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

In the Matter of: BERKELEY UNIFIED SCHOOL DISTRICT, Petitioner, v. STUDENT, Respondent.	OAH CASE NO. N 2006050657

DECISION

Administrative Law Judge (ALJ) Suzanne Brown, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on June 28, 2006, in Berkeley, California.

Petitioner Berkeley Unified School District (District) was represented by attorney Christine D. Lovely. Elaine Eger, program manager for special education, was present on the District's behalf.

Respondent Student (Student) was represented by his aunt (Aunt). Student's grandmother (Grandmother) was present on Student's behalf.

The District called the following witnesses: William Bove, school psychologist; Ms. Eger; and Grandmother. Student questioned all of these witnesses, but did not call any additional witnesses.

Oral and documentary evidence were received at the hearing on June 28, 2006. The parties delivered their closing arguments during a telephone conference on June 29, 2006, at which time the record was closed and the matter was submitted.

ISSUE

May the District conduct a reassessment of Student without the consent of Student's guardian?

FACTUAL FINDINGS

1. Student is 16 years old and resides with Grandmother within the geographical boundaries of the District. Student's mother has executed a power of attorney appointing Grandmother and Aunt as her agents regarding educational decisions for Student. Student attends the District's Berkeley High School, where he has just finished his tenth grade year. He has never been determined eligible for special education.

2. Student attended second grade through sixth grade in the Oakland Unified School District (Oakland). In or about March 2003, when Student was in sixth grade, Oakland assessed him for special education but did not find him eligible.

3. In fall 2003, Student transferred into the District and enrolled in the District's King Middle School (King) as an eighth grader, skipping seventh grade.[1] In February and March 2004, school psychologist Don Klose assessed Student, primarily in areas related to a specific learning disability (SLD), and did not find Student eligible for special education.

4. For the 2004-2005 school year, Student attended ninth grade at the District's Berkeley High School. During that school year, the District agreed to Grandmother's request for an independent educational evaluation (IEE) funded by the District. In August 2005, licensed psychologist Cheryl Jacques conducted the IEE. Dr. Jacques's assessment report states that Grandmother "denied permission to exchange information with [the District] or any other agencies." Dr. Jacques conducted testing of Student and interviewed Student and his family, but was not able to review his records, observe him at school, or interview his teachers. Dr. Jacques diagnosed Student with Major Depressive Episode on Axis I, pursuant to the Diagnostic and Statistical Manual-IV (DSM-IV), and recommended that the individualized education program (IEP) team find him eligible for special education as emotionally disturbed (ED). In a subsequent letter to Grandmother dated September 14, 2005, Dr. Jacques wrote that:

> One problem has been that you have denied access to school records and thus have prevented me from having a full picture of [Student's] struggle. As I have written to you before, the findings are based on assessment data and family input. Without the school's input, the picture is necessarily incomplete.

5. On November 9, 2005, Dr. Jacques and District members of Student's IEP team convened to discuss the results of Dr. Jacques's IEE; however, none of Student's family members appeared for the meeting. The other members of the IEP team agreed that the District should conduct its own assessment, because Dr. Jacques did not have sufficient information when she conducted the IEE. The team members agreed that District staff would mail an assessment plan to Student's guardian.

---

[1] Reportedly Student had been one year behind his chronological-age peers due to repeating a grade in elementary school. Apparently his skipping seventh grade occurred so that he could "catch up" with his age peers.

6. Immediately following that IEP meeting, special education teacher Eileen Jacobs prepared an assessment plan regarding Student. The plan indicated that the purpose of the assessment was "to determine whether your child has a disability and may be eligible for special education and/or related services." The plan listed the areas to be assessed as: (1) academic/preacademic achievement; (2) social/adaptive behavior; and (3) intellectual development. The plan indicated that a psychologist and a special education teacher would be the professionals involved in the assessment. The assessment plan was dated November 9, 2005, and was mailed to Grandmother for her signed consent. Grandmother never returned the assessment plan.

7. On January 17, 2006, the IEP team convened again to discuss the results of the IEE conducted by Dr. Jacques. Student's grandmother and aunt both attended this IEP meeting. During the meeting, District staff agreed that they did not have enough information to determine whether Student was eligible for special education, and indicated that the District needed to conduct its own assessment. The IEP notes indicate the following:

> The district does not feel that [Student] qualifies for Special Education services based on Cheryl Jacques assessment. The District would like to assess [Student] to determine whether or not he qualifies for Special Education services.

At the IEP meeting, District staff presented Grandmother and Aunt with a second assessment plan. This assessment plan was dated January 17, 2006, but was otherwise identical in content to the November 9, 2005 assessment plan. Both plans proposed to assess Student in academic/preacademic achievement, social/adaptive behavior, and intellectual development. Neither Grandmother nor Aunt signed consent to either assessment plan.[2]

8. On January 27, 2006, District staff convened a meeting with Aunt to consider Student's eligibility under Section 504 of the Rehabilitation Act (Section 504). While at that meeting, school psychologist William Bove presented to Aunt another assessment plan, which was essentially identical to the previous two proposed assessment plans.

