sessions

but Student completed only four subtests. Student completed the letter-word identification, math calculation, writing fluency and applied problems subtests of the Woodcock-Johnson III Test of Achievement (WJ III). The teacher had paraeducator support during some testing sessions. The teacher considered the completed subtests to be a fair sample of Student's abilities at that time. These indicated grade equivalencies of 2.2 in letter-word identification, 2.6 in math calculation, 1 in writing fluency, and K-4 in applied problems.

February 2010 Speech and Language Assessment

8. District conducted a speech and language assessment on February 4, 2010. A Parent accompanied Student during the assessment. Student exhibited non-compliant behaviors including screaming and dropping to the floor. The assessor observed Student's voice, articulation, vowel and consonant production, and administered the Expressive One Word Picture Vocabulary Test (EOWPVT) and the Receptive One Word Picture Vocabulary Test (ROWPVT). Student's performance on both were below average.

February 2010 ASSISTT Assessment

9. On February 10, 2010, District's ASSISTT team assessed Student. The ASSISTT team consisted of behaviorists, teachers and paraeducators, assembled to provide services to students with autism spectrum disorders. The assessors conducted interviews and observations of Student. Their report noted Student's limited social and verbal interaction with teachers or peers. Although he participated in structured activities, he did not initiate social interactions. Student was primarily nonverbal, with limited eye contact and social skills. His classroom teachers and paraeducators reported that he was bright, could attend appropriately during one-to-one sessions, enjoyed reading silently, and loved playing on the computer. When frustrated, and during transitions, he exhibited avoidance and non-compliant behaviors, aggression, tantrums, running away from the classroom, lying on the ground, screaming and kicking.

June 2010 Supplemental Assessments

10. Supplemental psychoeducational and speech and language assessments occurred in June 2010. According to the results of a re-administered Leiter-R, the assessor concluded that Student's cognitive ability was in the low average range. Student's supplemental speech and language assessment occurred on June 18, 2010. The assessor administered the Oral and Written Language Scales (OWLS) to observe Student's listening and oral comprehension, and to identify vocabulary, grammar, social language and idiomatic language. Student could understand and use basic definitions and basic vocabulary words, basic prepositions, regular plurals and some verb tenses. However, when the words became more complex or had multiple meanings, he struggled. He also struggled with formulating complete sentences.

2011 Assistive Technology Assessment

11. District conducted an assistive technology assessment on June 14, 2011. During this assessment, Mother accompanied Student. Student presented as friendly, sat at the examination table and interacted with the examiner throughout the assessment. He followed directions with minimal visual and verbal cues, was compliant overall, and completed all tasks requested. The assessor conducted trials with an I-pad and “Go-talk” software, a voice output software that permits the user to select icons that the machine will then verbalize. The assessor recommended a trial period of use of this assistive technology.

Student’s Home Hospital Program

12. For approximately the past two years, since approximately June 2011, Student has not attended school but has been taught at home by home hospital teacher Scott Hunt. Mr. Hunt works with Student on reading comprehension and math, in a one-to-one environment, twice weekly for two hours each session. Mr. Hunt is the sole District employee with any knowledge of Student’s current levels of functioning.

13. According to Mr. Hunt, Student understood and complied with verbal directions and spoke in short utterances such as “yes” or “no.” On a good day, Student worked well, and completed his work with minimal redirection. On a bad day, it was difficult to keep him focused on task, and he required more redirection.

14. Student had never exhibited aggression to Mr. Hunt. Student did not elope, except very rarely and only to another location within the home. He was compliant virtually all the time, requiring only verbal redirection.

15. When infrequently uncooperative, Student responded to redirection. Student did not have outbursts, except occasionally, when frustrated. Twice per week on average, Student would get upset and express this with yelling and hand gestures. Student also had infrequent episodes of self-biting, which Mr. Hunt witnessed a total of five or six times.

16. Parental intervention in the home teaching program was minimal. Mr. Hunt had no fears for Student’s safety, or his own, when he was with Student outside Parents’ presence. Once per every two or three visits, Student would not respond to Mr. Hunt’s redirection when off- task, but would attend Parents. Parents, however, did not generally supervise the sessions, and were not present in the room.

17. Mr. Hunt knew that Student took a medication called Risperdal, which made Student more focused. Mr. Hunt recalled that Parents had intervened to give Student his medication during Student’s infrequent episodes of elopement or noncompliance.

2012 Individualized Educational Programs

18. At Student's most recent annual individualized education program (IEP) team meeting on February 29, 2012, Mr. Hunt reported on Student's present levels of performance (PLOP's) in academic and functional skills. Student's reading was at the fourth grade level. Student's oral fluency was below the fourth grade, since he preferred not to speak. Student functioned at the second grade level in math. He wrote legibly, but preferred to type on his I-pad.

