

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

TUSTIN UNIFIED SCHOOL DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2009101194

DECISION

Stella L. Owens-Murrell, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on March 2, 3, and 4, 2010, in Laguna Hills, California.

Student was represented at the hearing by Richard Isaacs, Attorney at Law. Student's parents (Parents and/or Mother and Father) were present for the entire hearing. Student did not attend the hearing.

Tustin Unified School District (District) was represented at the hearing by Jennifer Brown, Attorney at Law. Lori Stillings, Ed. D., District Assistant Superintendent for Special Education, and SELPA Director, was present for the entire hearing.

District filed its Due Process Hearing request on October 23, 2009 and a continuance was granted for good cause on November 9, 2009. Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the matter was continued to March 22, 2010, to permit the filing of written closing arguments. The parties timely filed written closing argument, at which time the record was closed and the matter was submitted.

ISSUE

Whether District may conduct a triennial assessment of Student in accordance with the August 13, 2009 assessment plan without Parents' consent.

FACTUAL FINDINGS

BACKGROUND

1. Student is 18 years of age and resides with her parents within the jurisdictional boundaries of the District. She receives special education and related services under the disability category of autistic-like behaviors based upon a diagnosis of Aspergers Syndrome. Student is also eligible for special education and related services under the secondary disability category of specific learning disability (SLD). Student has been eligible for special education services since 1994.

2. Student attended Oak Ridge School (Oak Ridge), a non-public school (NPS) within the District, from the fifth to the eighth grades and enrolled in public school in 2006 in the ninth grade at Foothill High School (Foothill). Student is currently in the twelfth grade and is expected to graduate in May 2010.

3. Student had been diagnosed with various medical conditions during her childhood, including Encephalopathy¹ and Mitochondrial Dysautonomia². She was also

¹ Encephalopathy is any degenerative disease of the brain.

² Mitochondrial Dysautonomia is related to a dysfunction in the autonomic and sensory nervous systems resulting from incomplete development of the neurons.

diagnosed with a medical condition known as Arnold Chiari malformation³ which required Student to have neurosurgery at seven years of age.

4. Prior to entering Foothill, Student was assessed on August 10, 2006 by Dr. Robert Patterson (Dr. Patterson), Psy. D., a licensed Psychologist, who conducted a psychoeducational assessment. The assessment was conducted at District's request to determine Student's present levels of performance and unique needs

5. Lori Stillings (Dr. Stillings), Ed. D., District's Assistant Superintendent for Special Education, directly supervised the school psychologists, facilitators, and special education coordinators. Student's first triennial in the District occurred in October 2006 when Student transitioned to the ninth grade. Student had previously been evaluated by Dr. Patterson in 2003, and since Student had not attended a District school prior to the triennial, District contracted with Dr. Patterson to conduct the August 10, 2006 psychoeducational assessment. Dr. Stillings supervised the planning and coordination of Student's 2006 triennial psychoeducational assessment. Dr. Stillings testified that Dr. Patterson had conducted assessments for District over several years in the past under contract.

6. Based upon the assessment report and other information provided to the IEP team, Student's October 26, 2006 IEP identified Student as having development coordination disorder, anxiety disorder, and reading recognition and written language disorder. The IEP further identified Student with language and social skills deficits that impacted peer relationships in social functioning in the school setting. Student's unique needs were in the areas of pre-academic/academic cognitive and functional skills, speech and language and behavior, fine and gross motor development and

³ Arnold Chiari malformation is generally a neurological disorder causing deformity in the lower brain.

social/emotional development. The IEP established goals and objectives in Student's areas of need and offered placement in general education classes with specialized academic instruction, extensive accommodations, and an extended school year. The IEP also offered designated instructional services (DIS) in occupational therapy, behavior intervention services, speech and language, counseling services, and physical therapy. Parents consented to the IEP.

7. Dr. Julie Berg Ryan (Dr. Ryan), O.D., Developmental Optometrist, conducted a visual efficiency and sensorimotor assessment of Student on August 31, 2007, at Parents' request. In her assessment report, Dr. Ryan recommended a full visual efficiency and sensorimotor evaluation of Student in two years.

