

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2009030498

DECISION

Administrative Law Judge (ALJ) Darrell Lepkowsky, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Costa Mesa, California, on June 8 and 9, 2009.

Attorney Cynthia Vargas represented the Newport-Mesa Unified School District (District). Her colleague, attorney Adam Newman, was present briefly on the first day of the hearing. Ann Huntington, the District's Executive Director for Special Education, attended the hearing on all days on behalf of the District.

No representative appeared for Student. After opening the record and noting that neither Student's Parents (Parents) nor a legal representative for them was present, the ALJ telephoned the only telephone number on file in this case for Student but received only a voice mail recording. The ALJ left a voice mail message to inform Parents that the due process hearing was starting and that they should contact OAH. The ALJ waited 15 minutes after the scheduled time of the hearing to see if Parents would either call or appear at the hearing. When Parents did not telephone or appear, the ALJ opened the record of the hearing. Parents did not contact OAH at any time during the two days of the hearing.

The District filed a request for due process hearing on March 6, 2009. On April 3, 2009, OAH granted the District's unopposed motion to continue the proceedings. At the hearing, the ALJ received sworn testimony and documentary evidence. At the close of evidence on June 9, 2009, after hearing the District's oral closing argument, the ALJ took the matter under submission.

PROCEDURAL ISSUE

Neither Parents nor any legal representative appeared on behalf of Student at the telephonic prehearing conference on June 1, 2009. Based upon the District's prehearing conference statement, the ALJ defined the issue for hearing as "Does the District have the right to assess Student pursuant to its assessment plan dated January 20, 2009,¹ as resent to Student's parents on or about May 4, 2009, even absent parental consent?"

On June 5, 2009, Student filed a "Motion to Deny Complaint Amendment/ Motion to Dismiss." In his motion, Student contended that the original issue contained in the District's due process complaint was restricted to whether it had a right to assess Student pursuant to its January 21, 2009 assessment plan. Student argued that the assessment plan the District "resent" to his parents on May 4, 2009, contained revisions and amendments, and that it should have been the subject of an amended complaint. Student argued that since the District never moved to amend its complaint to include the subsequent assessment plan, it was not a proper subject for the instant due process hearing.

The ALJ addressed the issue at the beginning of the hearing on June 8, 2009. She tentatively granted Student's motion to exclude reference to the assessment plan sent to Parents on May 4, 2009, pending presentation by the District of case authority supporting its contention that the revisions to its assessment plan did not necessitate the filing of an amended complaint. On June 9, 2009, early in the second day of hearing, the District informed the ALJ that it was, in effect, withdrawing its opposition to Student's motion to deny amendment of the complaint, and that it would proceed to hearing solely on the issue of whether it could assess Student without parental consent, pursuant to the assessment plan dated January 21, 2009.

ISSUE

May the District reassess Student pursuant to its assessment plan dated January 21, 2009, without parental consent?

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is an 11-year-old boy who resides with Parents within the geographical boundaries of the District. The District's multidisciplinary assessment team first assessed Student in November 2002. Information from Parents gathered as part of the assessment indicated that Student was prone to diarrhea, that he had several food allergies, and that he was prone to frequent ear infections. The District's assessment indicated that

¹ In her Order Following Pre-hearing Conference, the ALJ inadvertently identified the assessment plan as having been dated January 20, 2009, rather than the correct date of January 21, 2009.

Student's cognitive abilities were within the significantly delayed range, that his social skills were delayed, and that Student was demonstrating language and behavioral patterns consistent with autism spectrum disorder. The District found that Student qualified for special education services under the category of autism. He has qualified for special education under this category since that time.