19. The team drafted PLOP's in the areas of communication, gross and fine motor development, social/emotional and behavioral skills, and vocational, relying on previous data regarding Student's skills. The team lacked current information due to Student's non-attendance in school.

20. The IEP team generated draft goals in APE, social skills, task completion, money skills, number sense, reading comprehension, making purchases, asking questions, expanding utterances, pragmatics, and behavior, all continued from the previous year's IEP. The team found that Student's previous goals had not been met, should continue due to Student's non-attendance at school, and that the baseline skills as stated for the goals were no longer current. The team agreed that Student would remain on home hospital throughout the remainder of the 2011-2012 school year.

21. The IEP team met again on September 10, 2012. At that meeting, the team agreed to extend the home hospital services until December 29, 2012, or until otherwise recommended by Student's physician.

2013 Assessment Plan and Scheduling

22. Jane Kusch is a special education teacher who serves as Student's "case carrier." Ms. Kusch's duties as case carrier are to organize assessments and IEP meetings. Ms. Kusch prepared an assessment plan dated February 1, 2013, proposing assessments in the areas of academic/preacademic achievement, social and emotional development, motor ability, language/speech/communication, general abilities, health and development, and a behavioral assessment designated as an ASSISTT assessment. Ms. Kusch sent this assessment plan to Parents via certified mail. Postal receipts confirmed delivery on February 2, 2013. District never received back a signed copy of this assessment plan. District filed this due process complaint on March 15, 2013.

23. Ms. Kusch prepared another assessment plan on or about March 26, 2013.

24. On April 16, 2013, Father obtained a document from Student's physician's office on a medical prescription pad form, which stated, under the list of medications to be

prescribed, that “due to [Student’s] disability (Autism), a parent needs to be present during any assessment(s) or testing situations because of his anxiety.”¹

25. On April 17, 2013, the parties entered into a written Interim Agreement, which provided that Parents would sign an assessment plan and would cooperate with the assessment process. Father signed a new version of an assessment plan, dated April 17, 2013. Like the earlier versions, it proposed assessments in the areas of academic/preacademic achievement, social and emotional development, motor ability, language/ speech/ communication, general abilities, health and development, and a behavioral assessment designated as an ASSISTT assessment. Father did not reveal to District the existence of the April 16, 2013, prescription document.

26. On or around April 24, 2013, Ms. Kusch contacted Father to schedule dates and times for the assessment. Father advised Ms. Kusch that all dates and times must be proposed to him in a writing signed by District’s attorney. On April 25, 2013, District sent a letter to Parents disputing this purported requirement. The letter set forth proposed dates for the assessments and asked Parents to contact Ms. Kusch to confirm their availability. District sent the April 25 letter via certified mail, but received it back unsigned and unopened.

27. Thereafter, on May 13, 2013, District sent another letter setting forth a proposed date of May 21, 2013, for the psychoeducational assessment, and a proposed date of May 23, 2013 for the academic, speech language, and motor ability assessments.

28. In May 2013, District behaviorist Hermine Voskanyan attempted to conduct a behavioral assessment of Student. She requested access to observe Student at his home hospital setting. She spoke to Father and asked if she could come to the home and observe. Father informed her that he and District had agreed that all assessments would be conducted at a District location and he would not permit her to come to the home to observe Student. Ms. Voskanyan discussed this conversation with Program Specialist Rudy Delano, who informed her there had not been any such agreement.

May 21, 2013 Psychoeducational Assessment

29. On May 21, 2013, Mother and Student appeared for the scheduled psychoeducational assessment, designated on the assessment plan as the “social and emotional development” assessment. The assessor, school psychologist, Ayana Cadres-Guidera, was in the first year of her employment as a District school psychologist. She held a master’s degree in school psychology, and a pupil personnel services credential. Ms. Guidera has conducted approximately 52 psychoeducational assessments.

¹ District subpoenaed Student’s physician, Dr. Juan Mocega, to appear as a witness at the due process hearing, but he did not comply with the subpoena.

30. Mother informed Ms. Guidera that she wished to be present for the assessment, to be there if Student acted up, to calm and soothe him if necessary. Ms. Guidera asked whether Student had maladaptive behaviors. Mother answered that he did, and also that he was nonverbal and needed her. Mother did not present the April 16, 2013, medical prescription document. Ms. Guidera allowed Mother to stay for the assessment.

31. Ms. Guidera administered the nonverbal component of the Stanford Binet Intelligence Scales (Stanford Binet), a cognitive testing instrument. During the assessment, Student complied with instructions and was easily redirected.

32. During the assessment, Mother sat two feet behind Student. At one point she got up and soothed Student by rubbing his shoulders when she perceived Student becoming frustrated. At another point Mother sighed, audibly. At another point Mother stated aloud that the testing was getting harder. Mother also redirected Student when he made vocalizations and exhibited hand-flapping gestures. These actions concerned Ms. Guidera, who made contemporaneous notations of Mother's actions.