8. The October 22, 2007 IEP noted no change in Student's present levels of performance. The IEP offered substantially the same placement, DIS services, and accommodations. The IEP team reviewed and considered Dr. Ryan's assessment report and recommendations. Consistent with Dr. Ryan's report and recommendation the IEP team notes included a notation that a "visual processing assessment (was) to be done in the summer of 2009 by Julie Ryan." Parents consented to the IEP.⁴

9. District convened an IEP team meeting on June 9, 2008, for the purpose of establishing Student's post-secondary transition goals and services and to amend the October 22, 2007 IEP's DIS services. The IEP included a note that Student would "have a psychoeducational study by Dr. Robert Patterson by fall 2009." The IEP also noted that

⁴ Parents filed a compliance complaint with the California Department of Education (CDE) On October 14, 2009, alleging District's failure to implement certain provisions of the October 2007 IEP. The matters raised in the complaint and the findings of the CDE are not relevant to the issue in this case and are not considered in the factual findings and legal determinations in the instant matter.

Student would "have a visual efficiency and sensorimotor evaluation by Julie Berg Ryan, O.D. by fall 2009."

10 On October 6, 2008, District convened an IEP team meeting to review Student's present levels of performance and progress against annual goals. Student's present levels of performance remained essentially the same. The meeting was continued to November 14, 2008; December 8, 2008; and January 23, 2009. The IEP team discussed, as reflected in the IEP notes, that assessments by Dr. Patterson and Dr. Ryan were scheduled to be done by fall 2009. The IEP team discussed DIS services and extensive accommodations requested by Parents. Parents disagreed with the IEP offer of school-based speech and language services and did not consent to the IEP.

11. Donna Parker (Ms. Parker), Special Education Coordinator for District, testified to District's efforts to provide speech and language services to Student pursuant to the October 2008 IEP offer of school-based speech and language services. Ms. Parker confirmed that there was a dearth of information and data concerning Student's functional speech and language skills. Ms. Parker's testimony supported the necessity of a speech and language assessment to facilitate the development of appropriate goals and services to meet Student's needs in this area.

12. Based upon Parents' contact with District employees, and the repeated references in the October 27, 2007 IEP, agreeing to Dr. Ryan for a visual assessment, and the June 9, 2008 and November 14, 2008 IEPs additionally agreeing to Dr. Patterson for a future psychoeducational assessment by fall 2009, Parents believed that the references to the assessments in the prior IEPs were binding agreements by District that future assessments would be conducted exclusively by Dr. Patterson and Dr. Ryan.

13. Beginning in June 2009, Parents sent numerous e-mails and other correspondence to District personnel urging them to follow up with Dr. Patterson in order to schedule the psychoeducational assessment before the start of the 2009-2010

school year. District did not respond to Parents' requests nor did District schedule Dr. Patterson's assessment.

14. When District took no action to schedule the psychoeducational assessment with Dr. Patterson, Parents proceeded to contact Dr. Patterson to schedule a psychoeducational assessment of Student, which Dr. Patterson conducted at Parents' request on July 15, 2009.

2009 TRIENNIAL ASSESSMENT

15. District had not obtained a psychoeducational assessment of Student since August of 2006 and Student had not been given a speech and language assessment since 2003. Student's Triennial Assessment was due by October 26, 2009.

16. Dr. Stillings testified that, aside from the requirement that District assess Student every three years, the assessments were necessary because Student had deficits in several areas. Parents complained and teachers reported that Student was struggling in mathematics and in classroom instruction and continued to have difficulty in the areas of receptive, expressive and pragmatic language. According to Dr. Stillings, Student's areas of suspected disability were autism, intellectual development, academic functioning, speech and language, health and vision, and social/emotional functioning. Dr. Stillings explained that, since Parents did not consent to the October 2008 IEP, Student's program and services were based upon the last agreed upon IEP of October 2007. The proposed assessments were necessary to give District a current global view of Student's functional skills and abilities, and to permit District to offer Student a free appropriate public education (FAPE). According to Dr. Stillings, current data obtained from the proposed assessments would also aide Student in her transition from high school to post-secondary education and/or employment.

