

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LODI UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2010040769

DECISION

Administrative Law Judge (ALJ) Judith Pasewark, Office of Administrative Hearings (OAH), State of California, heard this matter in Lodi, California, on June 14 and 15, 2010.

David W. Girard, Esq., and L. Thomas Newsom, Esq., represented Lodi Unified School District (District) at the hearing. Dr. David M. Wax, Ed. D., the District's Student Services/SELPA representative, attended the hearing on behalf of the District.

Father of Student (Father), represented Student (Student) at the hearing, as a Special Education Advocate. Student's mother (Mother) also attended the hearing each day. At the request of Mother and Father (collectively, Parents), Student did not attend the hearing, nor did the parties require him to testify in this matter.

The District filed its Request for Due Process Hearing (Complaint) on April 14, 2010. OAH granted Student's request for continuance on April 30, 2010. Hearing took place on June 14 and 15, 2010, and the matter closed on July 6, 2010, upon receipt of closing briefs.

ISSUE

The sole issue to be determined in this matter is whether the District may assess Student pursuant to the February 23, 2010 Assessment Plan without parental consent?

WITNESSES

The District called the following witnesses: (1) Father; (2) Erica Contreras-Suarez, Student's school counselor; (3) Rhonda Eyzaguirre, District school psychologist; and (4) Nancy Sherwood, District school psychologist.

In addition to the witnesses called to testify by the District, Student additionally called: (1) Mother; and (2) David Wax, the District SELPA representative.

FACTUAL FINDINGS

1. Student is a 16-year-old, tenth grader at Tokay High School in Lodi, California. Student and his parents reside within the District. To date, Student has not been found eligible for special education placement and services.

2. Based upon a diagnosis of ADHD, the District has provided Student with a 504 Plan ¹ since the third grade. The last signed 504 Plan from April 8, 2008, provided Student with ten accommodations, ranging from classroom, testing, and homework accommodations to positive behavior and personal monitoring/supervision.

3. Student has a significant history of disciplinary action; however, Student's levels of disruption and aggression have markedly increased since 2008. Parents have continually requested additional services through the 504 Plan, such as a Behavior Intervention Plan (BIP) or a personal aide to assist with Student's behavior issues. The District has not addressed these issues to Parents' satisfaction through the 504 Plan

¹ 1973 Americans with Disabilities Act, Section 504.

program,² thereby resulting in a high level of frustration, distrust and hostility between the parties.

4. Based upon State-standardized testing, Student's academic abilities generally range from "proficient" to "advanced." Student's grades, through 2008, correlated with these scores. As of the 2009-2010 school year, however, Student's grades began to dramatically spiral downward to failing grades or "incompletes" in all classes. Contributing to this academic failure was Student's excessive number of tardies, unexcused absences, and suspensions from school.³ Further, several teachers noted that Student failed to turn in homework assignments. As a result, Student is delinquent in credits required for graduation, and he has not passed the California High School Exit Exam (CAHSEE).

5. On February 17, 2010, Father sent David Wax, the District's SELPA representative, and other District employees an e-mail, which in pertinent part stated:

"Please hurry. I suspect that Student has more problems that should be appropriately (and immediately) explored. I suspect that Student may have an overarching group of conditions to which autism belongs. It is all speculation at this point, however, he may have some sort of pervasive development disorder not otherwise specified (PDD-NOS). As you know, this is sometimes known as PDD or atypical autism. In the last 24-hours I have heard (from both a teacher and administrator) the word "defiant" when describing Student's behavior. Is it possible that

² Reference to the 504 Plan is limited to brief background information only. Parents' complaints regarding the 504 Plan are not at issue in the District's Complaint nor are 504 claims within the jurisdiction of OAH.

³ The ALJ acknowledges that in addition to the absences discussed above, Student also had an extensive amount of illnesses and medical-related absences.

he could have ODD? ...Note: Dr. Wax, you have described yourself as head of SELPA for Lodi Unified. You may consider this memorandum as an urgent request for testing and services under IDEA. As you should know, upon request of these special education tests, my son is now fully protected under all special education law..."

At hearing, Father confirmed the content of the February 17, 2010 e-mail, and confirmed that the e-mail requested immediate assessment for special education eligibility. Father also indicated that in additional e-mails, he referenced his intent to seek other legal actions against the District for allegedly "violating Student's Federal rights."