May 23, 2013 Academic Assessment

33. On May 23, 2013, Mother and Student appeared for the scheduled academic assessment. Mother went to the vice principal's office with the April 16, 2013, prescription document. Mother informed the vice principal that she needed to be present in the assessment room because Student was nonverbal, was in an unfamiliar environment, and might become upset.

34. The vice principal conferred telephonically with Ms. Williams and Mr. Delano.

35. As District's Director of Special Education, Ms. Williams had the final decisionmaking authority. Ms. Williams held a master's degree in school psychology, a Ph.D. in Special Education, and a pupil personnel services credential.

36. Ms. Williams determined that the assessment scores would be invalidated if Mother were present.

37. Mother, Mr. Delano and Ms. Williams conferred telephonically. Mother informed Ms. Williams and Mr. Delano that she had been permitted to be present in the room during the May 21, psychoeducational assessment. Mr. Delano and Ms. Williams were not previously aware of this, were surprised, and expressed the view that those scores would therefore be invalid.

38. District informed Mother that the assessment must proceed with only the assessor and Student present, and that Mother would not be permitted to be present with Student in the assessment room. Mother informed District of her intention to leave with Student. District informed Mother that she had the right to leave if she chose, but that the

assessments would not be conducted with her present in the same room with Student. Mother determined that if that were District's position, the matter would have to be decided in a due process proceeding. Mother and Student departed and the assessment did not proceed.

39. Ms. Williams thereafter reviewed the May 21, 2013 psychoeducational assessment process with Ms. Guidera. Ms. Williams considered the results invalid, due to Mother's presence in the room. She considered that Ms. Guidera had erred in permitting Mother to stay. Ms. Guidera therefore never scored the Stanford Binet test she administered to Student.

Proposed Assessments

Academic Assessment

40. Cheryl Lynne Moore is the assessor who would, if permitted, conduct the academic assessment proposed by the assessment plan. Ms. Moore is a special education teacher at South High School, which would be Student's home school if he were attending school.

Assessor Qualifications

41. Ms. Moore is qualified to conduct the assessment in question. She has a master's degree in special education, a clear teaching credential to teach children with mild to moderate disabilities, a general education credential, and has taught at District for 12 years. She teaches the special day class known within District as "STEPS," which stands for "skills-based, therapeutic, educational practices for success," which is a non-diploma track program for students with cognitive or developmental delays who are not expected to graduate in the core curriculum. STEPS focuses on practical functional living skills, kitchen skills, cooking and cleaning, laundry, reading labels and ads, cutting coupons, and basic computer skills. Ms. Moore has worked with many children with autism, who comprise half her caseload. In addition to her teaching duties, she performs academic assessments on average of five per year. Ms. Moore's demeanor on the stand was calm, and gentle.

Assessment Tools

42. Ms. Moore testified to the assessment tools she would administer, based on her review of Student's file. In her view the most appropriate academic assessment tool for Student, and the one she plans to administer is WJ III, which assesses a student's abilities in the areas of reading, math, and written language. Ms. Moore would utilize the WJ III subtests in areas of letter-word identification, reading fluency, passage comprehension, word attack, reading vocabulary, spelling, writing fluency, writing samples, math calculation, math fluency and others. She has been trained to administer the WJ III, is familiar with it and able to administer it as required by the protocols. The total time it would take to administer the

subtests she chooses would depend on Student's abilities and responsiveness. Ms. Moore's best estimate is that the testing should take between one and two hours.

43. Ms. Moore would administer the test in an appropriate environment. She would use a location at South High School. She would conduct the testing in an empty quiet classroom. In Ms. Moore's opinion, Student would be in no danger at that location with her as assessor. Student would never be left alone. Ms. Moore has, in her career as a teacher, always been able to keep her students with autism safe.

Psychoeducational Assessment

44. Cathleen Geraghty is the assessor who would conduct District's proposed psychoeducational assessment, designated as the "social and emotional development" assessment on the assessment plan.

Assessor Qualifications

45. Ms. Geraghty holds a bachelor's degree, a master's degree and a PhD in School Psychology. She is a member of the permanent faculty of University of California, Riverside as a provisional non-tenured lecturer. She is credentialed as a school psychologist. She holds a pupil personnel services credential. She is currently pending certification as a Board Certified Behavior Analyst. She also serves as a private consultant and trainer. She conducts private psychological assessments and has performed approximately 1500-2000 such assessments. Approximately one-third of the student's she has assessed are autistic. Her demeanor on the stand was quiet and gentle.