17. In preparation for the triennial assessment, and in response to Parents' inquiries concerning the Patterson and Ryan assessments, District sent a letter to

Parents on August 13, 2009. The letter notified Parents that District was denying their request for a psychoeducational evaluation by Dr. Robert Patterson on the ground that District reserved the right to identify and select the assessors District deemed qualified to conduct the triennial psychoeducational assessment. District further notified Parents of its agreement to Dr. Ryan to conduct the visual assessment. District notified Parents of their right to request an independent educational evaluation at the time the IEP meeting convened to review the District's proposed psychoeducational assessment if they disagreed with the assessment. District also requested that Parents provide written consent to the assessment plan. The letter was intended to provide prior written notice to Parents of the District's decision. District also enclosed a Notice of Procedural Safeguards to Parents.

18. The District letter, written in English, included a proposed assessment plan dated August 13, 2009. The assessment plan explained that the purpose of the plan was to assist District in determining Student's educational needs.

19. The assessment plan proposed to assess Student in the following areas by these personnel:

Academic/Pre-Academic Achievement-TUSD teacher;

Intellectual Development-TUSD School Psychologist;

Language/Speech Communication Development-TUSD
Speech and Language personnel;

Health/Vision/Hearing-TUSD Nurse;

Social/Emotional Behaviors Status-TUSD Nurse; and
Additional and/or Alternative Visual Assessment-Dr. Ryan.

20. Parents responded by a letter dated August 20, 2009, in which they notified District of their belief that the assessment by Dr. Patterson had been previously approved by the IEP team at the November 14, 2008 IEP team meeting. Parents further stated that the IEP team agreed to contact Dr. Patterson to schedule the psychoeducational evaluation in the summer of 2009. Parents believed that Dr. Patterson was District's "assessor of record." Parents notified District in this letter that Dr. Patterson had conducted the psychoeducational evaluation on July 15, 2009, "at public expense." Parents also informed District that they would be willing to discuss further assessments after review of Dr. Patterson's assessment at the November 23, 2009 IEP team meeting. Parents did not provide District a copy of Dr. Patterson's assessment report and Parents did not consent to the assessment plan.

21. Dr. Stillings testified that Dr. Patterson was not the District assessor for all purposes nor did District agree to contract with him to conduct the 2009 triennial psychoeducational assessment. Dr. Stillings did not attend the IEP meetings at which the IEP team discussed the assessment to be conducted by Dr. Patterson. According to Dr. Stillings, the District did not customarily discuss or agree to triennial assessments several years in advance of the date the assessment was due. She further testified that, even if such discussions took place, District had the right to choose its own evaluators and that District chose to assign qualified District personnel to conduct the triennial assessments. Dr. Stillings further testified that District was not aware of Dr. Patterson's July 15, 2009 psychoeducational assessment at the time District prepared the August 13, 2009 proposed assessment plan. Dr. Patterson did not contact District in the course of the assessment and sought no input from District. When District became aware of the assessment, Parents would not sign a release to permit District to obtain information from Dr. Patterson concerning the assessment.

22. On September 9, 2009, District made a second written request that Parents consent to the August 13, 2009 assessment plan. District enclosed the identical assessment plan provided to Parents on August 13, 2009. District's second request was mailed to Parents September 9, 2009.

23. On September 10, 2009, Parents sent a letter to District by facsimile (fax) in which they inquired of the status of the visual processing assessment by Dr. Ryan that District had previously agreed to. Parents also notified District that they had scheduled an appointment with Dr. Ryan for September 15, 2009 to conduct a visual processing assessment of Student. Parents further indicated that they objected to the August 13, 2009 assessment plan because it failed to provide sufficient detail of the reasons for the assessment, the proposed test instruments, and the identity of the assessors. Parents requested that District provide more details concerning the assessment plan. Parents also enclosed an altered version of the proposed assessment plan provided by District in which Parents applied white-out to obliterate all proposed areas of assessment except for the category "Additional/Alternative Assessments," under which "visual assessment" was added by District, and noted at the bottom of the assessment plan their partial consent only to the proposed visual assessment by Dr. Ryan. The altered assessment plan was signed by Father on September 10, 2009, and faxed with the letter to District on the same date.

