

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

In the Matter of:

TEMECULA VALLEY UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH NO. N 2006050294

DECISION

Elizabeth Feyzbakhsh, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on June 8, 2006, in Temecula, California.

Petitioner Temecula Valley Unified School District (District) was represented by attorney Kelli Lydon of the law firm Lozano Smith. Ann Huntington, Director, Special Education Division was present throughout the hearing.

Respondent Student was represented by his parents, who were present throughout the hearing.

The record of this due process hearing was opened on June 8, 2006. At the request of the parents the hearing was opened to the public. Testimony was taken and evidence was offered and received. The record was closed and the matter was submitted on June 8, 2006.

ISSUE

Is the District entitled to assess Student based on the proposed assessment plan dated February 22, 2006?

FACTUAL FINDINGS

1. Student is a twelve year old boy who is eligible for special education and related services due to a diagnosis of Autism. He currently resides with his parents within the geographical boundaries of the Temecula Valley Unified School District.
2. Student is currently in the sixth grade. He has received special education services since the age of three. Starting in the fall of 2005, Student's parents unilaterally decided to provide his education at home. This was not part of an agreed upon Individual Education Plan (IEP). In October 2005, an IEP team meeting was held and parents requested that Student be home schooled. This request was denied and the IEP team was unable to come to an agreement regarding Student's IEP for the 2005-2006 school year.
3. In addition to being home schooled, Student is currently receiving nine hours per week of a home program. The program is administered by a provider called Early Education for Children with Autism (EECA) pursuant to the Student's last agreed upon IEP, in 2004.
4. Student was last assessed by the District on April 25, 2003. The IEP team did not accept the psychological assessment that had been completed by the District. Rather, the IEP team utilized a report by Jeffrey S. Owens, Ph.D, NCSP, dated December 3, 2003.
5. During the 2003 assessment, the District attempted unsuccessfully to conduct near-vision and hearing screenings. Many near-vision and hearing tests have been attempted on Student however the medical professionals have been unable to complete a test on Student.
6. Troy Knudsvig is a program specialist for the District. He has worked for the District since November 2002. Because it was time for Student's triennial review, and because Student had been home schooled such that the District had not observed him in close to one year, Mr. Knudsvig prepared the assessment plan.
7. The assessment plan was completed on February 22, 2006. The following assessments were requested: academic and pre-academic achievement, cognitive developmental learning ability, perceptual-motor development, language/speech development, social/emotional/behavioral development, self-help/adaptive, health/development/medical, observations/interviews and review of Student's home program data books.
8. The assessment plan was received by Student's parents on March 2, 2006. Student's mother wrote a letter in response indicating that she preferred to meet and discuss the assessment plan before giving approval. Student's mother indicated that she was available on most Tuesdays, Wednesdays, Thursdays, and Fridays after 4:00 p.m. She also requested "explicit information regarding the areas checked on the assessment plan."

9. On March 23, 2006, Mr. Knudsvig responded by letter on behalf of the District. The District provided documentation identifying the assessment tools that the District assessors planned to utilize with Student. The letter included a caveat that assessors may determine that assessment with a different tool is necessary during the course of assessing a student. Additionally, the District informed Student's mother that a meeting could not be convened after 4 p.m. because members of the assessment team are only available during the regular school hours of 8 a.m. to 3:15 p.m. Mr. Knudsvig further indicated that he would be available by telephone or letter and indicated that he would be available during the week of Spring Break.

10. On March 29, 2006, Student's mother responded by letter to Mr. Knudsvig. She indicated that she needed to know which versions, composites, and subtests the District planned to administer for certain assessments. On March 29, 2006, Mr. Knudsvig responded by letter. He indicated that the District is not obligated to identify the specific assessment tools that it will administer and that it is not possible to identify each specific test and subtest because the tests an assessor opts to administer during the course of an assessment may change based upon various circumstances that may arise during the course of the assessment.

11. On April 7, 2006, Student's mother responded by letter indicating that she had not been provided adequate information to consent to the assessments. She indicated that the IEP team is required to conduct a review of current data and observations to determine what additional data, if any, is needed to make the necessary determinations under Education Code section 56381. She further indicated that sufficient data can be obtained by assessing in the areas of academic achievement, language/speech development, and related services and would not agree to assessment in the other areas without further discussion and a meeting with the IEP team.

12. Student's parents signed part of the assessment plan and agreed to the academic and pre-academic achievement assessment, the perceptual-motor development assessment, the language/speech development assessment, and the self-help/adaptive physical education assessment, and the review of Student's home program data books. The assessments that Student's parents object to are the cognitive developmental learning ability assessment, the social/emotional/behavioral development assessment, the health/development/medical assessments, and the observations/interviews.

13. Student's parents contend that their relationship with the District has soured. Student's parents distrust the District. They did not consent to the February 22, 2006 assessment plan because they disagreed with the way it was written. According to Student's parents, the District did not provide sufficient information regarding the assessments to be conducted by the psychologist and the nurse for the parents to feel comfortable with the plan and feel that Student's rights were protected.