2. Prior to the start of the 2004 – 2005 school year, the District received a letter from Dr. Jerry Kartzinel. Dr. Kartzinel is a pediatrician who practices in the state of Florida. Dr. Kartzinel's letter informed the District that Student was a patient of his who had been diagnosed with "encephalopathy." Dr. Kartzinel stated he had deemed it medically necessary that Student not receive further immunizations of any kind or participate in any testing for tuberculosis. Students attending public schools in California are required to show proof of certain immunizations as a prerequisite for attendance. However, state law also permits the requirement to be waived either based upon the parents' personal beliefs or based upon medical reasons. Pursuant to Dr. Kartzinel's letter, the District permitted Student to enroll in school without having completed all normally required immunizations.

3. Dr. James Seltzer, the District's medical expert who testified at hearing, explained that encephalopathy is an extremely broad medical designation that refers to any disease or symptoms of disease relating to disorders of the brain. Autism could loosely fall under the broad umbrella of encephalopathy. However, Dr. Kartzinel's use of the term gave no indication of which specific brain disorder he believed Student had.

4. Student attended the District's Paularino Elementary School for the 2004 – 2005 school year, when he was in kindergarten. Pursuant to his individualized education program (IEP), Student received applied behavioral analysis (ABA) services at school and in the home, and received related services in the areas of occupational therapy (OT) and speech and language therapy (SLT). Student's related services were provided by non-public agencies (NPAS) under contract with the District.

5. On February 10, 2005, Dr. Kartzinel wrote to the District to inform it that Student suffered from frequent bouts of sleeplessness and from numerous upper respiratory infections due to a weakened immune system. Dr. Kartzinel therefore stated that Student might have to miss school periodically.

6. Student finished the 2004 – 2005 school year. Although the record is not clear on this point, he apparently only received instruction and related services in his home at the beginning of the 2005 – 2006 school year. He has not returned to a public school setting since that time.

7. On November 7, 2005, Dr. Kartzinel wrote to the District to inform it that Student had complex medical issues and a compromised immune system. Based upon Student's medical diagnosis, Dr. Kartzinel recommended that Student only receive in-home services for the 2005 – 2006 school year because exposure to illnesses in the classroom would be "devastating" to Student. Dr. Kartzinel stated in his letter that when Student had

attempted “traditional schooling,” he had experienced symptoms of increased sleep disruption, increased sound sensitivity, multiple infections, increased tantrums, increased allergic symptoms, diarrhea, which resulted in poor school attendance. Dr. Kartzinel advised that all future evaluations be conducted in Student’s home due to Student’s multiple sensitivities. Dr. Kartzinel did not define Student’s “complex medical issues” and there is no indication in his letter that he ever personally examined Student. Dr. Kartzinel did not include any assessment of Student, any medical report or any medical records of examination in conjunction with his letter. Nor did he state a recommended length of time for the in-home instruction.

8. Student’s IEP team met in November, 2005. Dr. Kartzinel did not attend either in person or by phone. However, based upon his letter, Student’s IEP team, including all District members, agreed to continue Student on an in-home program. The program consisted solely of ABA services, occupational therapy, and speech and language therapy, all to be provided through NPAS in Student’s home or at the NPA clinics. There was no academic instruction included in the home hospital instruction although Student was in first grade at the time. Although unclear from the record, this appears to be the last IEP to which Parents have consented.

9. Although Student’s triennial assessment was due in the fall of 2005, the District and Parents agreed at the November IEP meeting to delay it until the following spring, as well as agreed to a corresponding delay to hold Student’s triennial IEP meeting. The District sent Parents a permission form for the release of information from Student’s physicians so it could get tangible medical support for Dr. Kartzinel’s recommendation for a home hospital program. Parents never signed the release form. They did sign an assessment plan in January 2006. However, Parents did not give consent for the District’s nurse to complete the health and developmental portion of the assessment. Nor did they respond to the nurse’s telephonic request for medical updates for Student.

10. The District was able to complete triennial assessments of Student in the areas of intellectual functioning, academic functioning, perceptual/processing and motor skills, speech and language, and behavioral/social-emotional/adaptive behavior functioning during February and March 2006. The assessments were administered to Student in his home.

