

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

In the Matter of:

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N2007030652

DECISION

Administrative Law Judge (ALJ) John A. Thawley, State of California, Office of Administrative Hearings, Special Education Division (OAH), heard this matter on April 19, 2007, in Los Angeles, California.

Los Angeles Unified School District (District) was represented at hearing by Associate General Counsel Donald Erwin. Also present was District Due Process Specialist Joyce Kantor.

No appearance was made by or on behalf of Student or his mother (Parent), and neither Student nor his Parent appeared, testified, or presented any evidence.¹

On February 26, 2007, District filed a request for a due process hearing (Complaint)² regarding Student. At the hearing, witness testimony and documentary evidence were received. The record was closed and the matter was submitted on April 19, 2007.

¹ See Procedural Matters, below, regarding Student's request for a continuance of the hearing.

² A request for a due process hearing under California Education Code section 56502 is the due process complaint notice required under title 20 of the United States Code section 1415(b)(7)(A).

ISSUE

Does District have the right to assess Student, pursuant to the proposed assessment plans of December 2006 and February 2007, in the absence of parental consent?

CONTENTIONS OF THE PARTIES

District contends that: (1) Parent consented to two out of three proposed assessment areas (health and career) in District's December 2006 assessment plan; (2) Parent refused to consent to District proposed academic performance assessment of Student in that plan; and (3) Parent has failed or refused to consent to its February 2007 assessment plan, which includes proposed assessments in the areas of academic performance, general ability, language function, motor abilities, and social-emotional status. District contends that it has taken reasonable measures to obtain Parent's consent for the assessments after proper notice and advisement of rights. Student did not participate in the hearing.

PROCEDURAL MATTERS

On March 20, 2007, District served a copy of the complaint on Parent at her address of record. On March 21, 2007, OAH served a Notice of Due Process Hearing and Mediation on both the District and Parent at their respective addresses of record. The Notice set the due process hearing for April 19, 2007, at 9:30 a.m., at the District offices at 333 S. Beaudry Ave., 17th Floor, Los Angeles, California 90017.

On Friday, April 13, 2007, OAH issued an order setting a telephonic prehearing conference (PHC) for Tuesday, April 17, 2007, at 2:00 p.m. The order was served on Parent via overnight mail at her mailing address.

On April 17, 2007, at the start of the PHC (as reflected in the PHC Order), Parent told the ALJ that she would not be participating in the PHC or the hearing. Parent stated that she had not received notice of the hearing, but indicated that she was aware the hearing was set for April 19, 2007. The ALJ told Parent that, in the absence of a motion to continue, the PHC and the hearing would proceed as scheduled. Parent refused to participate in the PHC and hung up.

On the afternoon of April 18, 2007, Parent filed a request for a continuance. The request stated that Parent would be unable to attend the hearing because she was taking an antibiotic for a throat infection and "illness." Parent's request stated that her doctor's office would be faxing confirmation to support her request to OAH. However, OAH never received a fax from Parent's doctor. That same afternoon, the Presiding ALJ denied Parent's request because the request was untimely, and provided no basis to continue the hearing. The order was served on Parent at her mailing address. In addition, OAH telephoned the Parent and left a voicemail informing her that her request for a continuance had been denied.

On April 19, 2007, at the time and the place for the hearing, Parent did not appear. Parent did not make any further motion for a continuance of the hearing. Mr. Erwin, attorney for the District, and Ms. Kantor, District's due process specialist, represented that there had been no answer when District called Parent's home phone number shortly before the hearing. On the record, the ALJ noted the above procedural history. In addition, the ALJ used the speaker phone in the hearing room to call Parent's home phone number, but there was no answer. The ALJ also used the speaker phone to call Parent's cell phone number, and left a voicemail regarding the start of the hearing, and the urgency for Parent to contact OAH or the District immediately if she wished to participate in the hearing. The ALJ then recessed the hearing for about 15 minutes, to provide Parent with an opportunity to call OAH or the District, and/or to appear at the hearing site. Parent did not appear, nor did she contact OAH or the District. At 10:00 a.m., the hearing resumed in Parent's absence.

FACTUAL FINDINGS

Background

1. Student is 16 years old, and lives with Parent within the boundaries of District. He attended 11th grade at Alexander Hamilton High School (Hamilton), a public school within District boundaries, before he was removed from school by Parent. According to District's records, Student's health history includes a diagnosis of sickle cell anemia.

