

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

In the Matter of:

RIPON UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007060591

DECISION

Richard M. Clark, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on August 7 and 8, 2007, in Stockton, California.

Patrick Balucan, attorney at law, represented Ripon Unified School District (District). Camille Taylor, Director of Special Education for the District, was present during the hearing.

Tamara Loughrey, attorney at law, represented Student. Christopher Ide-Don and Robert Woelfe, both attorneys at law, were also present and examined witnesses on behalf of Student. Student's parents (Parents) were present during the hearing.

The District filed its request for due process hearing on June 19, 2007. The matter was continued on July 6, 2007. Oral and documentary evidence were received during the hearing. The record remained open for the submission of written closing arguments by August 17, 2007, when the record was closed and the matter was submitted for decision.

ISSUE

May the District conduct a triennial assessment of Student pursuant to the March 30, 2007 assessment plan, without parental consent and without the conditions and restrictions requested by Parents?

CONTENTION OF THE PARTIES

The District contends that as part of Student's triennial evaluation, it has the right to assess Student without any conditions or restrictions imposed by Parents. The District seeks a finding that it can assess Student, without parental consent, pursuant to the proposed assessment plan dated March 30, 2007.

Student contends that his Parents signed consent to the March 30, 2007 assessment plan and that the hearing was unnecessary. Student also contends that he did not set any conditions on the testing, but instead sought "reasonable accommodations" as required by his IEP. Further, Student contends that the District is retaliating against him because of a tort claim action filed in federal court by his Parents against the District.

FACTUAL FINDINGS

1. Student is eight years old and resides in the District with his family, where he attends Parkview Elementary School. Student is eligible for special education under the category of autistic-like behaviors. Student first became eligible for special education pursuant to an Individualized Education Program (IEP) meeting on June 1, 2004. His triennial assessment was due on June 1, 2007.

2. On March 30, 2007, the District proposed a written assessment plan for Student's triennial assessment. The assessment plan sought to test in the following areas using qualified professionals: academic/pre-academic areas by a special education teacher, psycho-motor development by an adaptive physical education specialist, intellectual development and social/emotional/behavior status by a school psychologist, health development by a school nurse and school psychologist, and other information, including previous assessments, inter-agency information, a cumulative file review, and/or independent evaluations. The assessment plan was presented on a pre-printed form which contained the notation, "Detailed descriptions of specific tests are available upon request." The assessment plan had three boxes for parental consent. The first box stated that, "I understand the assessment plan, my enclosed parental rights, and that no special education placement will result from this assessment plan without my consent." The next two boxes were, "Yes, I give my permission to conduct this assessment as described," or, "No, I do not give my permission for this assessment."

3. On April 2, 2007, Sean Henry, school psychologist, sent home a notice of re-evaluation that contained the March 30, 2007 assessment plan. Initially, Mr. Henry incorrectly checked a box stating that the District did not need to conduct an assessment of Student, but included the statement that the District sought to conduct an assessment of Student because “updated levels of functioning will be beneficial for better understanding [Student’s] skills and learning needs.” Mr. Henry sent a corrected copy of the notice of assessment the next day with the correct box checked and included the same statement that indicated the District would like to conduct a complete assessment.

4. On April 3, 2007, Student’s mother sent an e-mail to Camille Taylor, Director of Special Education for the District, acknowledging receipt of the assessment plan and stating she understood the error in the two introductory letters. In her email to the District, Mother requested an explanation regarding what comprised a “full assessment,” including the names of the test instruments, the reasons the particular assessments were requested, the name of the evaluator, the education, training, experience of the assessor in the area of autism, and the subject area of assessment or test, to ensure the evaluator met the requirements of 20 U.S.C. 1414(b)(3)(A)(i-v).¹ She indicated she needed “this information prior to signing the assessment plan with fully informed consent.”