6. On February 11, 2010, Nancy Sherwood,⁴ a school psychologist for District, prepared an Evaluation Plan⁵ (assessment plan) to determine eligibility for special education. The assessment plan indicated the following areas to be assessed: (1) pre-academic/academic achievement; (2) communication development; (3) psycho-motor development; (4) reasoning and problem-solving ability; (5) social/adaptive behavior; (6) health; (7) career/vocational; and (8) alternate means, which includes informal evaluations, analysis of student work samples, and observations. Ms. Sherwood also indicated that she prepared an additional information sheet titled "Proposed Assessment for Student," which defined Student's areas of suspected disabilities, and specified the specific assessments the District anticipated administering to Student.

⁴ Ms. Sherwood has been a school psychologist in the Lodi District for 18 years. She holds a teaching credential and is a licensed educational psychologist.

⁵ In the context of the Complaint, the phrase "Evaluation Plan" used by the District means the same as the phrase "Assessment Plan" used by OAH and the State of California. Along the same line of legal reasoning, the term "evaluation" is interchangeable with "assessment."

District was not required to provide this type of detailed testing information as part of an assessment plan; however, Ms. Sherwood created this Student-specific document, in anticipation of Parents' questions regarding the assessment process.

7. Ms. Sherwood agreed that Student needed to be assessed for special education eligibility. As a member of Student's 504 team, Ms. Sherwood observed Student's grades falling and behaviors escalating. She observed that Student was no longer successful with a 504 Plan, and an assessment for special education eligibility was warranted to address Student's increasing needs.

8. On February 20, 2010, Rhonda Eyzaguirre replaced Ms. Sherwood as the school psychologist on Student's 504 team. Dr. Eyzaguirre attended Student's 504 meeting on February 23, 2010. At the 504 meeting, the parties discussed an assessment plan, and the District provided Father with two copies of the assessment plan, as well as two copies of the Notice of Procedural Safeguards.

9. On March 30, 2010, Dr. Eyzaguirre sent Parents another copy of the proposed assessment plan, along with another copy of the Notice of Procedural Safeguards, as well as two additional copies of the Authorization for Release/Exchange of Pupil Information.

10. Dr. Eyzaguirre was a persuasive witness. Dr. Eyzaguirre holds a M.A and a Ph.D. from the University of California, Berkeley, and is a licensed educational psychologist. She has been a school psychologist for District for six years, and has assessed 400 to 500 children throughout her career. Dr. Eyzaguirre did not prepare the initial assessment plan of February 11, 2010. She indicated, however, that she considers the initial assessment as consultative with Ms. Sherwood, as she reviewed and utilized the initial document in creating her own assessment plan which was provided to Father on February 23, 2010. Dr. Eyzaguirre determined that an assessment of Student was needed, and her proposed assessment plan covered all areas of Student's suspected

disabilities. She based her conclusions on a review of Student's 504 file; communications with Student's teachers; conversations with Father; and a review of Student's absences, grades and work performance. Dr. Eyzaguirre was precluded from speaking directly with Student; however, she reported that the information she did consider provided a wealth of information to justify an assessment.

11. In discussing Ms. Sherwood's Proposed Assessment for Student, Dr. Eyzaguirre found the additional Proposed Assessment for Student to be unusual and unnecessary as part of an assessment plan. It is unclear as to whether Dr. Eyzaguirre produced Ms. Sherwood's original assessment plans in addition to her own assessment plan at the 504 meeting. Mother and other District staff indicate they had never seen the Sherwood documents prior to hearing. Dr. Eyzaguirre, however, did describe the proposed assessments as they applied to Student, and indicated they were appropriate tools with which to assess Student. She further indicated that District had qualified employees to conduct these assessments.

12. Parents did not consent to the assessment plan. Father continued to request additional information regarding the proposed assessment and possible non-special-education interventions for Student. Dr. Eyzaguirre continued to respond that "until I have permission from you to conduct an evaluation, I do not have any evaluation data to review in order to provide informed responses to your questions. I cannot conduct or interpret any tests until I receive your written consent."