11. Although Student’s IEP team convened to discuss the District’s March 2006 triennial assessment and to develop a new IEP for Student, apparently no consensus was reached on a new IEP and Student remained in his in-home placement, consisting of an ABA program, occupational therapy, and speech and language therapy, as his stay put placement.

District’s November 2007 Request to Conduct a Health Assessment

12. On April 24, 2007, Dr. Kartzinel again wrote to the District to recommend that Student continue his home hospital program through the 2007 – 2008 school year, again stating that his recommendation was based upon Student’s undefined medical diagnosis, Student’s compromised immune system, and past symptoms when attempting traditional

schooling. This letter is almost identical in wording to Dr. Kartzinel's letter of November 7, 2005. Like the previous letter, Dr. Kartzinal gave no indication that he had ever examined Student, did not include any assessment of Student, and did not include any medical report or medical records.

13. On November 9, 2007, the District sent an assessment plan to Parents. The District wished to conduct a health/physical status assessment of Student to determine the extent of his medical problems, particularly with regard to his immune system, so that Student's IEP team could ascertain whether Student still required home hospital schooling. Parents responded by letter to Mary Shields, a District coordinator for special education, dated November 29, 2007. Parents stated that the assessment plan made no mention of the manner, condition, or scope of the examination the District wished to conduct of their son. The District had already informed Parents that it had hired Dr. James Seltzer, a pediatric immunologist, to assess Student's health/physical status. In their letter, Parents stated that they needed more information before they would consider consenting to the assessment, and needed more information regarding Dr. Seltzer. Parents' letter raised several questions that they wished the District to answer before Parents would consider the District's assessment request.

14. On January 2, 2008, Ms. Shields answered Parents' letter, addressing each of the points they had raised in a five-page letter. Specifically, she indicated that Dr. Seltzer was a Board Certified Pediatric Allergist with 27 years' experience working with children. Ms. Shields carefully and fully answered each of the concerns raised by Parents, and gave them the website where they could view Dr. Seltzer's complete curricula vitae.

15. Parents responded to Ms. Shields in a letter dated January 30, 2008. In their letter, Parents stated that they did not believe that Ms. Shields had clearly answered their concerns or indicated who was providing the information in her letter. Parents requested that Dr. Seltzer specifically respond to the first 25 questions in their previous letter. They then raised several other questions in response to Ms. Shields' letter that they requested the District answer before they would consider consenting to the assessment plan. On February 19, 2008, Ms. Shields provided an updated response to Parents initial November 29, 2007 letter. Additionally, Dr. Seltzer reviewed the content of the letters from Ms. Shields to Parents, and, in a letter to counsel for the District, confirmed that the District had incorporated his input into Ms. Shields' responses and that he agreed with the content of the letters. However, Parents never consented to the November 2007 assessment plan.

Need for Health Assessment and Reassessment in Other Areas of Unique Needs

16. Parents never signed a District form for parent permission for the release of information so that the District could exchange information with Dr. Kartzinel, and specifically, obtain a copy of his medical records for Student. Parents, however, wrote to the District stating they had given their consent for the release of the information. The District therefore wrote to Dr. Kartzinel on March 13, 2008, copying him with Parents' letter of authorization to exchange information. The District requested that Dr. Kartzinel provide it

with copies of his medical evaluations of Student, treatment notes, medical reports supporting a diagnosed condition and clarifying that the severity of the condition prevents Student from attending a less restrictive placement than in the home. The District also requested test results, and any additional information that supported the extremely restrictive placement of in-home instruction. Dr. Kartzinel did not provide any medical records in response and never agreed to speak directly with District staff about Student's medical conditions.