Assessment Tools

46. Ms. Geraghty has reviewed Student's file. Based thereon, she would choose to administer the following assessment tools: the Autism Diagnostic Observation Schedule (ADOS), a play-based, norm-referenced standardized assessment; the Universal Nonverbal Intelligence Test (UNIT), a norm-referenced standardized cognition test for the nonverbal population; and the Maze test, a timed, norm-referenced and standardized cloze reading test that allows the assessor to look at a subject's silent reading skills.

47. The above instruments, administered directly to Student would require her to spend four hours with him, depending upon his need for breaks.

48. She would also utilize instruments that would require parent or teacher input on rating scales, as follows: the Autism Diagnostic Interview-Revised (ADI-R); the Social Skills Improvement System (SSIS); the Behavior Assessment System for Children, Second Edition (BASC-2); and the Vineland Adaptive Behavior Scale.

49. She would also conduct observations of Student at play, and in educational and noneducational settings, and would interview Parents and teachers.

50. Ms. Geraghty would administer the assessments at South High School. She would accommodate Student's needs for breaks.

Occupational Therapy Assessment

51. Erica Ely, District occupational therapist, is the person who would conduct Students' motor ability assessment.

Assessor Qualifications

52. Ms. Ely has a master's degree and PhD in occupational therapy. She is a licensed occupational therapist, employed by District since 2012. Prior to her tenure with District, Ms. Ely worked at a nonpublic agency, the Pediatric Therapy Network, and has also worked at medical facilities. She has performed approximately 130 school-based occupational therapy assessments. Her demeanor on the stand was calm, soft-spoken and gentle.

Assessment Tools

53. If permitted to go forward with her assessment, Ms. Ely would administer the Bruininks-Oseretsky Test of Motor Proficiency (BOT). The tests contain standardized subtests in the areas of fine motor integration, fine motor precision, manual dexterity and upper limb coordination. It includes exercises such as copying specific shapes, transferring coins from hand to hand, and ball skills like dribbling and catching. The BOT contains specific instructions which direct the assessor precisely what to say and do, and are invalidated by deviation from those instructions. To administer the BOT would require approximately one-to two hours with Student.

54. Ms. Ely would also conduct a records review of past assessments, past IEP's and Student's current and prior goals in his IEP's. She would watch Student write by hand, would examine the handwriting sample and would watch Student type. For both the writing and typing exercises, she would use a "near point" sample for Student to copy, i.e. text on a piece of paper, and a "far point" sample, i.e. text on a chalk board, to assess his grasp, manual dexterity and coordination.

55. Ms. Ely would interview Student's home hospital teacher to discuss Student's handwriting and attention in a functional setting. She would also interview Parents.

56. For the portion of the assessment requiring her to work with Student, Ms. Ely would use a room at South High School. The particular room she would choose is quiet and has a table. To avoid distractions, only she and Student would be in the room. Student would be given breaks if needed and Ms. Ely would monitor his attentiveness.

Speech Language Assessment

57. Joyce Renge, District speech language pathologist, is the person who would conduct Student's speech and language assessment.

Assessor Qualifications

58. Ms. Renge has been a speech language pathologist for 27 years. She joined District in 2002. Prior thereto, she worked for the Los Angeles County Office of Education since 1976. She has assessed numerous children with autism, emotional distress and cognitive delays. She has performed over 1,000 speech and language assessments. Ms. Renge's demeanor on the stand was soft-spoken, gentle, kindly and diminutive.

Assessment Tools

59. Ms. Renge determined that the following are the most appropriate assessment tools to use to assess Student: the Goldman-Fristoe Test of Articulation, which assesses speech sounds; the Oral Speech Mechanism Screening, which assesses anatomy and physiology as it relates to speech; the Oral and Written Language Scales, Second Edition (OWLS-2), a standardized instrument to assess receptive language skills; the Receptive One-Word Picture Vocabulary Test (ROWPVT), a standardized instrument to assess skills in matching words to objects or actions depicted in pictures; the Expressive One-Word Picture Vocabulary Test (EOWPVT), a standardized instrument to assess vocabulary and ability to identify words that describe a picture; the Clinical Evaluation of Language Fundamentals (CELF), a standardized instrument to assess vocabulary and grammatical skills. Ms. Renge would also take a language sample. This involves having a conversation with a student, using photographs to stimulate conversations if necessary, tape recording it, and then analyzing the recorded utterances according to the number of words per utterance, and other matrices, to see the number and type of words the student uses on average.

60. These instruments, taken together, evaluate a student's ability to produce sounds orally, to repeat, to identify the names of items when seen, to produce the names of items when prompted; to use words correctly in sentences. They measure comprehension, use of figurative language, use of social or pragmatic language, grammar and syntax. The instruments Ms. Renge would administer directly to Student would require approximately three hours.