24. District notified Parents by e-mail on September 14, 2009, that District would not authorize Dr. Ryan to proceed with an assessment until Parents consented to an unaltered assessment plan. The e-mail message included the August 13, 2009 assessment plan previously received by Parents and instructed Parents to sign the assessment plan and to note at the bottom in the space provided the proposed assessments to which they would not consent and those to which they consented. Parents did not respond.

25. On September 30, 2009, after several telephone calls and other efforts to speak with Parents, Dr. Stillings requested that Parents meet with her and Foothill's principal about the assessment plan and the reasons Parents refused to consent. Parents did not respond.

26. Dr. Stillings followed up with written notice to Parents on October 7, 2009, of District's request for their consent to the assessment plan. The notice also invited Parents to contact District for any further input or proposals for additional areas of assessment on the assessment plan. Dr. Stillings also notified Parents that District intended to file a request for due process if no response consenting to the assessment plan was received from them by October 14, 2009.

27. Parents responded by letter on October 11, 2009. Parents notified District that they would consent to the assessment plan only if District agreed to Dr. Patterson for the triennial psychoeducational assessment, authorized Dr. Ryan's visual assessment, and deferred the proposed speech and language assessment until District resolved issues pertaining to speech and language services unrelated to the triennial assessment.

28. On October 12, 2009, District sent a detailed response to Parents explaining that the purpose of the assessment plan was to enable District to conduct Student's triennial assessment. The letter included a fourth request that Parents sign their consent and return the August 13, 2009 assessment plan. The letter also provided an itemized description of the areas and subtests identified for assessment, and the identities of the assessors as follows:

29. Academic/Pre-Academic Achievement: Kathy Dawson (Ms. Dawson), Special Education teacher, was assigned to conduct the assessment. The proposed test instrument consisted of the Woodcock Johnson III Test of Achievement (WJ-3). Ms. Dawson had been employed with the District as a special education teacher for several

years, had administered the test to numerous students and was familiar with the test instruments and test protocols.

30. Intellectual Development: Trudy Flynn Chenoweth (Ms. Chenoweth), School Psychologist was assigned to conduct the Intellectual Development assessment. The proposed test instruments included the Woodcock Johnson III Test of Cognitive Ability; Beery-Buktenica Developmental Test of Visual Motor Integration-Self Report; and Gilliam Asperger's Disorder Scale-2. Ms. Chenoweth had been employed with the District for more than 18 years. She worked as a School Psychologist part time for several years and full time for over three years. She had conducted over 80-100 psychoeducational assessments per year. Ms. Chenoweth worked at various District school sites and worked with students from kindergarten to age 22. She also worked with Students at Foothill in all grade levels. She was familiar with all of the test instruments and the test protocols.

31. Social/Emotional Behaviors Status: Ms. Chenoweth, was also assigned to conduct this assessment. The proposed test instrument consisted of the Behavior Assessment System for Children-2 (parent and teacher) (BASC-2). Ms. Chenoweth was similarly experienced in the administration of this test instrument.

32. Ms. Chenoweth testified that District had no current assessment data pertaining to Student's intellectual development. Such an assessment was necessary to obtain information of Student's verbal, non-verbal and processing abilities. Ms. Chenoweth further testified that she was aware of Parents' request to preclude classroom observation due to Student's anxiety issues and the request to attend and record the assessments. Ms. Chenoweth stated that classroom observation was necessary for purposes of evaluating Student's functioning and peer interaction in the school setting.