5. On April 18, 2007, the District provided Mother with prior written notice that the school psychologist, Mr. Henry, would be conducting the assessment and it was up to him to use his judgment and expertise to determine which standardized testing instruments would be administered to Student as part of the assessment.²

6. On April 27, 2007, District staff met with Parents to discuss the impasse related to the assessment plan in an effort to reach a compromise. The parties discussed the standardized tests that would be used and listed the agreed upon tests on the assessment plan. The parties agreed to use the Wechsler Intelligence Scale for Children Fourth Edition (WISC-IV), the Woodcock Johnson-III, the Kaufman Assessment Battery for Children Second Edition (KABC-II), the Kaufman Test of Educational Achievement, Second Edition (KTEA-II), and the Behavior Assessment System for Children, Second Edition (BASC-II), which would include an interview of Student. The interview of Student would supplement

¹ Title 20 United States Code section 1414(b)(3) discusses the additional requirements for evaluations and requires that: “Each local educational agency shall ensure that: (A) assessments and other evaluation materials used to assess a child under this section: (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are 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; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.”

² The prior written notice also stated that the District would not conduct further occupational therapy (OT) assessments because an OT assessment had recently been completed. Further, the prior written notice stated that the Parent request for a reading assessment at Lindamood Bell made in a dissent to the January 19, 2007 IEP was premature in light of the request to conduct academic testing as part of the proposed assessment plan.

the BASC-II, and inquire about Student's own perceptions and views about school, whether Student thought he was being successful, how he sees himself in relation to other students, whether Student was excluded from activities and other information directly from Student about his program. The parties also agreed that a behavioral therapist from Genesis could be present during the assessments.³ The parties did not discuss tape recording of the assessments, and they did not discuss the District providing the test instruments, protocols, raw data, test questions or copies of the assessment reports, prior to the IEP meeting.

7. On April 30, 2007, Student's mother signed the assessment plan and checked the box, "Yes, I give my permission to conduct this assessment," but lined through the words "as described" and inserted the words "per above notes." Student's mother included a lengthy note in the box of the assessment plan entitled, "Additional Student Information Parent Would Like Considered." The explanation was as follows:

Consent is being given to perform ONLY the following assessments: WISC-IV, K-ABC II, K-TEA II, WJ-III, the BASC-II, hearing and vision screening and observations of [Student] in his natural environment in the classroom and on the playground. However consent is not being given for informal assessments of any kind, including, but not limited to, informal talks, discussions, interviews, etc., about [Student's] perceptions about himself, how he feels about school, if he feels he is being excluded from activities or any other type of assessment not specifically described above. All assessments described above shall not deviate from each test's protocol in any manner. All assessments will be given in the presence of a behavior therapist or higher individual from Genesis Behavior Center. Romina has assured us she will be able to provide a BT or higher to be present for all assessment periods. Copies of all assessment reports, raw data, test protocols and test questions shall be provided to us at least five days prior to the IEP meeting. All assessment sessions with [Student] shall be audio recorded. We will show Genesis how to operate our tape recorder.

The statement provided by Parents was not consent to the proposed assessment plan, but instead imposed additional conditions upon the evaluation process which had not been discussed or agreed upon at the meeting on April 27, 2007. In essence, Parents made a counter-offer to the District's proposed assessment plan.

8. Ms. Taylor established that the meeting and the conditions requested were unusual, but the District agreed as a compromise to move forward with the assessment process. In most cases, the District provides enough information to the parents so they are aware of what is going on in the process, but it is up to the independent evaluator, using

³ The WISC-IV manual permits, on rare occasion and at the test administrator's discretion, an accompanying adult to be in the room to facilitate testing, with appropriate instruction to remain silent and not prompt the student taking the test.

professional experience and judgment, to determine which tests to utilize to most effectively evaluate Student. When Mother returned a copy of the signed assessment plan, Ms. Taylor had concerns about tape recording the assessments, as did other District personnel, and contacted Harcourt Brace to ask about copyrights.⁴