61. She would also interview Parents, and give Parents and the home hospital teacher the CELF pragmatics profile, a checklist that assesses a student's social language skills

62. Ms. Renge would use an office in the administration building at South High to conduct her assessments. The room is quiet, has a table where two people can sit comfortably, and is unlikely to have nearby distractions. Parents would be able to sit in close proximity outside the room.

Health Assessment

63. Melissa Foster, School Nurse, is the person who would conduct Student's health and development assessment. Ms. Foster prepared a draft health assessment report on June 4, 2013, from information she gleaned from Student's file. She considers the report incomplete because it does not contain the results of a current parental health history form, nor of an audiometer or vision screening.

Assessor Qualifications

64. Ms. Foster obtained her B.S. in nursing in 1993. She is licensed as a registered nurse, and has a preliminary school nursing credential entitling her to perform the duties of a school nurse. She is currently working toward her school nursing degree at California State University, Fullerton. Ms. Foster has worked as a school nurse with District since 2010. Prior to working with District she worked as a pediatric nurse. She has performed approximately 100 school-based health assessments each year she has been with District. Her demeanor on the stand appeared friendly and warm

Assessment Tools

65. To complete her assessment report, Ms. Foster would request Parents to complete a health history form regarding Student's medications and general health status.

66. She would assess Student's hearing with an audiometer. There are two available types of audiometers she could use, one of which requires the student to respond when he hears sounds. If he will not or cannot cooperate, the second type of audiometer measures hearing on the basis of physical metrics without requiring the student's cooperation.

67. For the vision screening, Ms. Foster would utilize a vision chart with successively smaller lines of letters and symbols, requiring audible responses from Student. If Student would or could not comply, Ms. Foster would track the movement of Student's eyes tracking the movement of a falling ball.

68. The screenings Ms. Foster proposes to conduct would take five-to-ten minutes if a student was cooperative. Ms. Foster would conduct the screenings at her office at South High School.

Behavioral Assessment

69. Hermine Voskanyan is the person who would conduct Students' behavioral assessment, designated on the assessment plan as an "ASSISTT" assessment.

Assessor Qualifications

70. Ms. Voskanyan holds a master's degree in school counseling. She holds a pupil personnel services credential. Prior to joining District, she worked as a behaviorist with nonpublic agencies. Currently in her duties for District, she has a caseload of students for whom she provides behavioral services, supervises others behaviorists, and performs behavioral assessments for District's ASSISTT program. Her demeanor on the stand appeared friendly and warm.

Assessment Tools

71. Since Student does not currently attend a school site, Ms. Voskanyan would attempt to create a school-like environment in order to assess Student's behaviors in an educational setting. She would create a classroom setting with other peers and a teacher. In the classroom environment, she would provide Student with preferred and nonpreferred tasks to observe whether he sat, attended and complied with instructions. She would take data on the frequency and duration of any maladaptive behaviors observed, and would attempt to determine appropriate replacement behaviors, in order to generate appropriate IEP goals in the area of need for behavior. She would also set up a social situation with one or two peers, and would observe Student's interactions with them. The total time with Student Ms. Voskanyan would require would be three-to-five hours.

72. She would also observe Student during his other assessments to observe his attention to tasks. She would also conduct interviews of Parents and of Student's home hospital teacher. She would also do a record review. She would also provide the Assessment of Social and Organizational Skills by Dr. Kathleen Quill (Quill), a survey instrument administered to parents and service providers, which asks questions regarding a student's verbal, nonverbal, organizational and social skills, and his attention to task.

District Personnel's Opinions Regarding Parental Presence in Testing Room

73. At hearing, Ms. Guidera opined that she had erred to permit Mother to attend the May 21, 2013 psychoeducational assessment session. She was concerned for her own safety because Mother stated Student had maladaptive behaviors. But she was not comfortable with her decision to allow Mother to stay. Ms. Guidera had learned during her schooling that assessment manuals all require testing to be conducted in a quiet room, in a one-to-one situation without distractions. She had learned that it is not best practice to have anyone else in the testing room, especially a parent, as this may affect a student's performance on the assessment and thus invalidate the validity of the test. Ms. Guidera had never had a parent be present for any other assessment she had performed. Ms. Guidera had, in the past, on three occasions, administered psychoeducational assessments with a paraeducator present, when a student exhibited extreme aggression. The paraeducators had never intervened except in the event of extreme behaviors or safety concerns. Although the paraeducator's presence might have an effect on the students' test performance, it was not considered to invalidate the results. Ms. Guidera considered Mother's actions on May 21,

2013 to interfere with her ability to obtain an accurate view of Student's abilities to regulate himself, or to accept redirection in an educational setting. Moreover, Student was compliant and easily redirected. Ms. Guidera felt she could easily have dealt with Student's minimal behaviors on her own. Ms. Guidera considers there to be no rationale, based on what she observed of Student, to indicate he is a danger to himself or others.