14. Student's parents object to the school's psychologist performing the assessments. Student's parents contend that the District has an agenda to make Student ineligible for special education services and that the school psychologist might alter the tests

performed or adjust the results if asked to do so by personnel of the District. Student's parents are concerned because they believe that someone more familiar with their son should perform the psychological exam. Specifically, they believe that the assessment should be performed by their EECA provider. In addition to their concern regarding the psychologist, they are concerned about having another Intelligence Quotient (IQ) test administered in addition to those already in Student's records. Student's parents are frustrated because their son has been given many (IQ) tests and has received scores which vary more than 40 points. Finally, parents are concerned that the school district has filed for this due process hearing in an attempt to bolster their offer of FAPE for the 2005-2006 school year. It is the parent's contention that the school district wishes to use the assessment results to show that they offered FAPE for the 2005-2006 school year.

15. John Kroncke is a credentialed school psychologist who works for the District. He has worked as a school psychologist for 23 years. He has assessed more than 2,000 students for school districts. Approximately fifteen to twenty of those assessments involved students with autism but he has no experience treating children with autism. Mr. Kroncke was asked to assess Student's cognitive, perceptual-motor, self-help and adaptive physical ability and his fine motor tasks. Mr. Kroncke does not know Student personally. He testified that because he uses standardized instruments, he does not need to know the students beforehand.

16. Each student's present levels change from year to year. Nonetheless, Mr. Kroncke does not intend to conduct an IQ test in this case. He does not believe that it is necessary to obtain an IQ score in a case like this. It is not proper for anyone to tell Mr. Kroncke what tests he should give in an assessment and no school district has ever told him what tests to use. The District's assessments are not based on any single test and that the District does not rely on age level equivalencies when developing an IEP. Rather, the IEP team will do a qualitative review and look at the specifics regarding each student to develop the plan. Further, Mr. Kroncke does not make placement recommendations.

17. When asked, on cross examination, if the individual who has been providing treatment for Student for three years could provide a more accurate assessment than he could, he responded that he would review the home program and garner input from the in-home provider but he doesn't believe that just because the in-home provider knows Student better, she could provide a more accurate assessment. Mr. Kroncke's testimony was credible and is entitled to great weight.

18. During the hearing the parties stipulated that, upon reasonable notice, the parents will consent to the occupational therapy assessment and the adaptive physical education assessment and the parents agree to make Student available for those assessments.

19. Michele Westgard is a speech and language therapist employed by the District. She has worked at Vail Ranch Middle School for five years. She has worked with disabled children for the past seven years. She testified that she is missing one section of her communication development assessment for Student. The Functional Communication

Profile is a questionnaire that looks at different basic areas of communication. She asked that it be filled out by the EECA provider and she has not yet received it back.

20. Claire Johnson is a school nurse at the District. She has worked for the District for seven years and covers three school sites. She is part of the IEP teams and conducts health assessments. Autistic children have special health concerns. Many engage in self-injurious and other health related behaviors. She is responsible for conducting the vision and hearing tests for students and she compiles health histories of students. Student's parents are concerned that the health assessments are a waste of time because no one has ever been able to successfully conduct a near-vision or hearing test on Student. Ms. Johnson testified that if she were unable to assess a student, she would ask the parents to go through their insurance to obtain outside assessments.

LEGAL CONCLUSIONS

Applicable Law

1. A child with a disability has the right to a free appropriate public education (FAPE). (20 U.S.C. § 1412 (a)(1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in pertinent part as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.)

2. Before any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment of the pupil's educational needs shall be conducted in all areas of the suspected disability. (20 U.S.C. § 1414(a)(1); Ed. Code, § 56320.) When developing a pupil's IEP, the IEP team must consider the results of this initial assessment, or the most recent assessment, of the pupil. (20 U.S.C. § 1414(c)(1)(A); Ed. Code, § 56341.1, subd. (a)(3)) Regarding the reassessment of a student with an IEP, Education Code § 56381, subdivision (a) ¹ provides, in relevant part:

“A reassessment of the pupil, based upon procedures specified in Article 2 (commencing with section 56320) shall be conducted at least once every three years or more frequently, if conditions warrant a reassessment, or if the pupil's parent or teacher requests a reassessment and a new individualized program to be developed.”

¹ Under federal law, the circumstances under which a “reevaluation of each child with a disability” must be conducted are the same. *See*, 20 U.S.C. § 1414(a)(2)(A) for the substantive, and 20 U.S.C. § 1414(a)(2)(B) for the procedural, requirements.

3. Both state and federal law make it clear that before conducting an assessment, the District is required to secure parental consent (20 USC § 1414(a)(1)(C)(i); Cal. Ed. Code, § 56321, subd.(c).) However, the District may proceed with an assessment by seeking a determination through a due process hearing that such assessment is necessary. (20 USC 1414(a)(1)(C)(ii); Cal. Ed. Code, § 56321, subd. (c), 56501, subd. (a)(3).)

