

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

In the Matter of :

POWAY UNIFIED SCHOOL DISTRICT,

Petitioner,

and

STUDENT,

Respondent,

OAH CASE NO. N2006120311

DECISION

Timothy L. Newlove, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter on January 12, 2007, in Poway, California.

Attorney Justin R. Shinnefield, of Atkinson, Andelson, Loya, Ruud & Romo, represented Petitioner, Poway Unified School District (District). JoAnn Murphy, Executive Director of Special Education, also appeared for the District.

The hearing commenced at 9:30 a.m. Neither Student nor his parents were present at this time. The ALJ requested that District make an attempt to call Respondent's mother. At 9:45 a.m., attorney Shinnefield reported to the ALJ that District had contacted Respondent's mother who stated that she was driving to the hearing site. The parties waited until 10:30 a.m., when the hearing recommenced. Neither Student nor his parents appeared at the hearing.

On December 8, 2006, Petitioner filed with OAH the request for due process hearing in this case. On December 19, 2007, Student's mother made an appearance in the matter on behalf of Student. On January 2, 2007, OAH granted a brief continuance of the scheduled due process hearing. The Prehearing Conference Order which continued the hearing date was properly served upon Respondent. Under Education Code section 56505, subdivision (f)(3), the decision in this matter is due on or before January 31, 2007.

Oral and documentary evidence was presented, closing argument was made, and the matter was submitted on January 12, 2007, at 1:00 p.m.

ISSUE

Is the District entitled to assess Student based upon an assessment plan dated August 30, 2006?

CONTENTION OF THE PETITIONER

The District contends that, although the District must perform Student's triennial assessment on or before November 17, 2007, conditions warrant an immediate and comprehensive assessment of Student. District seeks the right to perform an early triennial assessment of Student.

FACTUAL FINDINGS

1. A school district must conduct reassessments of a student receiving special education services after the initial assessment establishing eligibility. These reassessments need not occur more frequently than once a year, but must be done at least once every three years (generally referred to as the "triennial reassessments"). A district may perform a reassessment if the district determines that the educational or related services needs of the student warrant it.

2. A district that seeks to reassess a special education student must give proper notice of the intent to reassess. The notice must include the assessment plan that describes the proposed assessments. The proposed assessments must meet statutory guidelines for valid assessments and the proposed assessors must be trained, knowledgeable and competent to perform the assessments. In addition, for a reassessment, the district must review existing information and develop current data in order to determine the educational needs of the student.

3. Student has reached the age of majority: he turns 19 in March 2007. He resides with his parents within the geographical boundaries of the District. He is entitled to receive special education and related services under the disability category of specific learning disability. Student has a severe discrepancy between ability and achievement in math and written language with auditory processing, planning and attention deficits.

4. For the 2002-2003 school year, the District enrolled Student in the ninth grade at Westview High School. Student attended about two weeks of school during his freshman year at Westview. On January 17, 2003, the District offered an assessment plan to conduct a comprehensive assessment of Student. Student's parents refused to allow the District to conduct the proposed assessment. The District then filed a request for a due process hearing with the Special Education Hearing Office (SEHO) seeking the right to conduct the

comprehensive assessment. On March 28, 2003, SEHO issued a Decision which upheld the District's right to conduct the proposed assessment of Student. This comprehensive assessment took 20 months to complete.

5. For the 2003-2004 school year, Student attended 10th grade at Westview High School. Student attended only two and one-half months of school during his sophomore year at Westview.

6. For the 2004-2005 school year, Student attended 11th grade at Westview High School. On October 28, 2004, the District finally completed the comprehensive assessment based upon the January 2003 assessment plan. The District took 20 months to complete the assessment because Student rarely attended school and because Student's parents did not make their son available for the assessment procedures. On November 18, 2004, the District convened an individualized education plan (IEP) meeting from which the District made an offer to Student of special education and related services for the 2004-2005 school year. Student's parents later challenged the adequacy of this offer. On April 13, 2006, OAH issued a Decision which both upheld the validity of the comprehensive assessment of Student and found that the District had offered a free and appropriate public education to Student for the 2004-2005 school year. (OAH Case No. N2005080077.) Student attended only one month of school during his junior year at Westview.

7. For the 2005-2006 school year, the District enrolled Student in the 12th grade at Westview High School. However, Student did not attend a single day of class for his senior year. Instead, Student received home-schooling from his mother and engaged in self-study. Student has not received a regular high school diploma.

8. On August 30, 2006, the District sent an assessment plan to Student and his parents. By law, the District must perform a triennial assessment of Student no later than November 17, 2007. The assessment plan represented a request to perform an early triennial assessment of Student. The assessment plan proposed to assess Student in the following areas: (1) academic achievement, (2) psycho-motor development/perceptual functioning, (3) intellectual development, (4) social/emotional/adaptive behavior, (5) health, (6) prevocational/vocational, and (7) a records review and observation. The assessment plan, on the reverse side, contained a notice of parental and procedural rights under federal and state law relating to special education disputes.