74. At hearing, Ms. Williams opined that parental presence in the testing room would invalidate results of all standardized assessments, the protocols for which direct assessments to be conducted in a quiet place in a one-to-one situation. She considered, based upon the protocols and on Mother's conduct in the room, that the results of the May 21, 2013 Stanford Binet, were not a valid measurement of how Student might perform un-aided. She has the same opinion about the instrument that was to be used on May 23, 2013 the WJ III, considering that it would be invalid if conducted in Mother's presence.

75. Ms. Williams was not at any time in actual possession of the April 16, 2013, medical prescription document, which was not in Student's file and which Parents did not present to District until the May 23, 2013 assessment appointment. However, she does not consider District to be automatically bound to follow a medical prescription. Ms. Williams gave the example of a doctor's recommendation that a student requires occupational therapy, which is not in all instances accepted by an IEP team. In her view the IEP team, and not the medical provider, is the final decisionmaker regarding the educational implications of a student's medical conditions.

76. Special education teacher and academic assessor Ms. Moore is of the opinion that parental presence in an assessment room might constitute a distraction, especially if the parent attempts to help, or calm, the student. She was trained that administering the WJ III requires that there be no distractions or interruptions during the testing process.

77. School psychologist and psychoeducational assessor Ms. Geraghty is of the opinion that all standardized assessments are standardized in a quiet environment with no distractions, conditions which are specified in the testing manuals. Norm-referenced instruments compare students to same-age peers, and if the results are not comparable, they are not meaningful. The tests come with protocols that determine the testing conditions. In determining whether or not a parent should be present, Ms. Geraghty would look to the test protocols, considering that if another person is present in the room, the results may be invalid, not comparable to other students, thus rendering the norm-referencing meaningless.

78. Speech pathologist Ms. Renge would prefer her assessment to be conducted with only herself and Student. In her view, in an assessment situation it is important to establish rapport. Another person's presence in the room would constitute a distraction.

79. Behaviorist Ms. Voskanyan would prefer no other adults to be present for the assessment, other than the teachers she would use for the educational setting. In her opinion, parental presence might alter a student's behavior, because students often modify behaviors when aware they are being observed by parents or others. This would render the assessment

results invalid as a measure of Student's ability to function un-aided in the educational environment.

Parent's Testimony at Hearing

80. According to Mother, Student is frequently frustrated. He elopes frequently. Student exhibits self-injurious behaviors frequently. Student experiences frustration and anxiety on a daily basis, both while working with Mr. Hunt and outside Mr. Hunt's presence. In Mother's opinion, her presence during the assessments is crucial for "moral support" and to prevent outbursts by Student. Student also needs breaks that Mother feels she can anticipate. He also requires assistance with toileting, so she must be present to take him to the bathroom. In her opinion, Student cannot attend the three-to-five hour assessment sessions District is requiring. Student is nonverbal, thus if he is hungry, cold or thirsty, he may experience outbursts that Mother's presence is required to prevent or calm.

81. Father stated that Student had been traumatized at school in 2010, prior to being put on home hospital. He stated that Student is large, and can act aggressively. Student is given Risperdal twice daily with a syringe, once in the morning and once in the afternoon or evening. The morning dose has worn off by the time Mr. Hunt arrives; therefore the family doctor added the afternoon dose. Student's toileting schedule is two-to-three times daily, in the morning, around noon, and in the evening.

LEGAL CONCLUSIONS

1. District contends that it should be permitted to conduct a triennial assessment of Student, or else Parents forego the right to District's provision of special education to Student. Parents do not dispute District's right to assess. Parents contend that Father signed the assessment plan, and that Mother and Student appeared for the assessments as scheduled. However, Parents insist that Mother must be present for the assessment to ensure Student's safety and comfort. Parents contend that Student's doctor's office has directed this, and that District is obligated to comply. Parents contend that the sole reason the assessments did not go forward was District's failure to grant this requested accommodation. District disagrees that Mother's presence is required and contends that her presence would invalidate the assessment results. District disagrees that the doctor's note dictates the conditions under which the assessment must occur. District therefore seeks an order that it may conduct the triennial assessment of Student without parental presence, or else Parents forego the right to the District's provision of special education to Student.

Burden of Proof

2. The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, District has the burden of persuasion on all issues.

Definition of a FAPE

3. Under both State law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400; Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

Triennial Assessments

4. The right to a FAPE arises only after a pupil is assessed² and determined to be eligible for special education. (Ed. Code, § 56320.)

5. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related services needs. (20 U.S.C. §1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a)(1).)

6. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)³

7. A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304 (b)(1).) The assessment must use technically sound instruments that assess the relative

² An assessment under California law is the same as an evaluation under federal law. (Ed. Code, § 56302.5.)

³ All references to the Code of Federal Regulations are to the 2006 version.

contribution of cognitive, behavioral, physical, and developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).)