33. Ms. Chenoweth indicated the assessments could be administered to Student in a manner that would address her anxiety and allow the assessments to go forward. Ms. Chenoweth did not believe it appropriate for Parents to be present during

an assessment or to audio or videotape the assessment because of the potential to cause invalidation of the standardized tests and because Parents' presence would violate confidentiality requirements.

34. Language/Speech Communication Development: Cyndy Negru (Ms. Negru), Speech and Language Pathologist for District, was assigned to administer the speech and language assessment. The proposed test instruments included the Clinical Evaluation of Language Fundamentals-4 (CELF-4), including the Pragmatic Profile Questionnaire to Teachers, Class Observation, Test of Problem Solving-2 (Adolescent), Comprehensive Assessment of Spoken Language including the Non-Literal Language, meaning from context and Pragmatic Judgment subtests and Reciprocal Interview with Student. Ms. Negru had more than 15 years of experience as a speech pathologist for District and has assessed an average of 80 students per year. She was familiar with the test instruments and their protocols to be used in Student's proposed speech and language assessment.

35. Ms. Negru testified that she reviewed Student's school and medical records. She reviewed a progress report prepared by an NPA provider and a speech and language assessment administered to Student by an NPA provider in April 2003. Ms. Negru credibly testified that, based upon her review, Student had deficits in the areas of expressive, receptive and pragmatic language. Ms. Negru explained that Student had not been receiving speech and language services offered in the IEP and District had no current and up-to-date assessment data and information on Student's speech and language needs. Regarding classroom observation, Ms. Negru explained that it is an integral part of the assessment as it permits the assessor to observe Student in the classroom setting and interaction with peers to determine the level of Student's receptive and pragmatic language skills. Ms. Negru further explained that a comprehensive speech and language assessment was long overdue and necessary in

order to enable District to set appropriate goals and provide an appropriate program and services for Student.

36. Health/Vision/Hearing and Additional and/or Alternative Assessment: The Health, Vision, and Hearing assessments were assigned to the District's school nurse. Dr. Ryan was identified to conduct the visual efficiency and sensorimotor assessments.

37. On October 19, 2009, District made a written request to Parents to sign an authorization for release of information from Dr. Patterson to enable District to obtain and discuss with Dr. Patterson his psychoeducational assessment. Parents did not sign the release. The failure to sign the release precluded District from obtaining information from Dr. Patterson concerning the assessment.

38. Dr. Stillings notified Parents on October 19, 2009, that District accepted the signature on the altered assessment plan submitted by Parents on September 10, 2009, as their consent to proceed with the visual assessment by Dr. Ryan. District subsequently authorized Dr. Ryan to proceed with a visual efficiency assessment on October 26, 2009.

39. On October 20, 2009, Parents notified District of further objections to the proposed assessment plan on grounds that District's proposal to conduct classroom observations of Student was contrary to the accommodations set forth in the October 2007 IEP. Parents advised that Student became anxious when singled out for observation in the classroom setting and would not participate in classroom observation because of an anxiety disorder. Parents also demanded they be permitted to be present in the classroom and be allowed to video and/or audiotape the assessments. District denied Parents' requests.

40. Having received no response from Parents consenting to the remaining areas in proposed assessment plan, District filed the instant request for due process hearing on October 23, 2009.

41. Shortly after District filed the due process hearing request, Parents consented to the proposed health assessment. The health assessment was conducted on November 16, 2009.⁵

42. Dr. Patterson testified as Student's expert in the area of assessments. He had more than 25 years in the field of psychology and is a licensed Psychologist and licensed Educational Psychologist. He had been previously employed by District in various capacities. He had been retained by District on May 20, 2003, and August 10, 2006, to conduct psychoeducational assessments of Student. Dr. Patterson testified that he was retained by Parents to conduct the July 15, 2009 psychoeducational assessment and thus acted as an independent educational evaluator without consultation with the District personnel. He testified that he administered the WJ-III test of cognitive functioning, the WJ-III test of Academic Achievement, the Conners-3 (Parent and Self-report), the DSM IV-TR Scales, Behavior Regulation Index, the Adaptive Behavior Inventory, the Personality Inventory for Children-2nd Edition (PIC-2), the Revised Children's Manifest Anxiety Scale-2nd Edition (RCMAS-2), the Gilliam Asperger's Disorder Scale, and the Social Communication Questionnaire (SCC). He also reviewed and considered records provided by Parents. He did not conduct observations of Student in the school setting. Dr. Patterson did not perform other cognitive functioning subtests because he believed those could be left to District staff to perform.