17. On April 29, 2008, at an IEP meeting for Student, Parents hand-delivered to Ms. Shields another application for in-home instruction signed by Dr. Kartzinel, and a three-page document dated April 23, 2008, also signed by Dr. Kartzinel that consisted of a list of his diagnoses for Student, a list of Student's medications, a section entitled "Appointment Notes" that merely included a description of life with Student as described by Parents, and Dr. Kartzinel's recommendations for Student. Attached to the document were 30 pages of laboratory reports for Student. Of the 30 pages, approximately 26 of them were results of laboratory tests done for Student dated 2002 or earlier.

18. The District contracted with Dr. James Seltzer to review Student's medical records (to the extent they had been provided to the District) and to conduct the health assessment of Student once consent was obtained. Dr. Seltzer also testified at hearing as the District's expert. He received his bachelor's degree in biology and psychology in 1973 from the University of Pennsylvania. He received his medical degree in 1977, also from the University of Pennsylvania. From 1977 to 1980, Dr. Seltzer trained in pediatrics at Children's Hospital of Los Angeles. From 1980 to 1982, he was a Fellow in the Immunology and Allergy Division, Department of Pediatrics, at the University of California, San Diego. He is a Diplomate of the National Board of Medical Examiners, a Diplomate of the American Board of Pediatrics, a Diplomate of the American Board of Allergy and Immunology, and has been a Fellow of the American Academy of Allergy, Asthma and Immunology several times. In addition, Dr. Seltzer has been a consultant to the United States Environmental Protection Agency (EPA). Dr. Seltzer has been a Clinical Professor at the University of California Irvine School of Medicine since 2004, and has been Co-Director of the Pediatric Environmental Health Specialty Unit for the EPA, also since 2004.

19. Dr. Seltzer has worked with many special needs children, particularly those with autism, whose parents seek him out because of his experience with environmental toxins. He has treated scores of children who have allergic or immunological disorders. Over the course of his career, Dr. Seltzer has developed an ability to establish a rapport with his patients. He has learned to discern each child's rhythm by speaking first with the child's parents and/or other caregiver to determine what makes the child more comfortable, what makes him or her uncomfortable, and what types of sensory challenges the child may have. With autistic children, Dr. Seltzer tries to avoid touching them as much as possible and, when direct contact is required that results in the child demonstrating discomfort, gives the child time to recover before proceeding to another part of his examination. He plays with the child if that will help put him or her at ease. Dr. Seltzer has learned to work with children by observing their non-verbal cues, and will discontinue a medical assessment if a child's

behavior interferes with his examination. But, due to the rapport he is generally able to establish with each child, Dr. Seltzer has rarely had difficulties in completing his assessments. He saves the most uncomfortable aspects of an examination, such as drawing blood, for the very end of the examination. Dr. Seltzer considers himself to be an expert in the field of pediatric immunology. Given Dr. Seltzer's credentials, including 27 years of experience in pediatrics with an emphasis on pediatric immunology and pediatric allergies, as well as his thoughtful, reasoned and persuasive testimony at hearing, Dr. Seltzer's opinions were given significant weight.

20. Dr. Seltzer reviewed all of Dr. Kartzinel's letters to the District, including his April 23, 2008 documents and the attached laboratory reports, in preparation for the instant hearing. He could not discern why Dr. Kartzinel referred to Student's encephalopathy as a basis for recommending against immunizations because encephalopathy is not affected by any immunizations. Nor does he find a credible correlation between vaccines and autism. Dr. Seltzer pointed out that Dr. Kartzinel's letters to the District stating that Student has "complex medical issues" fail to meet an acceptable standard of practice as a medical report because the letters do not state the criteria used, or give support or clarification, for Dr. Kartzinel's conclusions and recommendations. There is no explanation of what Student's complex medical issues are, no causes described or explained, no information on how frequent or what the symptoms are, how often they occur, how severe they are, or how they are manifested. Dr. Kartzinel only provided vague comments that do not describe causes, the nature of the illnesses or the severity of the illness, and thus are basically meaningless in a medical context. Additionally, there is no indication that Dr. Kartzinel ever conducted an examination of Student in person.