9. On May 9, 2007, the District sent Parents prior written notice denying the Parent's request to have a one-to-one behavioral therapist observe and tape record all assessments in the proposed triennial evaluation. The District explained that the denial was based upon the legal policies of the test developers, copyrighted test protocols, and confidential nature of the test questions and instruments. Further, the District objected to not allowing informal conversation with Student while the testing was occurring. The District staff believed that informal evaluations were an integral part of the evaluation process, including rapport building and responding to questions from Student, which would provide a more thorough triennial evaluation. It was the position of the District that the limitations placed upon the evaluation process by Student was not consent to the evaluation and would limit the ability of the District to get an accurate assessment of Student.⁵

10. Student offered testimony and evidence that the District allowed the parents of other students to observe portions of assessments that did not include standardized testing and that the District provided test protocols to the parents of the other students. The evidence and testimony was unpersuasive and generally irrelevant. What the District may or may not have done in other cases is not relevant to what should occur in this case, and is not relevant to the District's legal requirements for conducting assessments. The ALJ is not persuaded by the testimony of other parents who testified in this case. Furthermore, the District did not dispute that the test answer sheets were available to Parents since the test protocols become part of Student's school record. (Ed. Code, §§ 49060-49085.) The persuasive weight of the evidence and testimony, including testimony of Student's expert Dr. Wright, established that the actual test itself is not produced and given to the Parents for a variety of reasons including copyright infringement, test confidentiality and security to prevent the questions from being widely disseminated, and other ethical concerns. Whether the tests are widely available on the Internet is again irrelevant to the District's legal obligations in this matter.

⁴ On or about January 25, 2007, Student filed a lawsuit in the United States District Court for the Eastern District of California alleging civil rights violations by the District. Ms. Taylor was credible and established that she was not aware that a federal court action had been filed prior to filing for due process in this matter and that the District did not file for due process in retaliation for the federal lawsuit.

⁵ On July 27, 2007, Tamara Loughrey, attorney for Student, sent a letter to Ms. Taylor making a formal request for accommodations under Title II of the Americans with Disabilities Act. She requested that one of Student's behavioral therapists be present during testing and that the testing be tape recorded. Ms. Loughrey claimed that the requests were reasonable and that Student's IEP provides for similar accommodations during testing, including STAR testing. The letter was sent a month and a half after the due process case had been filed. The District did not respond to the letter.

11. Dr. Roslyn Wright is a licensed psychologist in private practice who had recently conducted an independent assessment of Student. She has a doctorate in clinical psychology, a master's degree in counseling and education, and a bachelor's degree in psychology, and has been a licensed psychologist since 2001. She observed that Student had a difficult time sitting still, was impulsive and fidgeted. At one point, Dr. Wright allowed Mother to stand in the back of the testing room to focus Student so he could complete the testing. Dr. Wright allows a person in the testing room if it is necessary and believes an evaluator should use his or her professional judgment to determine if the presence of someone in the room would be required. Allowing an individual in the testing room would be a non-standard condition and should be notated in the formal report. Dr. Wright does not consider rapport building to be an informal assessment, which is an evaluation of the student that does not use standardized measures. Dr. Wright used several informal assessments in the area of social-emotional and clinical interviews, including a behavioral checklist. Dr. Wright stated that she would not allow an assessment to be tape recorded, and had the same concerns regarding professional ethics as the District employees. She did not give Mother a specific list of tests, but discussed generally what the tests would be. She stated that a certain amount of trust is required in the assessment process. Mother also did not ask to tape record sessions with Student. Dr. Wright was a credible witness and corroborated the professional opinions of the District staff regarding the assessment process, testing, and professional concerns and ethics.