8. Assessment materials must be used for purposes for which they are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(iii)); 34 C.F.R. § 300.304(c)(1)(iii); Ed. Code, § 56320, subd. (b)(2).) Assessments must be administered by trained and knowledgeable personnel, and in accordance with any instructions provided by the author of the assessment tools. (20 U.S.C. § 1414(b)(3)(A)(iv),(v); 34 C.F.R. § 300.304(c)(1)(iv), (v); Ed. Code, §56320, subd. (b)(3).) Competent persons who are knowledgeable of the student’s disability shall conduct assessments. (Ed. Code, §§ 56322, 56320, subd. (g).) Assessments must be provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer. (20 U.S.C. § 1414(b)(3)(A)(ii).)

9. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, §56381, subd. (f)(1).) In order to start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§ 1414(b)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (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 IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and/or pupil 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

10. When a parent imposes unreasonable conditions upon the assessment process, their consent is effectively withheld. (*G.J. v. Muscogee County School Dist.* (11th Cir. 2012) 668 F.3d 1258, 1262-64.)

11. A parent cannot withhold consent and still receive special education and related services. “Every court to consider the [Individuals with Disabilities Act’s] reevaluation requirements has concluded that “if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student” (*M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d 1153, 1160, quoting *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178-179.) The Ninth Circuit held in *Gregory K. v. Longview School Dist.* (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.”

12. If the parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (34 C.F.R. § 300.300(a)(3)(i), (c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

13. Neither the IDEA nor California special education law address whether, or to what extent, educational assessors must adhere to medical orders that purport to dictate how the assessment shall be conducted. Generally, however, in the context of deciding whether to assess in the first place, medical recommendations are informative but not binding on the IEP team. Thus, California Code of Regulations, title 5, section 3021.1 (“referral of pupils having a diagnosed chronic illness”) provides that when a student has been medically diagnosed as having a chronic illness or acute health problem, a student may be referred for a school-based assessment to determine the need for special education, during which referral the IEP team shall review the medical information. Similarly, California Code of Regulations, title 5, section 3051.4, which governs instruction in the home or hospital, puts the IEP team in control of deciding, after appropriate consideration of doctor recommendations, whether the services are educationally necessary. The IEP team is also the final decisionmaker regarding the provision of other specialized education or related services, including services such as audiological services, mobility instruction, adapted physical education, physical and occupational therapy; vision services, vision therapy, and other needs, all of which may implicate the overlap of medical and educational necessity. . (Ed. Code, §56363; Cal. Code Regs., tit. 5, § 3051, subd. (a)(2).) Thus, medical orders or prescriptions are informative but not automatically binding on the educational decisions of the IEP team..

Analysis

14. District provided proper notice to Student and Parents of the proposed assessment plan. (Factual Findings 22-28, Legal Conclusions 4-9.)

15. Parents initially did not consent to the assessment plan. When they ultimately did consent, they imposed conditions upon the assessments that were the equivalent of revoking their consent. Parents did not return the February 1, 2013, assessment plan. Father signed the April 17, 2013, assessment plan only after having obtained, the previous day, from Student’s doctor’s office a prescription purporting to impose conditions upon the assessments. After signing the assessment plan on April 17, 2013, Parents then attempted to frustrate the assessment process by insisting that there was an agreement that scheduling must be in a writing signed by District’s attorney. No evidence established any such agreement, nor is that a reasonable requirement regarding scheduling. Thereafter, Parents frustrated District’s attempts to resolve that matter when they failed to sign for a certified letter sent on April 25, 2013, regarding the scheduling issues. Then, in May 2013, Parents refused to permit Ms. Voskanyan to observe Student at his home hospital setting. Father again stated there was an agreement with District, one that is also unsupported by any evidence, this time that all assessments would be conducted at a District location. This condition is also unreasonable, given that Student’s home hospital setting was the only educational setting he had participated in for the past two years. (Factual Findings 22-39, Legal Conclusions 9-12.)

16. The evidence did not support Parents’ further requirement that Mother be in the assessment room for Student’s safety and comfort. The note from Student’s physician’s

