

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

WHITTIER UNION HIGH SCHOOL
DISTRICT,

v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2009080045

DECISION

Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH), State of California, heard this matter in Whittier, California, on September 1, 2009.

Law clerk Matthew O'Neill represented the Whittier Union High School District (District). Attorney Darin W. Barber supervised Mr. O'Neill. Jacqueline Leigh, the District's Coordinator of Special Education, attended throughout the hearing on behalf of the District.

No representative appeared for Student.¹ On August 4, 2009, OAH served a Notice of Due Process Hearing that informed the District and Parents of the hearing date of September 1, 2009. 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 no answer or answering service.² The ALJ called again after ten minutes, but there was still no answer. The ALJ waited 25 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 hearing.

¹ Neither Parents nor any legal representative appeared on behalf of Student at the telephonic prehearing conference on August 26, 2009.

² A Spanish language interpreter was present for Parents during the entire hearing.

The District filed a request for due process hearing on July 31, 2009. There were no continuances granted in this matter. At the conclusion of the hearing, the parties were given leave to file closing briefs by September 8, 2009. On that date, the District submitted its closing brief and the record was closed.

ISSUE

May the District assess Student pursuant to the June 16, 2009 assessment plan without parental consent?

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is a 16-year-old boy who resides with Parents within the geographical boundaries of the District, and should be entering the 12th grade for the 2009-2010 school year (SY). Student is eligible for special education services under the category of autistic-like behaviors, and has received special education services since his entry into the District during SY 2006-2007.

2. For SY 2007-2008, Student attended Rossier Park School (Rossier), which is a nonpublic school. Student attended Rossier due to his behavioral and speech and language deficits, which could not be adequately addressed at a District school. At Rossier, Student had a behavior intervention plan (BIP) to address his behavioral difficulties. However, Student became increasingly violent at Rossier and physically assaulted staff members and other students.

3. Due to Student's increasingly violent behaviors, Rossier requested that its staff be permitted to conduct a Functional Analysis Assessment (FAA) to examine the causes of Student's increasing behavior problems. Rossier also requested Parents' permission to develop an interim BIP while the FAA was conducted. At the May 2008 individualized educational program (IEP) meeting, Mother refused to consent to any change in the BIP or to the FAA.

4. In June 2008, Parents withdrew Student from Rossier. During the summer of 2008, the District offered two other nonpublic schools for Student to attend for SY 2009-2010, but Parents refused to consent to either placement. Student has not attended any school since June 2008, nor received any special education services from the District since then. The only services that Student receives to address deficits related to his autism are provided by the Regional Center. Parents have informed the District that they will not attend or consent to any IEP for Student.

District's June 16, 2009 Triennial Assessment Plan

5. 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 agree to a different assessment schedule.

6. Student's last triennial assessment was in November 2006. The District held an IEP meeting on June 16, 2009, which Parents did not attend. At this IEP meeting, the District's IEP team members discussed moving up Student's triennial assessment because the District did not have any current information regarding Student's abilities and deficits since he had not attended any school for the past year.

7. Because the District had no current information regarding Student from which it could develop an IEP, it appropriately decided to advance Student's triennial assessment a few months to obtain needed information regarding Student's present levels of performance and his unique needs. The District needed this information to make an offer of services and placement that would meet Student's unique needs and allow him to make meaningful educational progress.

8. Blythe Saylor Lee, the District's program specialist, developed the assessment plan based on information presented at the June 16, 2009 IEP meeting and her review of Student's records. On June 24, 2009, the District mailed a copy of the June 16, 2009 IEP offer and a proposed assessment plan, dated June 16, 2009, to Parents. The cover letter was in English and Spanish, and the assessment plan was in English. The District also sent a notice of parental rights in English and Spanish, and a self-addressed, stamped envelope to return the assessment plan to the District.

9. Student's parents did not reply to the District's June 24, 2009 letter. Sandra Lomeli, a District secretary who is bilingual, contacted Student's mother to find out why Parents had not responded to the letter and assessment plan. Mother acknowledged that she received the June 24, 2009 letter. Mother did not inform Ms. Lomeli that she did not understand the contents of the assessment plan, even though the assessment plan was in English. Mother stated that she was not going to sign the assessment plan because she did not ask that her son be assessed and did not want any District services.

10. On August 20, 2009, the District again sent to Parents the June 16, 2009 assessment plan, along with another copy of their parental rights and a self-addressed, stamped envelope. This time, the District sent the assessment plan in Spanish. Student's parents did not respond to the August 20, 2009 correspondence. Ms Lomeli again contacted Mother, who informed Ms. Lomeli that she would not agree to the District's assessment plan because she was satisfied with the Regional Center services for her son.

11. To determine Student's current academic abilities, the District proposed having a psychologist from the Whittier Area Cooperative Special Education Program

(WACSEP) conduct an academic assessment. The District needed to assess Student's academic performance to obtain his present levels of performance, especially since Student has not attended school since June 2008 and the District did not have present information regarding his academic abilities. Although the District did not name a particular person to conduct the assessment, WACSEP has qualified psychologists available who have previously assessed high school students with autism and behavioral deficits similar to those of Student.

12. The District also proposed assessing Student's learning potential and developmental status related to his autism and cognitive deficits. The District needed to determine Student's present abilities because he has not attended school for a year and the District does not have current information. Additionally, the District did not know if Student made any progress while receiving services from the Regional Center. The District proposed having a psychologist from WACSEP conduct this assessment, and WACSEP's psychologists are qualified to conduct this assessment, as they are trained to assess high school students with autism.