13. Erica Contreras-Suarez, Student's counselor and 504 case carrier, provided additional information at hearing. As Student's case manager, Ms. Suarez spoke with each of Student's teachers and confirmed that the 504 Plan was implemented. She observed that Student's behaviors were not getting better under the 504 Plan; instead, his behaviors were getting worse. Ms. Suarez observed that Student demonstrated a series of atypical behaviors. These behaviors can evidence underlying disabilities which

indicate a need for assessment. Ms. Suarez, reported a unanimous concern about Student's attendance. Clearly, Student cannot benefit from his education if he does not attend school. Further, his failing grades, and negative behaviors were severe.

14. Student points out that Ms. Contreras acknowledged that Student was in need of more services and support under the 504 Plan, yet she failed to initiate a 504 meeting or other intervention to address these issues. She also knew that Parents adamantly wanted a BIP as part of Student's 504 Plan. Ms. Contreras, however, indicated that the BIP needed Student's participation. It was not pursued because Father had made it clear in his e-mails to District, that no one at District was authorized to speak with Student without Father being present. Further, it is clear from the testimony of both Parents that they did not want Student involved in *any* type of assessment. Ultimately Ms. Suarez concluded that the 504 team had tried all sorts of accommodations. She viewed the special education assessment as a last resort, albeit a necessary one for Student.

15. Mother steadfastly testified that she would not subject Student to a special education assessment. Mother is a special education teacher for District. Both Parents consider themselves to be experts in the special education arena, and both Parents believe the "special education" label is inappropriate for Student. To a great extent, Parents consider District's request to assess to be retaliatory in nature. Mother emphasized that District's insistence to compel an assessment was unprecedented in her career.

16. Mother described Student as highly intelligent, multi-talented, and a gifted athlete. Yet, at the same time, Student was psychologically fragile and clinically depressed. She feared that District's assessments would push Student over his emotional edge. Mother also stated that Student did not want to be labeled as a special education student. Further, Student told her he would kill or harm himself if he was

forced to be assessed for special education. Mother adamantly refuses to have Student assessed, and will not subject him to a District assessment when it puts him in physical or emotional jeopardy.

17. District witnesses disagree with Mother's concerns. Ms. Suarez indicated that in her experience, she has never seen a child damaged from an assessment, even children with emotional disturbances. Dr. Eyzaguirre concurred, and indicated that most children enjoy the assessment process. Dr. Wax noted that District always weighs the pros and cons of conducting an assessment, and did so in Student's case.

18. Mother's testimony regarding Student's threats of injury was limited to one statement from Student, and is unsupported by any other evidence. It appears that Parents have obtained independent psychological and medical treatment for Student; however, no evidence has been provided from these sources to suggest that Student is self-injurious or too fragile to withstand assessment. Further, Student has participated in standardized testing, such as the STAR, in the past without incident.

19. District has sustained its burden of proof to establish a basis for assessment.

LEGAL CONCLUSIONS

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49, [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. District filed this due process request and bears the burden of persuasion.

2. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA. Special education is defined as specially designed instruction

provided at no cost to parents, calculated to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29); Ed. Code, § 56031.)

3. School districts are required to actively locate and assess students with disabilities who require special education and related services. This obligation is commonly referred to as “child find.” (Ed. Code, §§ 56300, 56301.) A referral for special education, “child find,” occurs when there is a written request for assessment from a parent. (Ed. Code, § 56029, subd., (a).) When a parent makes a written request for a special education assessment, the school district *must* initiate the assessment process. (Ed. Code, § 56320) (emphasis added.)

4. Generally, a school district must obtain parental consent before conducting an assessment. (Ed. Code, § 56321, subd., (a)(2).) However, in those instances where a parent refuses to consent to an initial assessment, then the school district may file for a due process hearing seeking an order that there is a basis for the assessment. (Ed. Code, § 56321, subd., (c).) A school district’s obligation to provide services does not arise until the parents have made the student available for assessment. (*Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176.)

5. Education Code, section 56321, subdivision (b) sets forth four requirements for a proposed assessment plan as follows: (1) be in “language easily understood by the public;” (2) be provided in the native language of the parent; (3) explain the types of assessments to be provided; and (4) clearly state that no IEP program will result from the assessment without parental consent. The law, however, does not require that the assessment plan specify the particular tests which will be used. (*Parents v. Ravenswood City School District* (2009) OAH Case No. 2008110601, at p. 18.)

6. A proposed assessment plan must be provided to parents within 15 days of the date of the referral and a copy of the Notice of Procedural Safeguards, explaining

each of the procedural safeguards under the IDEA must accompany the assessment plan. (Ed. Code, § 56321, subd. (a).)