2. Prior to the 2005-2006 school year, Student lived within the boundaries of, and attended a school within, the ABC Unified School District (ABCUSD). At least as of February 2005, ABCUSD had provided Student with a 504 Individual Accommodation Plan (504 Plan), pursuant to the federal Americans with Disabilities Act and section 504 of the Rehabilitation Act of 1973. Student's 504 Plan for ninth grade at Gahr High School in the ABCUSD provided him with accommodations based on a diagnosis of sickle cell anemia.

3. In June 2005, ABCUSD proposed an individualized education program (IEP) for Student.³ The IEP proposed that Student would be eligible for special education services from ABCUSD under the category of Other Health Impaired (OHI). The IEP offer was executed by Kathleen A. Cronin, Special Education Supervisor, on June 16, 2005. The proposed IEP refers to a prior settlement agreement. The IEP notes indicated that Parent attended an IEP meeting with ABCUSD personnel on June 16, 2005, but that Parent refused to sign either the attendance or the consent pages.

4. For the 2006-2007 school year, Parent attempted to enroll Student in Hamilton in late August or early September 2006. Parent claimed that Student was eligible for special education and related services, and that Student had an IEP. Parent became upset in dealing with a Hamilton clerk about Student's 504 Plan. Special Education Coordinator Giselle Khazzaka was called to speak with Parent. Parent told Ms. Khazzaka that she did not have a

³ See California Education Code section 56345.

copy of Student's ABCUSD Proposed IEP or of Student's ABCUSD 504 Plan. Ms. Khazzaka told Parent that a pupil would not have both an IEP and a 504 Plan. Ms. Khazzaka gave Parent her name and phone number, and asked Parent to contact her, and to bring both documents to Hamilton. Ms. Khazzaka did not hear from Parent, so later she asked the attendance clerk whether Parent had returned with either document.

5. Then Hamilton Assistant Principal Sharon Greene met with Parent. Parent insisted that Student was eligible for special education services, and showed Ms. Greene some documents that indicated Student had a 504 Plan. Ms. Greene told Parent that Student could not have both an IEP and a 504 Plan. Parent insisted that Student was a special education pupil, and had attended ABCUSD the previous school year. Ms. Greene telephoned ABCUSD. Ms. Cronin, told Ms. Greene that ABCUSD had been unable to complete the IEP process because Parent had refused to sign the IEP. Parent told Ms. Greene that Ms. Cronin was lying, and that she would go home and fax Student's IEP to Ms. Greene. Parent did so. However, the ABCUSD IEP that Parent faxed to Ms. Greene lacked Parent's signature.

District's December 2006 Proposed Assessment Plan

6. A school district must provide a comprehensive individual evaluation before special education services are initially provided to a child. A school district is required to assess a child in all areas of suspected disability, including, if appropriate, health and development, vision, hearing, language function, general intelligence, academic performance, communicative status, motor abilities, career and vocational abilities and interests, and social and emotional status.

7. On September 8, 2006, Parent filed a request for due process hearing on behalf of Student, which named ABCUSD as the respondent. Student later amended his Complaint to add the District as a respondent.

8. On November 21, 2006, a resolution session was held between Parent and District. Ms. Kantor, Ms. Greene, Hamilton school psychologist Sherymaria Makkar, Parent, and Rodney Ford, Parent's advocate, were present.

9. During the November 2006 resolution session, District personnel explained to Parent their need to assess Student to determine his eligibility for special education and related services, and developed a draft assessment plan. Parent and her advocate took the draft assessment plan form with them in order to review it, but never returned it.

10. On December 7, 2006, District sent Parent a formal assessment plan form for Parent's consent. Consistent with the assessment offer made during the resolution session, District offered to assess Student in the areas of health and development, including vision and hearing; academic performance; and career and vocational abilities/interests. The plan proposed that the health assessment would be completed by a nurse or physician, and the other two assessments would be done by a special education teacher. Enclosed with the

December 2006 assessment plan was a copy of “A Parent’s Guide to Special Education Services (Including Procedural Rights and Safeguards).”

11. On January 8, 2007, Parent signed and dated the December 2006 assessment plan. Parent subsequently returned the signed plan to the District. Parent’s signature includes a checkmark in a circle next to the following pre-printed phrase: “YES, I consent to the Assessment Plan except in the following area(s): . . .”⁴ Printed by hand next to this phrase and above Parent’s signature is the following: “IEP TESTING HAS TO BE DONE BY ABC UNIFIED SCHOOL DISTRICT.” Parent did not provide any written reason for wanting ABCUSD to test Student’s 2007 levels of academic performance, particularly in light of the fact that Student was attending a District school.