21. Dr. Seltzer's review of Dr. Kartzinel's medical report of April 23, 2008, indicated that there is no evidence that Dr. Kartzinel has ever examined Student. Dr. Kartzinel did not address from what specific allergies Student suffered, does not identify the physicians who provided medical care to Student or what their diagnoses were. Dr. Seltzer stated that Dr. Kartzinel's recommendations and opinions appear to be based solely on the report from Parents and Dr. Kartzinel's own biases, rather than on any hard medical evidence. Specifically, Dr. Seltzer stated that "immune deficiency" is not a real diagnosis. He stated that a complete medical report for Student should have contained a description of Student's primary medical complaint, a history of that and any other illnesses including all information relevant to those illnesses and how they related to Student's present complaints, descriptions of the nature of the problems and factors related to them, a history of the progress of the disease or disorder, a list of things that trigger the disease or disorder, a list of previous medical data that would be relevant to the present complaint(s), recent laboratory reports, medical notes, X-rays and other scans, and a description of all medications previously and presently taken and the reason they were prescribed. Dr. Seltzer stated that the report should also have included an environmental history for Student, such as any exposure to second-hand smoke, a family history, and a review of Student's other body systems.

22. Dr. Kartzinel's document indicated that Student was taking 10 medications at the time: Actos, Singulair, Nasonex, LDN-Naltrexone, Methylocobalamin, Claritin, Pacreacarb, Pentass, Ibuprofen, and Fluconazole. The report also indicated that Student intermittently took Metronidazole, Azithromycin, Valtrex, Bethenecol, Leucovorin, Zyrtec, Sporanox, and Ketoconazole. Dr. Seltzer noted that there was no explanation in Dr. Kartzinel's report of why Student was taking the medications listed, and that many of those he was taking were not approved for children. For example, Actos is a medication used to treat diabetes, but is not approved for children, and there is no indication in any case that Student is diabetic. Also, as another example, Pentassa is used to treat colitis, but has not been established to be effective in children, and Leucovorin is used to treat people who have cancer and are receiving chemotherapy. There is no evidence that Student has ever suffered from cancer. The document from Dr. Kartzinel does not indicate if he prescribed any or all of the medications for Student or if they were prescribed by other physicians.

23. Ultimately, for Dr. Seltzer and the District, Dr. Kartzinel's report and accompanying documentation provided little information regarding Student's present medical issues, treatments, and need for home hospital instruction, and raised many more questions than it answered.

24. Since Parents refused to permit Student to be assessed for his medical condition, the District had no current information that would enable it to make a concrete and reasoned offer of placement to Student outside his home. In April 2008, the District again offered to maintain Student in his home hospital instruction placement, with NPA support. It offered, as it had done in the past, to provide Student with five hours a week of academic instruction with a credentialed teacher in addition to the program Student was already receiving. Parents consented to new goals and objectives, as proposed by Student's NPA providers, none of whom were credentialed teachers. However, Parents refused to consent to the offer of academic instruction and thus Student continued to receive the same program he had begun receiving in the 2005- 2006 school year: ABA instruction, occupational therapy, and speech and language therapy.

25. Since the District was not providing any services directly to Student and because his triennial assessment was due in March 2009, the District determined that in addition to a health assessment of Student, it was appropriate to conduct other assessments of him. Between March 2006, when Parents had permitted the District to conduct Student's triennial evaluation, and fall 2008, when the District again requested permission to begin assessments of Student in addition to its pending request to conduct a health assessment, Parents had only consented to one District administered assessment: an observation of Student in his home conducted by District autism specialist Marie Baba on April 18, 2007.