9. In the August 30, 2006 assessment plan, the District proposed to have a special education teacher administer to Student the assessment of academic achievement. The District planned to have Michael Murray give the Wechsler Individual Achievement Test (WAIT 2) and the Woodcock-Johnson Achievement Battery (WJ-R 3) for this assessment. Mr. Murray is a credentialed special education teacher at Westview High School. He taught algebra to Student during his junior year at the high school. Mr. Murray has extensive experience in administering the WAIT 2 and WJ-R 3 assessment materials to students.

10. In the August 30, 2006 assessment plan, the District proposed to have an occupational therapist and a psychologist administer to Student the assessment of psycho-

motor development/perceptual functioning. Chene Coordt is a credentialed occupational therapist. The District planned to have Ms. Coordt administer two elements of this assessment: (1) the Bruininks-Oseretsky Test of Motor Proficiency (BOT 2) and (2) the Adolescent & Adult Sensory Profile (AASP) in which the student self-reports and the occupational therapist interprets the answers. Ms. Coordt has experience administering the BOT 2 and interpreting the AASP. Hilary Ward is a credentialed school psychologist who helped develop the subject assessment plan. The District planned to have Ms. Ward administer the remaining elements of the psycho-motor development/perceptual functioning assessment: Bender-Gestalt 2, the Motor-Free Visual Perception Test, the Wechsler Individual Achievement Test, and the Woodcock-Johnson Achievement Battery. Ms. Ward has extensive experience in administering such assessment materials to students.

11. In the assessment plan, the District proposed that a psychologist administer to Student the assessments of intellectual development and social/emotional/adaptive behavior, and perform the observation of Student and the review of his records. The District planned to have Ms. Ward, as a school psychologist, perform these assessments. For the assessment of intellectual development, the District proposed to have Ms. Ward give Student the Wechsler Tests of Intelligence. For the social/emotional/adaptive behavior assessment, the District proposed to have Ms. Ward give Student the Achenbach/Child Behavior Checklist and Sentence Completion. Ms. Ward has extensive experience administering such assessment materials to students. She also has extensive experience in the observation of students and the review of student records.

12. In the assessment plan, the District proposed that a guidance technician perform the prevocational/vocational assessment which involves post-high school planning. Kathy Bloomfield is a guidance technician at Westview High School. She has held this position for two years. The District planned to have Ms. Bloomfield administer to Student a Vocational Interest Inventory as part of this assessment. Ms. Bloomfield is experienced in performing the prevocational/vocational assessment.

13. In the assessment plan, the District proposed that a District resource nurse perform the health assessment of Student. The District planned to have Gayle Cohen perform this assessment. Ms. Cohen is a licensed registered nurse in California and she has been a school resource nurse for 15 years. Ms. Cohen has extensive experience in performing student health assessments.

14. The purpose of the August 30, 2006 assessment plan was to allow the District to assess Student's present levels of educational performance and establish a special education program for the 2006-2007 school year. Due to the Student's absence from high school and the refusal to cooperate by his parents, the District had not been able to assess Student since the comprehensive assessment completed in October 2004. Teachers and special education personnel at Westview High School did not have knowledge of Student's academic and functional skills because they had not had the opportunity to work with Student. The District needed to update information concerning Student's educational needs and establish appropriate goals and objectives for him.

15. Neither Student nor his parents responded to the August 30, 2006 evaluation plan. On September 11, 2006, the District sent a letter to Student, with a copy to his mother, referencing the assessment plan and requesting a response. Student and his parents did not respond to this letter.

16. On September 21, 2006, the District convened an IEP meeting for Student. The District held the meeting at the request of Student's mother who attended the meeting for a short period of time. During this IEP, Student's mother requested that the District perform the following assessments of Student: (1) occupational therapy, (2) an assessment for Asperger's (autism), and (3) a referral to County Mental Health. In the August 30, 2006 assessment plan, the District had already proposed to perform an occupational therapy assessment. The IEP team declined to make a referral of Student to County Mental Health because the team decided that such a referral was not necessary. On October 5, 2006, the District sent to Student, with a copy to his mother, a letter informing that the District did not agree to conduct an assessment of Student in the area of autism.

17. The District gave proper notice of the August 30, 2006 assessment plan to Student and his parents. The assessment plan is set forth in easily understood English and describes the assessments that the District proposes to perform. The assessment plan states, in part, that "(N)o placement in a special education program or provision of other services will be initiated without your written permission." The assessment plan contained a notice of procedural safeguards. The District has given Student and his parents more than 15 days to consent to the assessment plan.