4. The Ninth Circuit Court of Appeals has held that if parents wish their child to receive special education and related services, they must allow the responsible educational agency to assess their child. *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315. *There is no exception to this rule. Andress v. Cleveland Independent Sch. Dist.* (5th Cir. 1995) 64 F.3d 176, 178.

5. A school District is required to assess a student in all areas related to a suspected disability including, where appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communication, self-help skills, orientation and mobility, career and vocational interests and abilities, and social/emotional status. (20 USC § 1414(b)(3)(C); 34 CFR § 300.352(g); Cal. Ed. Code § 56320, subd. (f).)

6. The assessments proposed must themselves meet the statutory requirements set forth in Education Code section 56320 et seq. California Education Code section 56321 sets forth the requirements for a proposed assessment plan, notice to parents, and parental consent to the assessment. Cal. Educ. Code sections 56320, subdivision (g) and 56322. The tests and assessment materials must be validated for the specific purpose for which they are used, and must be selected and administered so as not to be racially, culturally, or sexually discriminatory,” must be provided and administered in the Student’s native language or other mode of communication unless this is clearly not feasible, and must be administered by “trained personnel in conformance with the instructions provided by the producers of such tests.” Cal. Educ. Code section 56320, subdivisions (a), (b). A psychological assessment must be performed by a credentialed school psychologist. Cal. Educ. Code section 56320, subdivisions (e), (f).

Discussion of Issue

7. The reassessment of Student under the February 22, 2006, Assessment Plan falls squarely within the mandate of Education Code section 56381, subdivision (a). The District established at the due process hearing that conditions warranted reassessment of Student as outlined in the February 22, 2006, assessment plan. There is no dispute that the last triennial assessment of Student occurred in 2003 and that his current triennial assessment is due in 2006. Further, there is no dispute that Student has not been assessed by the District since 2003. Reassessment is necessary to determine Student’s present levels of performance and enable the IEP team to prepare the appropriate goals and objectives and to make an offer of placement at the triennial review.

8. District personnel determined that Student, who had not been attending school for over six months, needed reassessment in a variety of areas. Such areas include cognitive, functional, and behavioral abilities. This satisfies the substantive requirements of Education Code section 56381, subdivision (a)(1).

9. Moreover, District had not conducted an assessment of Student within one year before the February 22, 2006, assessment plan was created, and a triennial review was due in 2006. This satisfies the procedural requirements of Education Code section 56381, subdivision (a)(2). Not only is the District entitled to conduct an assessment, it is required to conduct an assessment and the fact that the parents refuse to sign the assessment plan does not relieve the District of that obligation.

10. The District's proposed assessors are competent, qualified, and meet the requirements of Education Code sections 56320 and 56322. There was no competent evidence presented to support the contention that Mr. Kroncke would tailor either the tests he administers or his conclusions to on the request of any person. Further, he has never been asked by anyone to do so.

11. Student's parents argue that it would be more appropriate to have someone from Student's home program, EECA, perform the assessment rather than the school psychologist. However, the law specifically mandates that a psychological assessment must be performed by a credentialed school psychologist. While Mr. Kroncke did not agree that the EECA provider would conduct a superior assessment, he did emphasize that the input provided by the in-home provider would be very important to his assessment.

12. Because the reassessments have not yet been performed, there cannot be a determination of whether the assessments will actually conform to the legal requirements. However, the District presented credible evidence that the proposed assessments are designed to meet the legal requirements.

13. Student's parents contend that the District is using this hearing and the triennial assessment process to support the District's contention that they offered a FAPE for the 2005-2006 school year. To support their argument, Student's parents point to the timing of the hearing. Originally the District had filed for due process to have the 2005-2006 offer deemed a FAPE. The District thereafter dismissed that due process hearing request and filed the present request. Because conditions warrant reassessment of Student, whether or not the triennial assessment has an ancillary effect on a later FAPE case is not relevant to this proceeding, and no findings or conclusions are made herein regarding the District's 2005-2006 offer of FAPE.

14. Although there was testimony that a portion of the speech and language assessment had not been completed, the portion that was not completed was to be completed by the EECA provider. The EECA provider is not a party to this action and the Office of Administrative Hearings has no jurisdiction to order the EECA provider to do anything with regard to this case.

15. All factual and legal arguments made by the parties and not addressed herein have been considered, are deemed unsupported by the evidence, determined to be without merit, and are therefore rejected.

ORDER

1. The District is authorized to conduct the triennial assessment pursuant to the assessment plan dated February 22, 2006, without parental consent, within 45 days of this decision.

2. Parents shall make Student reasonably available for these assessments.

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. The following findings are made in accordance with that statute:

The District has prevailed on the issue heard and decided.

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 the receipt of this decision. (Cal. Ed. Code § 56505, subdivision (k).)

Date: June 21, 2006



ELIZABETH R. FRYZBAKHS
Administrative Law Judge
Special Education Division
Office of Administrative Hearings