9. On March 21, 2006, the IEP team convened for another IEP, with Aunt in attendance. District staff again offered an assessment plan, dated March 20, 2006, but Aunt refused to take it or sign it.[3]

---

[2] A January 23, 2006 letter from Grandmother to special education program manager Elaine Eger stated that Grandmother and Aunt believed that the assessment plans were not specific enough, and expressed concern that Student "will be over assessed." However, in her testimony Ms. Eger credibly established that she never received this letter.

[3] All four of the assessment plans proposed to assess in the exact same areas: academic achievement; social/adaptive behavior; and intellectual development. The District presented multiple assessment plans only for the purpose of giving the guardian additional opportunities to agree to the proposed assessment. On the assessment plans dated January 27, 2006 and March 20, 2006, the school psychologist forgot to check the boxes indicating which professionals would be conducting the assessments; however, there was no indication that this created any question about who would be conducting the assessments.

10. By the end of Student's tenth grade year, he was attending Berkeley High School only part-time. For the fourth quarter of the 2005-2006 school year, Student's report card indicated that, in his three classes, all of his grades were Fs.

11. William Bove, school psychologist at Berkeley High School, is one of the two proposed assessors. Mr. Bove has a Pupil Personnel Services Credential, and earned a Bachelor's degree in psychology from University of California, Santa Barbara, a Master of Arts in Counseling from San Diego State University, and a Master of Science in Counseling and School Psychology from San Diego State University. Including his internship year, Mr. Bove has worked as a school psychologist for four years. Over the past two years, Mr. Bove and the other proposed assessor, special education teacher Eileen Jacobs, have conducted approximately 15 to 25 special education evaluations together. Mr. Bove was a knowledgeable, credible witness whose testimony is entitled to significant weight.

12. In his testimony, Mr. Bove established that the District's assessment would include standardized testing and "ecological data gathering," such as interviews, observations, and review of records. The assessment would be tailored to measure Student's specific areas of educational need. The assessors do not intend to repeat tests which have already been administered by Dr. Jacques, and instead intend to focus on areas which Dr. Jacques did not assess.

13. Assessment tools would be selected and administered to minimize any racial or cultural bias. Regarding assessment in intellectual development, Student has already been tested in this area, and therefore retesting may not be required. If further testing in this area is required, the assessors would not administer any standardized intelligence quotient (IQ) tests, and would instead use alternative testing for intellectual development, such as the Wide Range Assessment of Memory and Learning (WRAML).

14. Regarding assessment in academic achievement, the assessors would review Student's school functioning, and would review results of academic achievement tests such as the current version of the Woodcock-Johnson Tests of Achievement (Woodcock-Johnson). Measuring Student's school functioning would include interviewing his teachers, observing him at school, and reviewing his grades. Any standardized testing in academic achievement would be administered by the special education teacher, Ms. Jacobs. Because both Dr. Jacques and Mr. Klose administered achievement testing to Student, further standardized testing in this area may not be required.

15. Mr. Bove would assess Student's social and adaptive behavior by observing Student and interviewing Student and others who know him well, such as his teachers. In particular, Mr. Bove would conduct these observations and interviews to evaluate how Student's depression impacts his educational performance. Additional formal testing in this area may not be required, because Dr. Jacques already conducted that testing.

16. The proposed assessment plans would assess Student in all areas related to his suspected disability. In light of Dr. Jacques's diagnosis of Major Depressive Episode and

recommendation for ED eligibility, ED is an area of suspected disability for Student. The assessments will also assess Student related to two other suspected disability categories, SLD and other health impaired (OHI). Mr. Bove is knowledgeable about the areas of disability he proposes to assess, and is trained in administering the proposed tests and other assessment materials.

LEGAL CONCLUSIONS

1. School districts are required to systematically seek out all persons under the age of 22 who reside within their boundaries and have exceptional educational needs. (Ed. Code § 56300; 20 U.S.C. § 1412(a)(10).) To implement this "child find" obligation, "each district, special education local plan area, or county office shall provide for the identification and assessment of an individual's exceptional needs, and the planning of an instructional program to meet the assessed needs." (Ed. Code § 56302.)

2. Before any action is taken with respect to the initial special education placement of a student, the student must be assessed in all areas related to his or her suspected disability. (Ed. Code § 56320, subd. (f); 34 C.F.R. § 300.532(g).) The process for assessment begins with a written referral for assessment by the parent, teacher, school personnel, or other appropriate agency or person. (Ed. Code §§ 56302, 56321, subd. (a); Cal. Code Regs., tit. 5, § 3021.) Within 15 days of referral (with exceptions not applicable here), the parent or guardian must be given a written assessment plan which explains, in language easily understood by the general public, the types of assessments to be conducted. (Ed. Code § 56321, subd. (b).) The parent or guardian then has 15 days to consent in writing to the proposed assessment. (Ed. Code § 56321, subd. (c).) Generally, a local education agency must have the parent's or guardian's consent prior to conducting an assessment. (20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code § 56321, subd. (c).) However, a local education agency can overcome a lack of consent for an evaluation by establishing at a due process hearing that an assessment is necessary. (Ed. Code §§ 56321, subd. (c), 56506, subd. (e); 20 U.S.C. § 1414(a)(1)(C)(ii); 34 C.F.R. § 300.505(b).)