26. Consistent with its desire to obtain first-hand information about Student's present levels of performance and present needs, the District began requesting permission to conduct home observations of Student in the fall of 2008. Dr. Lori Williams, the coordinator of autistic programs for the District since 2007, contacted Parents in October 2008 to arrange an observation. Dr. Williams has a Doctorate in educational psychology, a master's degree

in school psychology, and a bachelor's degree in psychology. She is an adjunct faculty member of Alliant International University teaching doctoral candidate courses. She was previously a program specialist for the District and, before that, a school psychologist for two other school districts.

27. Parents refused to permit the observation requested by Dr. Williams. One of the rationales furnished by Parents for their refusal was the fact that an "appropriate" IEP had not been developed and implemented for Student. In other words, Parents insisted that observations (which are part of the assessment process) be done only after an IEP was formulated, rather than as a part of the development of Student's IEP.

Instant Request for Parental Consent to Reassess and to Conduct an Initial Health Assessment

28. 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. On January 21, 2009, in an attempt to start the triennial assessment process for Student, the District mailed an assessment plan to Parents. As of that date, the only information the District had with regard to Student's present levels of performance, his medical needs, or his present unique needs, came either from the letters and laboratory provided by Dr. Kartzinel, the progress reports from the NPA providers, and the observation conducted by Ms. Baba almost two years before. The assessment plan, and the cover letter from special education coordinator Mary Shields, state that the District wished to assess Student in the areas of reading, written expression, and math skills, through formal assessment tools as well as informally through observation, review of Student's work samples and through interviews with Student's teachers (and service providers).

29. In order to determine Student's current academic abilities, the District proposed having autism specialist Marie Baba conduct an academic assessment of Student. Ms. Baba has a master's degree in educational leadership, and is a credentialed special education teacher. As of the hearing, she had been an autism specialist with the District for almost three years. Previously, she taught an autism-specific special day class (SDC) in two other school districts, as well as a moderate to severe SDC. Ms. Baba is qualified to administer the academic assessments proposed by the District.

30. The District also proposed assessing Student in the area of speech and language and indicated on the January 21, 2009 assessment plan that a speech and language pathologist (SLP) would conduct the assessment. The District wished to determine Student's then current speech and language abilities through observation and functional assessments of Student. District SLP Lila Seldin testified at hearing that the District had designated her to assess Student once permission to do so was granted. Ms. Seldin has a master's degree in speech pathology and audiology from the California State University, Los Angeles. She has been a licensed SLP since 1984, has a clinical-rehabilitative service credential in language, speech and hearing for grades preschool through adult education, has a certificate of clinical

competence from the American Speech and Hearing Association, and is certified in the Fast ForWord reading program. Ms. Seldin also has trained extensively in the area of autism. Her intent is to determine Student's receptive and expressive language skills through observation and assessment. She would interview Parents, do informal language sampling of Student, and administer formal assessment tools such as the One Word Vocabulary Test in order to obtain a complete understanding of Student's present speech and language capabilities and needs. Ms. Seldin is a SLP who is qualified to administer the speech and language assessments proposed by the District.

31. In order to determine Student's current fine motor abilities and sensory needs, the District proposed having one of its occupational therapists (OT) assess Student. Claudel Gapultos is a District OT who would assess Student if given permission to do so. He has a master's degree in Occupational Therapy from the University of Southern California and has been practicing as an OT since 2001. He is certified to administer the Sensory Integration and Praxis Test (SIPT), and has worked extensively with sensory integration therapy. Before being hired by the District in 2004, Mr. Gapultos worked for a private therapy provider. Since 2003, he has been on the staff of Children's Hospital of Los Angeles providing OT services to children ages 0 – 21 years of age. He has also been trained to, and has worked with, autistic children. Mr. Gapultos helped develop the OT portion of the January 2009 assessment plan. His intent is to assess Student's fine and visual motor skills through formal tests such as the VMI and sensory processing questionnaires, and through informal assessments such as observations. Mr. Gapultos is an occupational therapist who is qualified to administer the OT assessment proposed by the District.