12. Parent’s reference to “IEP testing” meant the academic performance testing. By virtue of Parent’s qualified signature, as found in Factual Finding 11, Parent consented to District’s health and career assessments, but did not consent to District’s offer to assess Student’s academic performance.

13. On January 25, 2007, Hamilton health nurse Linda Luther, a registered nurse, conducted the health assessment of Student by interviewing Parent by telephone, reviewing available health records, and by testing Student’s vision and hearing. Parent cooperated with the health assessment.

District’s February 2007 Proposed Assessment Plan

14. On February 6, 2007, Ms. Greene sent a letter to Parent, along with an additional proposed assessment plan that was designed to establish Student’s baseline information in more areas related to his suspected disability. The letter included another copy of District’s advisement of procedural rights and safeguards. Ms. Greene’s letter explained to Parent that District requested consent to conduct an academic performance assessment of Student, and requested that Parent consent to assessments in the additional areas of general ability, language function, motor abilities, and social-emotional status. The plan proposed that the academic performance assessment would be conducted by a special education teacher, and the other new areas would be assessed by a psychologist. Since Parent had already consented to the health and career assessments in the December 2006 assessment plan, those areas were not included in the new 2007 assessment plan.

15. District’s letter, proposed assessment plan, and procedural rights and safeguards were sent to Parent via Student, regular mail, and certified mail. The certified mail was returned to the District unopened. A District Pupil Services and Attendance employee (PSA) verified the address of Student/Parent. However, District never received a response from Parent regarding the other two copies of the proposed assessment plan that District had sent.

⁴ The other two pre-printed choices on the form were: “YES, I consent to the Assessment Plan” and “NO, I do not consent to the Assessment Plan.”

16. On March 20, 2007, District filed its request for due process hearing. On April 2, 2007, District's attorney sent a letter via Federal Express to Parent, with another copy of the February 2007 assessment plan, and invited Parent's consent in advance of the April 4 mediation. The District also offered to withdraw this matter if Parent consented to the plan. Parent has not submitted any written consent to the plan.

17. The December 2006 assessment plan remains in effect pursuant to Parent's qualified consent, as found in Factual Findings 11 through 13. District should have conducted the career assessment for Student. However, Parent has now removed Student from school. No other assessments have been commenced or completed under either assessment plan. Therefore, the career assessment portion of District's plan requires enforcement.

18. Both the December 2006 and February 2007 assessment plans were duly served on Parent with written notice of parental rights and an explanation of procedural safeguards that are required by law. Both proposed assessment plans were understandable, in English, Parent's language, and explained the general types of assessments that were proposed, as well as the District personnel who would conduct the assessments.

19. District's assessments pursuant to the December 2006 and February 2007 assessment plans would use multiple standardized tests and tools administered by the appropriate District personnel. District was obligated to conduct its own assessments of Student, and could not legally comply with Parent's demand that ABCUSD conduct an academic performance assessment of Student. District has the right and obligation to determine which of its competent personnel would conduct the assessments.

20. District has a valid concern that Student should be assessed for eligibility for special education and related services. In addition to the Parent's express request for special education services, District's records show that Student has numerous tardies and absences, that he has suffered low or failing grades in some subjects, and that he has not earned sufficient credits for his grade level. Ms. Makkar meets informally with Student on a regular basis. Ms. Makkar is concerned about Student's unusually high number of unexplained or "uncleared" absences, without parental explanation. Parent has informed Ms. Makkar that Student takes medications that have made it difficult for him to get up in the morning. To accommodate Student's medication/tardiness issues, District has made Student's first period a "home period" instead of an academic subject class, so that Student can come to school about two hours later in the morning. District has also moved Student's Period One to Period Six. District has sufficient information from Parent and from Student's attendance and grade problems to support the need to assess Student.

21. Parent's failure or refusal to consent to Student's assessments in the proposed areas listed in the February 2007 assessment plan, and failure to present Student for assessment pursuant to the December 2006 assessment plan, has continued to the date of the hearing herein. The District's proposed assessment plan represents a comprehensive assessment of Student, so that the assessment results could be presented at an IEP team

meeting, including Parent, to allow the IEP team to make an eligibility determination. District has shown that it has taken reasonable measures to obtain Parent's consent.