APPLICABLE LAW

1. The District bears the burden of persuasion in this matter. (*Schaffer vs. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. Reassessment of a student eligible for special education must be conducted at least every three years, or more frequently if the local educational agency determines conditions warrant reassessment, or if a reassessment is requested by the student's teacher or parent. (20 U.S.C. § 1414(a)(2)(A); Ed. Code, § 56381, subs. (a)(1), (2).) No single procedure may be used as the sole criterion for determining whether the child has a disability or for determining an appropriate educational program for the child. (20 U.S.C. § 1414(b)(2), (3); Ed Code, §56320.)

3. A reassessment requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, §§ 56321, subd. (c), 56381, subd. (f).) To obtain consent, a school district must develop and propose a reassessment plan. (20 U.S.C. § 1414(b)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (f).) If the parents do not consent to the plan, the district can conduct the reassessment only by showing at a due process hearing that it needs to reassess the student and is lawfully entitled to do so. (20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.300(c) (2006); Ed. Code, §§ 56321, subd. (c), 56381, subd. (f), 56501, subd. (a)(3), 56506, subd. (e).) The District must propose a written assessment plan and include notice of the procedural safeguards under the Individuals with Disabilities Education Improvement Act (IDEA) and state law. (20 U.S.C § 1414(a)(1)(D)(ii); Ed. Code, §§ 56321, 56329, 56381..)

4. A parent who wishes that a child receive special education services must allow reassessment if conditions warrant; “if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing.” (*Gregory K. v Longview School Dist.* (9th Cir. 1987) 811 F.2d 130, 1315.) “A parent who desires for her child to received special education must allow the school district to reevaluate the child using its own personnel; there is no exception to this rule.” (*Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 179.) [T]here is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student’s eligibility under the IDEA.” (*Id.* at 178.)

DETERMINATION OF ISSUE

1. As determined in Factual Findings 1 and Legal Conclusion 2, Student’s triennial evaluation was due on June 1, 2007. Accordingly, the District had to a request a reassessment of Student for the triennial evaluation.

2. As determined in Factual Findings 2 to 4 and Legal Conclusion 3, the District properly noticed the triennial assessment to Parents and provided a proper written assessment plan to Student.

3. As determined in Factual Findings 5 to 11 and Legal Conclusions 2 to 4, Student’s parents did not consent to the March 30, 2007 assessment plan. The conditions imposed by the written response from Parents impeded the District’s ability to evaluate and assess the special education needs of Student. The District has the right to evaluate Student for special education services using its own personnel. In so doing, District staff needed to use their professional judgment and training to determine the proper tests to be given, the nature of observations during the assessment process, and information they would need to gather to produce valid test results. The conditions and restrictions proposed by Parents would unfairly constrain the assessment process such that the District might not have received the proper picture of Student, the nature of his disability, and how best to meet his needs in the educational environment. Further, the nature of the conditions imposed by the Parents would have required that the District use only a single criterion to determine the appropriate educational program for Student. The District made reasonable efforts to obtain parental consent to the assessment plan and made reasonable efforts to inform the Parents about the process. Further, the District made reasonable attempts to accommodate the parental requests, but was under no legal obligation to do so. The District is legally mandated to reassess Student for his triennial evaluation without restriction or condition from the parents.

4. Accordingly, the District is entitled to assess Student pursuant to the March 30, 2007 assessment plan without condition or restriction and without parental consent. The District is not obligated to provide any accommodations, including recording of the testing

sessions or the presence of a behavioral therapist, unless in the professional judgment of the individual evaluator, it would be necessary to assist the testing process.

ORDER

1. The District is entitled to assess Student pursuant to the March 30, 2007 assessment plan, without conditions or restrictions imposed by Parents, and without parental consent.
2. Parents shall make Student reasonably available for assessment by the District.

PREVAILING PARTY

The hearing decision shall indicate the extent to which each party has prevailed on each issue heard and decided. (Ed. Code, § 56507, subd. (d).) The District prevailed on all issues heard and decided.

RIGHT TO APPEAL THIS DECISION

The parties 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 12, 2007



RICHARD M. CLARK
Administrative Law Judge
Special Education Division
Office of Administrative Hearings