3. Reassessment of a pupil shall occur if the local educational agency determines that the educational or related services needs of the pupil warrant a reassessment, or if the pupil's parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A); Ed. Code § 56381, subd. (a).) To proceed with a reassessment over a parent's objection, a school district must demonstrate at a due process hearing (1) that the parent has been provided an appropriate written reassessment plan to which the parent has not consented, and (2) that the student's triennial reassessment is due, that conditions warrant reassessment, or that the student's parent or teacher has requested reassessment. (Ed. Code §§ 56321, 56381, subd. (a).)

4. In order for a student to be determined eligible for special education, the Student's IEP team must determine the following: (1) whether the student has a qualifying disability and (2) by reason thereof needs special education and related services and (3) the

student's needs cannot be met in the regular classroom with modifications. (Cal. Education Code §§ 56026, 56329, subd. (a); 34 C.F.R. § 300.7(a).) To meet the criteria for the qualifying disability of ED, a student must exhibit one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance: (1) an inability to learn which cannot be explained by intellectual, sensory, or health factors; (2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (3) inappropriate types of behavior or feelings under normal circumstances exhibited in several situations; (4) a general pervasive mood of unhappiness or depression; or (5) a tendency to develop physical symptoms or fears associated with personal or school problems. (Cal. Code Regs., tit. 5, § 3030, subd. (i); 34 C.F.R. § 300.7(c)(4).)

5. Parents who want their child to receive special education services must allow reassessment if conditions warrant it. In *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315, the court stated that "if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing." (See, e.g., *Patricia P. v. Board of Educ. of Oak Park and River Forest High School Dist. No. 200* (7th Cir. 2000) 203 F.3d 462, 468.) In *Andress v. Cleveland Independent. School Dist.* (5th Cir. 1995) 64 F.3d 176, 178, the court concluded that "a parent who desires for her child to receive special education must allow the school district to evaluate the child ... [T]here is no exception to this rule."

6. Contrary to the Student's contention, there is no evidence that the proposed assessment would "over-assess" the Student.[4] In order for Student to be determined eligible for special education under the category of ED, the IEP team must determine that Student exhibits one of the five characteristics of ED over a long period of time and to a marked degree, which adversely affects educational performance. The team must further determine that, due to his ED, Student needs special education and related services, and those needs cannot be met in the regular classroom with modifications. Pursuant to Factual Findings 4, 5, 15, and 16, Dr. Jacques diagnosed Student with one of the five characteristics of ED, but did not have sufficient information to evaluate whether or how that characteristic adversely affects Student's educational performance. Hence, further assessment is required to determine whether the Student is eligible for special education, and therefore conditions now warrant reassessment of Student by the District. Moreover, as determined in Factual Findings 12-15, the District does not intend to assess the Student in areas sufficiently covered by Dr. Jacques's assessment.

7. Pursuant to Factual Findings 6-9 and 11-16, above, the District has presented the guardian with appropriate written assessment plans to which she has not consented, and those assessment plans propose conducting assessments which meet the legal requirements, in particular the requirements of Education Code sections 56320 and 56321.[5]

---

[4] Many of Student's other arguments were irrelevant to the hearing issue. For example, Student contended that the District failed to provide requested pupil records, and that the District never completed its 2004 assessment of Student.

[5] At the hearing, the Student did not assert that the assessment plans failed to comply with any legal requirements.

ORDER

8. The District is entitled to assess Student in accordance with its reassessment plans dated November 9, 2005, January 17, 2006, January 27, 2006, and March 20. 2006.

9. The District shall notify Student's guardian in writing of the date and place of the assessment at least fifteen calendar days before the reassessment occurs.

10. Student's guardian shall make him reasonably available for the reassessment.

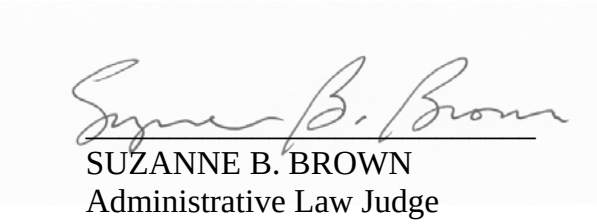
PREVAILING PARTY

11. 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 this statute: The District prevailed on the only issue heard and decided.

RIGHT TO APPEAL THIS DECISION

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

IT IS SO ORDERED THIS DAY: July 12, 2006



SUZANNE B. BROWN
Administrative Law Judge
Special Education Division
Office of Administrative Hearings