43. Dr. Patterson opined that Ms. Chenoweth, District's choice for the proposed psychoeducational assessment, was a former student of his and he considered her to be most qualified to conduct the assessment. He did not render an opinion concerning the qualifications of other personnel chosen by District in the assessment plan. He further

⁵ The health and visual assessments have been completed and will not be addressed further in this decision as they are no longer in issue in the case.

opined that, in light of his assessment, the proposed assessments in Academic/Pre Academics, Intellectual Development, Social/Emotional Behavior, and Language and Speech with classroom observation were unnecessary. He also opined that classroom observation was not necessary given Student's anxiety when under observation. He opined that Parents' presence in an assessment would not invalidate standardized test results. Finally, Dr. Patterson opined that any further testing would be stressful to Student and served no purpose because she was scheduled to graduate from Foothill in May and had plans to attend college. Dr. Patterson also testified that District had the legal right to conduct a triennial assessment. He further testified, however, that in his opinion, a triennial assessment was not required since he had adequately assessed Student in all areas of suspected disability. Dr. Patterson's opinion concerning the adequacy of the psychoeducational assessment he conducted cannot be given any weight because it is not relevant to the issue to be decided.

44. Kim Huynen (Dr. Huynen) , Ph. D., is a licensed Psychologist and owner of Vista Behavior Consulting, a non-public agency (NPA). Dr. Huynen testified that the NPA has provided behavioral services to Student since 1994. Dr. Huynen testified as Student's expert concerning Student's anxiety disorder. She opined that forcing Student to submit to classroom observation would cause needless stress and anxiety and such assessments would not be useful to Student since she would soon be graduating and attending college. Similarly, Dr. Huynen's opinion is not relevant on the question of District's authority to assess Student under the proposed assessment plan.

45. Father testified that Parents consented to the health and visual assessments but refused to consent to the remainder of the August 13, 2009 assessment plan because they believed Dr. Patterson's evaluation was sufficiently comprehensive to address all areas of suspected disability. Parents further disagreed with the August 13, 2009 assessment plan because District had agreed to a psychoeducational assessment by

Dr. Patterson in the fall of 2009. In view of the agreement, they believed Dr. Patterson was District's "assessor of record." Parents also believed that a proposed speech and language assessment was premature because of yet unresolved issues concerning Student's speech and language services as of the date of the assessment plan; in addition, Parents took issue with the proposal to conduct classroom observation. Father further testified that he did not question District's right to assess Student, but he did question the necessity of any further testing in light of Dr. Patterson's psychoeducational assessment which caused him concern about "test validity issues."

LEGAL CONCLUSIONS

1. In a special education administrative due process hearing, the party seeking relief has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) District has the burden of proof in this matter.

2. District contends that District has an unequivocal right and legal obligation to conduct a triennial assessment of Student. District also contends that District did not agree to waive its right to conduct a triennial assessment at any of the IEP meetings predating the year the assessment was due. District contends that its assessment plan is appropriate and that the assessments are necessary to provide Student a FAPE because the assessment data in existence prior the proposed 2009 triennial assessment was stale and obsolete. Student contends that Parents withheld consent to the August 13, 2009 assessment plan because the proposed assessments were inappropriate, not purposeful, and unnecessary because Student had already been assessed in all areas of suspected disability as of July 15, 2009.

3. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not

necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related services needs. (20 U.S.C. § 1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a)(1).) Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).)

4. In order to start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his/her parents. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law, (U.S.C. §§ 1414(b)(1), 1415(c)(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 student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

5. Assessments shall be conducted by persons competent to perform the assessment, as determined by the local educational agency, and any psychological assessments of pupils shall be made in accordance with Section 56320 and shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, §§ 56322 and 56324, subd. (a).)