18. In the August 30, 2006 assessment plan, the District proposed to perform assessments that are valid and reliable for the purpose of gathering information concerning Student's present levels of academic achievement and his current educational needs. The proposed assessments are comprehensive and tailored to evaluate Student's specific educational needs. The proposed assessments are necessary to determine whether the District must make modifications or additions to Student's special education program. The proposed assessors are trained, knowledgeable and competent to perform the assessments set forth in the assessment plan.

19. The District is entitled to reassess Student based upon the August 30, 2006 assessment plan. The District has shown that conditions warrant an early triennial reassessment of Student. The District needs current information regarding Student in order to provide an appropriate educational plan. The District took reasonable steps to obtain the consent of Student and his parents for the implementation of the assessment plan.

LEGAL CONCLUSIONS

Applicable Law

1. Petitioner has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Under the federal Individuals with Disabilities Act (IDEA) and companion state law, students with disabilities have the right to a free and appropriate public education (FAPE). (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's individualized education plan (IEP). (20 U.S.C. § 1401(a)(9); Cal. Code Reg., tit. 5, § 3001, subd. (o).)

3. Under IDEA and state law, a student with a disability is entitled to receive special education and related services until the age of 22. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56026, subd. (c)(4), 56040.) In California, a person who is 18 years or older is an adult. (Fam. Code, § 6501.)

4. IDEA and state law require that, in order to provide FAPE, a school district must develop an IEP that is reasonably calculated to provide the child with an educational benefit. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 203 [102 S.Ct. 3034, 3049].) The IEP must contain specified information including a statement of the child's present levels of academic achievement and functional performance, and a statement of measurable annual goals. (20 U.S.C. § 1414(d)(1)(A)(i)(I), (II); Ed. Code, § 56345, subs. (a)(1) & (2).) The district must review the child's IEP at least once a year in order to determine whether or not the annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4)(B)(i); Ed. Code, § 56341.1, subd. (d).)

5. In order to meet the continuing duty to develop and maintain an appropriate IEP, the school district must assess the educational needs of the disabled child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) In addition, the school district must conduct a reassessment of the special education student not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) The district must conduct a reassessment if the district "determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation." (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a).)

6. School districts must perform assessments and reassessments according to strict statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor. The district must select and administer assessment materials that appear in the student's native language and that are free of racial, cultural and sexual discrimination. (20 U.S.C. § 1414(b)(3)(A)(i); 34 C.F.R. § 300.304(c)(1)(ii); Ed. Code, § 56320, subd. (a).) The district must administer assessment materials that are valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) The district must administer assessment materials that are sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); 34 C.F.R. § 300.304(c)(6); Ed. Code, § 56320, subd. (c).) Trained, knowledgeable and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.) A credentialed school psychologist must administer psychological assessments and

individually administered tests of intellectual or emotional functioning. (Ed. Code, §§ 56320, subd. (b)(3), 56324, subd. (a).) A credentialed school nurse or physician must administer a health assessment. (Ed. Code, § 56324, subd. (b).)

7. In addition, to perform a reassessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the student and to decide whether modifications or additions in the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subds. (b)(2)(B) & (D).) The district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).)

8. In order to start the process of assessment or reassessment, the school district must provide proper notice to the student and his/her 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 and procedural rights under IDEA and companion state law. (20 U.S.C. § 1414(b)(1); 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 individualized education program without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and/or the student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

9. Normally, before a school district performs an assessment of a child with a disability, the district must obtain parental consent for the assessment. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321, subd. (c).) However, the district need not obtain informed consent if the district can demonstrate that it took reasonable measures to obtain such consent and the student and/or the child's parents failed to respond. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f).) Instead, in the event that a parent or disabled student does not provide consent, the district may bring a due process complaint seeking an order that requires the child to present for the reassessment. (20 U.S.C. § 1415(b)(6)(A); Ed. Code, § 56501, subd. (a)(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."].)

10. School districts have the right to conduct assessments and reassessments of students who request and receive special education and related services. A student who does not permit such testing is not entitled to receive benefits under IDEA and related state law. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Wesley Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178.)

Determination of Issue

11. Based upon Factual Findings 3 through 19 and Applicable Law 1 through 10, the District is entitled to assess Student based upon the assessment plan dated August 30, 2006. The District cannot prepare an appropriate educational program for Student without current information concerning his academic skills and educational needs. The District cannot meet the statutory obligations for a reassessment without such current information. Student must make himself available for the proposed reassessment; otherwise, he is not entitled to receive special education and related services under IDEA and related state law.

ORDER

1. The District may conduct a reassessment of Student according to the assessment plan dated August 30, 2006.
2. If Student wishes to receive special education benefits at public expense, Student, with the assistance of his parents, must make himself reasonably available for the proposed assessments recited in the August 30, 2006 assessment plan.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on the sole issue presented for decision in this case.

RIGHT TO APPEAL 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 the receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: January 24, 2007



TIMOTHY L. NEWLOVE
Administrative Law Judge
Office of Administrative Hearings
Special Education Division