office, without more, is not automatically dispositive. The note is rendered less credible by the fact of its being dated immediately before Father signed the assessment plan, yet not revealed to District at that time, and by the fact that the doctor refused to appear as a witness although properly subpoenaed. Other than Parents' testimony, no evidence established any basis for the medical determination stated in the note. All the other evidence indicates that Student's safety and comfort would be amply provided for in assessments conducted one-on-one with District staff. Each of the assessors presented on the witness stand as friendly and warm. Student's comportment with his home hospital teacher shows that Student is compliant overall with minimal Parental intervention, with limited and easily redirected instances of noncompliance, and that any self-injurious or elopement behaviors are infrequent. Home hospital teacher Mr. Hunt has no fears for Student's safety, or his own, when he is with Student outside Parents' presence. Student's comportment at the May 21, 2013, assessment with Ms. Cadres-Guidera also revealed no safety concerns, as Ms. Cadres-Guidera could easily have dealt with Student's minimal behaviors alone, and saw no rationale for Mother's presence. Previously during the 2010 assessments, Student was at times compliant and at other times non-compliant, but exhibited noncompliant behaviors both when Mother was and when Mother was not present, and he was independent with feeding and toileting skills in school. Thus, there is no evidence other than Parent's own opinions, and the doctor's note unsupported by any medical expert testimony, that Student requires parental presence in the assessment room. The professional assessors' opinions that valid assessments could be administered safely, without a parent present, and that the presence of a parent would invalidate the data obtained, is more persuasive on this issue. (Factual Findings 1-81, Legal Conclusions 1-13.)

17. Moreover, Mother's conduct in the single assessment she did attend, reveals that her presence impaired District in its legal duty to assess the relevant functional, developmental, and academic information about Student, in the form most likely to yield accurate information on what he knows and can do academically, developmentally, and functionally, and in accordance with the test instructions. Mother stood up and rubbed Student's shoulders, sighed audibly, and stated audibly that the questions were getting harder. These actions so concerned Ms. Cadres-Guidera that she made contemporaneous notations, and so concerned Ms. Williams that District considered the assessment invalid. All the assessors opined that parental presence in an assessment room might constitute a distraction, especially if the parent attempts to help the student, or calm him, and that such distractions or interruptions are contrary to the testing protocols. Significantly, it is precisely Student's ability to function in the educational setting alone, without Mother's soothing or calming presence, that District must assess to gain an accurate picture of his functional levels. (Factual Findings 29-81, Legal Conclusions 1-13.)

18. The assessments District proposes are in compliance with the three-year time frame provided for by law. Student's last comprehensive assessments were in 2010, and District is correct to assert that reevaluation is necessary. Other than Student's home hospital teacher, no District staff has interacted with Student for two years, and he has not attended a District placement. His 2012 IEP team reiterated the lack of current information, and stated that his PLOP's were all generated from previous data on Student's skills, because the team

lacked current information due to Student's non-attendance in school. All Student's 2012 IEP goals were continued from the previous year's IEP, due to Student's non-attendance at school. The baseline skills were not current. Thus, District has established the need for a comprehensive triennial assessment. (Factual Findings 1-81, Legal Conclusions 1-13.)

19. The assessment plan proposed assessments in all areas of suspected disability. Accordingly, District proposed to assess Student in the areas of academics, social and emotional development, motor ability, speech and language abilities, health and development and behaviors. These proposed assessments are sufficiently comprehensive to identify all of Student's needs for special education and related services. The assessors propose to use tests based on the information they know about Student and a review of his records. The assessors propose a variety of technically sound assessment tools and strategies to gather relevant functional, developmental, and academic information. The proposed assessors all established their competence, training and knowledge, and their ability to administer the tests in accordance with the testing protocols and instructions provided by the author of the assessment tools. (Factual Findings 1-81, Legal Conclusions 1-13.)

20. In conclusion, Parents have effectively withheld their consent to assessment by imposing unreasonable conditions upon the assessment process. District has prevailed in establishing its need and legal entitlement to reassess Student. If Parents continue to withhold consent and/or do not comply with the orders set forth below, the IDEA provides that Student may not continue to receive special education and related services. (Factual Findings 1-81, Legal Conclusions 1-13.)

ORDER

1. District may reassess Student pursuant to its April 17, 2013, triennial assessment plan without parental consent.
2. Parents shall not be present during the assessments.
3. Parents shall:
 - a. Permit a District assessor to observe Student during one home hospital instruction session of District's choosing.
 - b. Promptly complete any forms, scales, questionnaires or other documents that are part of the District's triennial assessment and return them to the District no later than 14 days after receiving them.
 - c. Make Student available for all assessments scheduled by District pursuant to paragraph 4, below.

4. District shall give Parents 14 days' written notice of the date, time, and place of each assessment required by the April 17, 2013, triennial assessment plan.

5. If Parents fail to cooperate with the triennial reassessment process as required by this Order, District may, upon prior written notice to Parents and without further order of an ALJ, terminate its delivery of special education and related services to Student.

6. Written notification by the District sent by first class United States Mail to Parents' address as stated on their pleadings in this proceeding shall constitute sufficient notification to Parents under this Order, unless Parents advise the District in writing of a change of address. The District need not use certified mail or obtain signatures from Parents acknowledging receipt.

7. This Order is effective immediately.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on all issues heard and decided in this case.

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 (90) days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: September 6, 2013

/s/

JUNE R. LEHRMAN
Administrative Law Judge
Office of Administrative Hearings