LEGAL CONCLUSIONS

Applicable Law and Determination of Issues

1. District, as the 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. Before any action is taken with respect to the initial placement of a child with special needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (e) & (f).) Areas of suspected disability include, if appropriate, health and development, vision, hearing, language function, general intelligence, academic performance, communicative status, motor abilities, career and vocational abilities and interests, and social and emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).)
3. As found in Factual Findings 9 through 21, both of District's assessment plans, taken together, proposed to assess Student in most, if not all, areas related to his suspected disability, and would involve the use of multiple standardized tests and tools.
4. An assessment plan must be accompanied by a notice of the parent's rights and a written explanation of the procedural safeguards under IDEA 2004 and California law. (Ed. Code, § 56321, subd. (a).) The parent has at least 15 days from the receipt of the proposed assessment plan to arrive at a decision. (Ed. Code, § 56321, subd. (c).) Consent for initial assessment may not be construed as consent for any initial placement or provision of services. (Ed. Code, § 56321, subd. (e).)
5. As found in Factual Findings 9, 10, 14, and 15, the December 2006 assessment plan and the February 2007 assessment plan were properly sent to Parent along with written notice of parental rights and an explanation of procedural safeguards. Parent was given from November 21, 2006, through January 8, 2007, to respond to the December 2006 plan, and was given over a month to respond to the February 2007 assessment plan, from February 6, 2007, to March 20, 2007, when District filed its request for a due process hearing.
6. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producers of the tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a) & (b).) Assessments must be conducted by individuals who are knowledgeable and "competent to perform the assessment, as

determined by the school district, county office, or special education local plan area.” (20 U.S.C. § 1414(b)(3)(B)(ii); Ed. Code, §§ 56320(g), 56322.)

7. As found in Factual Findings 9, 10, 13, 14, and 17 through 19, District’s December 2006 and February 2007 proposed assessments meet the requirements in Legal Conclusion 6, because they would be conducted by the appropriate District personnel: a registered nurse or physician, a special education teacher, and a psychologist. District was and is obligated to conduct its own assessments of Student, and could not legally comply with Parent’s demand that ABCUSD conduct an academic performance assessment of Student.

8. While the law provides that a local educational agency (LEA) has the right and obligation to conduct assessments, parental consent is generally required before a school district may conduct assessments. (20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code, § 56321, subd. (c).)⁵

9. As found in Factual Findings 10 through 17, Parent consented to two areas of assessment in the December 2006 plan, refused to consent to an academic performance assessment to be conducted by District, and has failed or refused to consent to any of the proposed areas of assessment in the February 2007 plan.

10. An LEA can override a lack of parental consent if the LEA prevails at a due process hearing. (20 U.S.C. § 1414(a)(1)(C)(ii); Ed. Code, § 56506, subd. (e).) The LEA must demonstrate at hearing that it has taken reasonable measures to obtain the consent of the parent, and that the child’s parent has failed to respond. (Ed. Code, § 56506, subd. (e).)

11. As found in Factual Findings 8 through 16, as well as Legal Conclusions 5 and 10: (1) in November 2006, District personnel met with Parent and her advocate, explained the need for assessments, and provided Parent with a draft assessment; (2) in December 2006, the District duly served Parent with a formal proposed assessment plan; and (3) in February 2007, District duly served Parent with an additional proposed assessment plan. District provided Parent with sufficient time within which to consent, and its attorney sent another copy of the February 2007 assessment plan to Parent in April 2007. District has met its burden of proof to establish that it has taken reasonable measures to obtain Parent’s consent.

12. As found in Factual Finding 17, the career assessment portion of District’s December 2006 assessment plan requires enforcement, in light of the fact that Parent consented to the career assessment and it has not yet been conducted.

⁵ A parent has the right to obtain an independent educational assessment of the student at public expense if the parent disagrees with an assessment obtained by the public agency and other factors are met, including a finding that the public agency’s assessment was not appropriate. (Ed. Code, § 56329, subd. (b).)

13. As found in Factual Findings 1 through 5 and 20, District has valid concerns that Student should be assessed based on Parent's request for special education and related services, and Student's reported diagnosis, attendance, and grades. In *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1315, the Ninth Circuit Court of Appeals held that "if the parents want Gregory to receive special education under the Act, they are obligated to permit such testing." Likewise, the court in *Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176, 180, held that "there is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student's eligibility under IDEA."

ORDER

1. Los Angeles Unified School District may conduct assessments of Student pursuant to the proposed assessment plans of December 2006 and February 2007.

2. If Parent wants Student to receive special education and related services from Los Angeles Unified School District, Parent shall make Student reasonably available for the assessments.

PREVAILING PARTY

Los Angeles Unified School District prevailed on the only issue for hearing in this case. (Ed. Code, § 56507, subd. (d).)

NOTICE OF APPEAL RIGHTS

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

DATED: May 1, 2007



JOHN A. THAWLEY
Administrative Law Judge
Special Education Division
Office of Administrative Hearings