13. The District also wanted to assess Student in the area of social-emotional needs and adaptive behavior, and stated on the June 16, 2009 assessment plan that a psychologist from WACSEP would conduct the assessment. The District wished to determine Student's social-emotional and adaptive behavior abilities because of Student's increasingly violent behavior at Rossier, and to determine if there had been any improvement in Student's behavior with the Regional Center services. WACSEP's psychologists are also qualified to conduct this assessment because of their training in assessing high school students with autism.

14. To determine Student's current speech and language needs, the District proposed having a District speech and language pathologist assess Student. Student has significant speech and language deficits, is non-verbal and communicates through gestures and grunting sounds. He received speech and language services at Rossier. The District needed to assess Student to obtain present levels of performance since Student has not attended school for a year. The District's speech and language pathologists are qualified to conduct this assessment, as they are trained to assess high school students with significant speech and language deficits.

15. To determine Student's current visual perceptual skills and gross motor needs, the District proposed having a WACSEP psychologist assess Student's visual perceptual skills and an adaptive physical education (APE) specialist assess Student's gross motor skills. Student has significant deficits in these areas and received occupational therapy services at Rossier. A WACSEP psychologist is qualified to examine Student's visual perceptual skills. The District proposed using either an APE specialist from a non-public agency or an APE specialist from a member school of WACSEP, who would be qualified to assess Student's gross motor needs.

16. The District's June 16, 2009 assessment plan also included a request for an FAA, to be conducted by a WACSEP behaviorist, to address Student's behavioral issues.

The District proposed that the behaviorist be a board-certified behavior analyst (BCBA). The District requested permission to conduct this assessment to examine the reasons behind Student's escalating behavioral problems, and also to obtain current information to develop a BIP that addressed Student's behaviors so that he may remain in school to make meaningful educational progress. WACSEP's behaviorists are qualified to conduct an FAA due to the training needed to obtain a BCBA, their experience in performing prior FAAs, and their work with students with significant behavioral deficits.

17. The District also proposed a vocation skills assessment by a District vocational counselor as part of the June 16, 2009 assessment plan because Student, now 16 years old, is eligible for transition skills services. The District's vocational counselor is qualified to conduct this assessment.

18. Finally, the District proposed a health, vision and hearing assessment, in which a school nurse would obtain medical information to determine whether there have been any changes in Student's health that affect his educational abilities. The District's nurse is qualified to perform the health, vision and hearing assessment.

19. In this case, the District had ample reason to conduct an early, comprehensive triennial assessment because Student has been at home receiving services from the Regional Center for a year. Student has not received any academic instruction from credentialed teachers, whether employed by the District or by a non-profit agency. The District requires the information from the proposed assessment plan to develop an IEP, especially to address Student's behavior problems, which were escalating towards the end of SY 2007-2008. The District has attempted to gain Parents' consent to such an assessment for over two months, to no avail. Parents' only statement is that they do not wish for Student to receive any services from the District, even though he is qualified to receive special education services.

20. Therefore, the District has sufficient reasons to conduct a multidisciplinary assessment of Student. He is now nearly due for a triennial assessment and his IEP is overdue. The District has had very little contact with Student over the last year since he receives services only from the Regional Center. Parents have prevented the District from learning of Student's present levels of performance and present needs in any area. For these reasons, the District submitted its June 16, 2009 assessment plan to Parents, properly giving them notice of the reasons it wished to assess Student, notice of the areas in which it wished to assess, and the type of professional who would administer the assessment. Parents were adequately notified of their rights, both in Spanish and in English. Parents have not given specific reasons as to why they do not wish the District to assess Student. To date, Parents have failed to give their consent to any portion of the assessment plan.

21. 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 June 16, 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 that "'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 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."
3. Under special education law, a reassessment of a student must be undertaken by the district, if the reassessment is requested by the parents, or is warranted by the student's needs and performance. (20 U.S.C. § 1414(a)(2)(A).) The reassessment 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).)
5. Where a student's behavior impedes his or her learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. (Ed. Code, § 56341.1, subd. (b)(1).) When a child exhibits "serious behavior problems," a California Local Educational Agency must conduct an FAA. (Cal. Code Regs., tit. 5, § 3001, subd. (aa).) Serious behavioral problems are defined as behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive. (*Ibid.*) An FAA is a highly prescriptive evaluation. An FAA must be conducted by, or be under the supervision of a person who has documented training in behavior analysis with an emphasis on positive behavioral interventions. The qualified assessor must gather information from three sources: direct observation, interviews with significant others, and other available data such as assessment reports and other individual records. (Cal. Code Regs., tit. 5, § 3052, subd. (b).)

May the District reassess Student without parental consent pursuant to the assessment plan sent to the Parents on June 16, 2009?

6. 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 state 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).)

7. 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.)

8. 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).)

9. According to Factual Findings 6 and 7, the District last assessed Student nearly three years ago. Factual Findings 2, 3, 4, 7, 8, 19 and 20 establish that the District requires a complete assessment of Student because Student has not attended any school for over a year and the District does not have current information regarding Student’s present levels of performance. Additionally, the increasingly violent behavior that Student exhibited at the end of SY 2007-2008 warrants a reassessment to determine the cause of his behavioral problems, and how to address this deficit to allow Student to make meaningful educational progress. Because the District has not assessed Student in three years, and Parents have not permitted the District to provide Student with any academic instruction or to have direct contact with Student for over a year, the evidence shows that reassessment of Student at this time is appropriate and necessary.

10. Factual Findings 8, 9 and 10 establish that the District provided Parents with advance notice of its proposed assessment plan, and the notice adequately advised Parents of their procedural rights. The notice indicated the areas to be assessed, the type of professional