7. It is undisputed that Father requested an assessment and services under the IDEA and that District offered a proposed assessment plan within the legal timeline. It is also undisputed that Student exhibits extreme behaviors, diagnosed or not, which are affecting his grades, attendance and behavior at school. (Factual Findings 4, 5, 7,10,13 and 14.) In spite of these acknowledged facts, Parents still adamantly refuse to consent to the assessment, and contend that they are justified in refusing to sign the proposed document.

8. Parents' recurring theme and assertion is that "from the beginning to end, the District's initiative to help the Student is nothing more and nothing less than dressed up bad faith brought to the table of justice with unclean hands for the sole and exclusive benefit of the District, not the Student, Parents or the laws the District claims to be obligated to follow."⁶ The evidence does not support such conclusions.

9. Parents question Ms. Sherwood's veracity and suggest that the February 11, 2010 Proposed Assessment Plan for Student is a phantom document, which was fabricated and slid into evidence for some mysterious reason. The facts do not support this argument. Based upon Factual Findings 6, 7 and 8, Ms. Sherwood indicated she created her assessment plan on February 11, 2010. She also indicated that she was removed from Student's 504 team prior to the February 23rd, 504 meeting. As Ms.

⁶ It is clear that Parents failed to accept the narrow legal issue presented in this matter. Instead, their true focus and concern remained on the alleged failure of District to create an appropriate 504 Plan. Despite continued warnings from the ALJ and objections from counsel, Student continued to primarily present his evidence and argument addressing the 504 Plan.

Sherwood was not present at the meeting, it was not conspiratorial for her to testify that she had no information regarding what occurred at the meeting or whether her original documents were presented or discussed.

10. Parents indicate that they never received a copy of the Proposed Assessment Plan for Student, which represents a violation of their parental rights and safeguards. As indicated by Dr. Ezyaguirre in Factual Finding 11, the document in question, is not a required component of an assessment plan.⁷ Further, pursuant to Legal Conclusion 5, a description of specific assessments is not required.

11. Father sought to establish that, before requesting assessment, District failed to consider all other possibilities for Student's behavior before it required an undesired assessment. As an example, District failed to provide Student with a BIP. The BIP however would require, at minimum, Student's participation, which was rejected by Parents. (Factual Finding 14.) It is clear that District considered and implemented a series of accommodations for Student, yet his behaviors continued to escalate.

12. Student alludes to failures in supervision, failures in understanding Student's disabilities, and failing to properly teach Student, as a child with disabilities. The evidence fails to support these contentions in any manner. Further, even in argument, assuming these contentions bear some merit, they merely represent one facet in determining Student's educational needs. Student still needs to be assessed in order to determine *his* unique needs.

⁷ Student further contends in his closing brief that other issues, other questions, and other "unexpected matters," must be considered. Specifically, Student wishes to argue that Parents were not provided a legally valid Notice of Procedural Safeguards. It is noted that Father testified that he received the documents, and he did not raise procedural or content objections at the time of hearing. Student's request is denied.

13. District, on the other hand, has established an undisputed basis for the assessment.

14. Based upon District's child find obligations alone, District has a duty to assess Student for special education. This obligation arises from the factual observation and educational records presently known to the District regarding Student's grades, attendance, and negative behaviors at school. (Legal Conclusion 3; Factual Findings 4, 5, 7, 10 and 13.)

15. District has a mandatory obligation to assess Student based upon Parent's written request for assessment. (Legal Conclusion 3; Factual Finding 5.)

16. District presented the proposed assessment plan in a timely fashion, and provided Parent's with a copy of the Notice of Procedural Safeguards. (Legal Conclusion 6; Factual Findings 8 and 9.)

17. District has established a basis for the assessment, and may proceed to assess Student without parental consent. (Legal Conclusion 4.) Further, District shall have no obligation to provide special education placement or services until Parents have made Student available for assessment. (Legal Conclusion 4.)

ORDER

1. District's request is granted. District shall be allowed to assess Student pursuant to its February 23, 2010 assessment plan without parental consent.

2. Further, District shall have no obligation to provide special education placement or services until Parents have made Student available for assessment.

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. District prevailed on the sole 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 receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: April 2, 2010

_____/s/____

JUDITH PASEWARK

Administrative Law Judge

Office of Administrative Hearings