6. An IEP is an annual document that may change from year-to-year, based upon the student's needs. The school district is required to have an IEP in effect at the beginning of each school year, for each child with a disability. (34 C.F.R. § 300.323(a).)

7. If the parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(a)(3)(i), (c)(ii)(2006); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) Parents who want their children to receive special education services must allow reassessment by the district, and cannot force the district to rely solely on an independent evaluation. (*Johnson v. Duneland Sch. Corp.* (7th Cir.1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir.1995) 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Dubois v. Conn. State Bd. of Ed.* (2d Cir.1984) 727 F.2d 44, 48.) A school district has the right to a triennial evaluation by an assessor of its choice. (*M.T.V. v. DeKalb County Sch. Dist.* (11th Cir. 2007) 446 F.3d 1153, 1160).)

8. As a matter of law, District must assess Student every three years. Dr. Patterson affirmed District's right to do so. In order to override parental consent to the triennial assessments, the district must prove that it met all of the statutory requirements of notice to parents and must prove that the proposed assessment plan was appropriate. On August 13, 2009, District provided the proposed triennial assessment plan to Parents with a copy of Parents' procedural rights. The assessment plan was in Student's native language- English. The assessment plan identified the assessments that District proposed to conduct. District subsequently provided detail of the tests to be administered and the names of the qualified individuals who would administer the assessments. The assessment plan explained that assessments were in conjunction with Student's triennial review. The assessment plan also explained that Parents' consent to assess was required and the evidence established that District made reasonable efforts to obtain Parents' consent to the assessment plan. (Factual Findings 15 to 41; Legal Conclusions 1, and 3 to 7.)

9. If Parents want Student to continue to receive special education services, they must allow District itself to reevaluate the Student with the qualified assessors of its choice. Regarding the District's choice of assessor for the psychoeducational triennial, the June and fall of 2008 IEPs contained a note that Dr Patterson would conduct a psychoeducational study by the fall of 2009. Dr. Patterson had assessed Student in 2003 and in 2006, and there may have been an expectation by Parents that he would conduct the assessment in 2009; however, an IEP is an annual document and prior IEP notations do not bind District to this choice of assessor as Parents argue. Furthermore, the law tasks District with performing triennial assessments and provides District the authority to determine what qualified personnel shall conduct the assessments. If Student does not like the choice of District assessors, Student can obtain an independent assessment, a copy of which must then be given to District for their consideration. Student, however, cannot force District to rely solely on an independent assessment. (Factual Findings 4 to 14; 15 to 43, and 45; Legal Conclusions 1, and 3 to 8.)

10. Ms. Negru and Ms. Dawson were competent to perform the proposed assessments. Moreover, District's choice of Ms. Chenoweth, a credentialed school psychologist, to conduct the proposed psychoeducational assessments was appropriate. Dr. Patterson affirmed Ms. Chenoweth's qualifications. (Factual Findings 21, 28 to 36, and 43; Legal Conclusions 1, and 3 to 9.)

11. In sum, District was required at a minimum to assess Student every three years. Not only was Student due for a triennial assessment, but the evidence showed that the assessment was necessary in all areas identified in the assessment plan, and that the District complied with all procedural requirements of the IDEA to conduct the assessments. Thus, District has met its burden by a preponderance of the evidence that it is entitled to assess Student under the August 13, 2009 assessment plan without parental consent. (Factual Findings 1 to 43, and 45; Legal Conclusions 1, and 3 to 10.)

ORDER

The District may assess Student pursuant to the August 13, 2009 assessment plan without parental consent.

PREVAILING PARTY

The decision in a special education administrative due process hearing must indicate the extent to which each party prevailed on the issues heard and decided at the hearing. (Ed. Code, § 56507, subd. (d).) The District prevailed on the sole issue in this matter.

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

Dated: April 13, 2010

_____/s/____

STELLA L. OWENS-MURRELL

Administrative Law Judge

Office of Administrative Hearings