32. The District's January 2009 assessment plan also includes a request to assess Student in the areas of health and physical status. The District proposes to have the assessments administered both by District school nurse Claire McGirr and by Dr. Seltzer, the latter of whose qualifications had been thoroughly presented to Parents in previous years.² The District specifically wanted to determine Student's current medical status and how it impacts his ability to attend a public school setting. The assessments it proposed would include a review of Student's medical records, interview with treating physicians, and medical assessments by Dr. Seltzer. In conducting his examination of Student, Dr. Seltzer testified that he would probably do laboratory tests to check Student's immune system, that he would take a complete medical history from Student's parents, and would do a records review over at least the last six years of Student's life, but more likely from birth given the alleged onset of health problems when Student was very young. After completing a physical exam of Student, Dr. Seltzer would determine what other testing needs to be done; he would make a diagnosis with a rationale for it, along with a description of the evidence supporting the diagnosis. He then would recommend a treatment plan and recommend whether Student could be educated outside the home. Both Dr. Seltzer and Nurse McGirr are qualified to administer their respective portions of the health assessment proposed by the District.

² The assessment plan incorrectly identifies the doctor as Dr. Switzer rather than Dr. Seltzer.

33. Mary Shields, a District coordinator for special education, has a master's degree and bachelor's degree in special education. She also has a Tier II Professional Administrative Services certification from the state of California. Ms. Shields has been a special education teacher since 1981. She is credentialed in both special education and administration and has attended additional seminars in special education law. She, as well as the other District staff, testified credibly that the District has concerns as to whether Student continues to require in-home instruction. Their testimony established that in-home or home hospital instruction is the most restrictive educational setting for a student and that a student's overall growth is inhibited by not being exposed to a school environment. Student has been educated at home since at least the beginning of the 2005 – 2006 school year. The District has not conducted a multidisciplinary assessment of him since March 2006, and has never been able to conduct a health assessment of him. The District's expert, Dr. Seltzer, and school nurse McGirr, found numerous discrepancies and gaps in the information provided by Dr. Kartzinel, and found no support for his diagnoses, conclusions, and recommendations regarding Student's health and need for continued in-home instruction. Most significantly, the District witnesses recognized that it is possible that Student continues to require a home placement. However, they need the opportunity to obtain more specific information so that they can make appropriate recommendations to Student's full IEP team about his present needs and what they believe would be a proper present placement for him. The education background and expertise of the District staff, their experience in the educational setting, particularly with working with autistic and other special needs children, and the forthright manner in which they testified, made them credible and convincing witnesses. Their testimony supported the District's position that a triennial assessment of Student is appropriate. Additionally, Dr. Seltzer's concerns with the lack of specificity and evidence that would support Dr. Kartzinel's recommendations, established that the health assessment the District proposed is needed at present in spite of Parents' reliance on Dr. Kartzinel's conclusions and recommendations.

34. In the instant case, the District had ample reason to wish to conduct a health assessment of Student given the fact that he has been receiving home hospital instruction since at least the beginning of the 2005 – 2006 school years. The District has attempted to gain Parents' consent to such an assessment for over a year and a half, to no avail. The District also has ample reason to conduct a multidisciplinary assessment of Student. He is now overdue for a triennial assessment and IEP. The District has had very little contact with Student over the last four years since he receives all his education and services from outside providers. Student is not receiving any academic instruction from credentialed teachers, whether employed by the District or by an NPA, and the District has been prevented by Parents from direct acquisition of knowledge of Student's present levels of performance and present needs in any area. For these reasons, the District submitted its January 2009 assessment plan to Parents, properly giving them notice of the reasons it wished to assess Student, notice of the areas it wished to assess and the type of professional who would administer the assessment, as well as notifying Parents of their rights. Although Parents have vigorously opposed permitting the District to conduct a health assessment of Student, they have not given specific reasons as to why they do not wish the District to assess Student in

the areas of speech and language, OT, or academic achievement. To date, Parents have failed to give their consent to any portion of the assessment plan.

35. The District has met its burden of proof that its proposed assessments are appropriate and that they will be conducted by qualified personnel. The District is therefore entitled to an order that it may assess Student pursuant to the assessment plan dated January 21, 2009, without parental consent.

LEGAL CONCLUSIONS

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 cannot withhold consent as a means of forcing a school district to 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 January 21, 2009, 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) (2006).)

4. Placement in the home is one of the most restrictive placement options for a special education student. Special education and related services provided in the home or hospital are limited to eligible students for whom the IEP team recommends such instruction or services. (Cal. Code Regs., tit. 5, § 3051.4, subd. (a).) Before placing a student on home instruction, the IEP team must be assured that a student has a medical or psychological condition that prevents the student from receiving special education and related services in a less restrictive environment. When recommending placement for home instruction, the IEP team shall have in the assessment information a medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the student from attending a less restrictive placement. The report shall include a projected calendar date for the student's

return to school. The IEP team shall meet to reconsider the IEP prior to the projected calendar date for the student's return to school. (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).)

5. For students with exceptional needs with a medical condition such as those related to surgery, accidents, short-term illness or medical treatment for a chronic illness, the IEP team shall review, and revise, if appropriate, the IEP whenever there is a significant change in the student's current medical condition. (Cal. Code Regs., tit. 5, § 3051.4, subd. (c).)

6. According to Factual Findings 2 – 15 and 24 – 27, other than Ms. Baba's observation of Student in April, 2007, Student was last assessed by the District over three years ago. Factual Findings 2 – 34 establish that Student's continued placement on home hospital instruction may not be appropriate. The testimony of Dr. Seltzer supports a finding that Student has failed to produce adequate medical justification for Dr. Kartzinel's continued statements that Student's immune system is too compromised for him to be educated out of the home and for his contention that Student's other medical conditions warrant such a restrictive educational placement. The testimonial and documentary evidence fully support the District's request that it be able to administer its own health assessment to Student so that it can make its own conclusions and recommendations. As stated in Legal Conclusion 2, a school district is not required to rely on third party assessments and recommendations provided by a student's private assessors or service providers. Additionally, given that Student has not had any speech and language, OT, or academic assessments since March 2006, and given that the District has not been permitted to provide him with any academic instruction or have direct contact with Student, reassessment of Student at this time is more than reasonably supported by the evidence.

7. 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, subds. (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).)

8. Factual Findings 28 – 34 establish that the District provided Parents with advance notice of its proposed assessment plan and the notice advised Parents of their procedural rights. There is no evidence that Parents did not understand the plan; as stated in Factual Findings 13 – 15, any concerns expressed by Parents with regard to a health assessment to be conducted by Dr. Seltzer were specifically addressed by the District and Dr. Seltzer in correspondence with Parents. There is no evidence that Parents ever raised specific objections to the other assessments proposed by the District in its January 2009 assessment plan and no evidence that they did not understand the plan. The District

indicated the areas to be assessed, the type of professional who would perform the assessment, and the reason for each proposed assessment.

9. 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) (2006); Ed. Code, §§ 56321, subd. (c)(2), 56506, subd. (e).)

10. Special education assessments shall be conducted by qualified persons. (Ed. Code, §§ 56320, subd. (g), 56322.) 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.) Factual Findings 13 – 15 and 28 – 34 establish that the District’s proposed assessors are qualified to conduct the assessments proposed in the assessment plan dated January 21, 2009.

ORDER

The District’s request to assess Student is hereby granted. If Student’s Parents wish to have Student considered for special education services by the District, Student’s Parents are ordered to make Student available for assessment by the District, in accordance with the assessment plan which was first sent to Student’s Parents on January 21, 2009.

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

DATED: June 18, 2009

/s/
DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings