

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

In the Matter of:

IRVINE UNIFIED SCHOOL DISTRICT,
Petitioner,

v.

STUDENT,
Respondent.

OAH CASE NO. N 2006020259

DECISION

Jacqueline Jones, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter on February 7, 2007, in Irvine, California.

Attorney Sundee M. Johnson, Atkinson, Andelson, Loya, Ruud & Romo, represented Petitioner, Irvine Unified School District (District). Nancy Melgares, Director of Special Education, also appeared for the District.

Attorney Carol Hickman Graham, represented Respondent (Student). The Student's mother (Parent) was present at various times throughout the hearing.

On June 2, 2005, Petitioner filed with McGeorge School of Law Special Education Hearing Office (SEHO)¹ the request for due process hearing in this case. Under Education Code section 56505, subdivision (f)(3), the decision in this matter is due on or before April 5, 2007.

Oral and documentary evidence were received, the matter was continued and the

¹ SEHO was the entity responsible for providing due process hearings prior to July 1, 2005.

record was left open for receipt of the written closing arguments. The record was closed on February 20, 2007, and the matter was submitted.

ISSUE

Is the District entitled to assess Student based upon an assessment plan dated December 15, 2004, as amended on September 1, 2006?

CONTENTIONS OF THE PARTIES

The District contends that the Parent has already consented to the December 15, 2004, assessment plan, as amended on September 1, 2006. The appropriateness of the assessment plan, and the District's right to proceed with the assessment pursuant to the assessment plan are not at issue. The District further contends that because the assessment plan has been signed by the Parent, the District is entitled to an order requiring the Parent to make the Student reasonably available for the assessments to be completed.

Student contends that he was reasonably available for assessment and seeks a protective order against a request for an additional assessment that could be harmful.

FACTUAL FINDINGS

1. A school district must conduct reassessments of a student receiving special education services after the initial assessment establishing eligibility. These reassessments need not occur more frequently than once a year, but must be done at least once every three years (generally referred to as the "triennial reassessments"). A district may perform a reassessment if the district determines that the educational or related services needs of the student warrant it.

2. Student has reached the age of majority. He turns 21 in March 2007. He resides with his Parent within the geographical boundaries of the District. He is entitled to receive special education and related services under the disability category of autistic-like behaviors (autism).

3. Fullerton Elementary School District made Student eligible for special education under the category of autism² when he was a preschool student.

4. Student transferred into the District in April 2004.

5. Student's current grade is high school. He receives his schooling in a home program. Student has severe sensory processing deficits. His language is moderately to severely delayed. Student has erratic sleep patterns in that he sleeps during the day. His current educational program funded by the District includes up to 46 hours per week of one- to-one instruction from an instructional assistant provided in the home and community, up to 5 hours per week of speech and language therapy/assistive technology services provided in the home, three sessions per week of occupational therapy provided in the home, three sessions per week of horse back riding therapy, one session per week of physical therapy, three sessions per week with a supervising teacher, and consultation services provided by Dr. Robert Patterson.³

² Autism is a developmental disorder of neurobiological origin that impacts how children learn to be social beings, to take care of themselves, and to participate in the community. Autism affects the child's ability to communicate ideas and feelings, to use his or her imagination, and establish relationships with others. Education covers a wide range of skills or knowledge, including not only academic learning but also socialization, adaptive skills, language and communication, and reduction of behavior problems to assist a child to develop independence and personal responsibility. (See *Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 883.)

³ Dr. Patterson is an experienced school psychologist who holds a Ph.D. in psychology from United States International University. He also has a Masters degree in educational psychology from California State University at Long Beach and a Masters degree in vertebrate zoology from California State University at Fullerton. He has a Masters degree in communicative disorders from California State University at Fullerton. Dr.

6. On December 15, 2004, the District proposed an assessment plan to assess Student in all areas of suspected disability. Student had not had a formal completed assessment since elementary school. Parent consented to the December 15, 2004, assessment plan, but indicated that she was not consenting to any standardized assessments.

7. Dr. Patterson conducted an assessment of Student in March 2005 pursuant to the December 15, 2004, assessment plan. That assessment revealed that Student's cognitive ability was at the two through four year old age range. Dr. Patterson indicated that additional assessments were needed.

8. The District also determined that the remainder of the assessments proposed by the assessment plan would need to be conducted in order to develop an appropriate program for Student. The assessment plan proposed to assess Student in the following areas: (1) language/speech/communication development, (2) academic achievement, (3) psycho-motor development, (4) intellectual development, (5) social/emotional/behavior status, (6) health/vision/hearing, (7) self help/career/vocational abilities, (7) functional analysis assessment, (8) assistive technology assessment and (9) a records review and observation. The assessment plan, on the reverse side, contained a notice of parental and procedural rights under federal and state law relating to special education disputes.

9. Parent was concerned that the assessment would harm the Student by disrupting his schedule. The District agreed to scheduling the remaining assessments between the hours of 4:00 p.m. through 7:00 p.m. Parent was also concerned about the amount of stress that the assessment would possibly cause to the Student. District addressed this concern by requiring all of the assessments to be in Student's home and by

Patterson has over 35 years of experience in assessing students. Dr. Patterson was reasonably knowledgeable about assessing the Student because he has worked with the Student since 2002.

compensating the Student's private service providers so that they would be present at the time of the assessments.⁴

10. On November 1, 2006, Parent agreed to amend the December 15, 2004, assessment plan and include each of the specific testing instruments that the District was proposing to use as part of the assessment. The District received the signed assessment plan on November 3, 2006. Parent did not place any restrictions on completion of the assessment. By law, the Individualized Education Program (IEP) team meeting to review the assessment was to be held on or before January 19, 2007.

11. Nancy Odanaka Melgares is the Director of Special Education for the District. Ms. Melgares⁵ has been an employee of the District since 1979. Ms. Melgares credibly established the difficulties encountered in scheduling the Student for assessment. On November 29, 2006, Ms. Melgares and Kathy Hartman (school nurse) went to Student's home to complete the vision and hearing screening, and to schedule the remainder of the assessments for Student. Ms. Hartman was able to complete a hearing screening, and was informed by Parent that Student had a recent vision assessment report. Parent indicated that she would provide the report to the District. Ms. Hartman also provided Parent with a health and development history form to complete regarding Student. Parent has not provided the completed health and development history form or a signed release so that

⁴ Sallie Dashiell (Student's speech and language provider) and Robert Patterson both indicated that having assessors who were familiar with the Student would be best for Student.

⁵ Ms. Melgares received her Bachelor degree in linguistics and social science from the University of University at Long Beach, California. Ms. Melgares is a licensed Speech-Language Pathologist. She has an Administrative Services Credential, a lifetime Community College Instructor Credential and a Clinical Rehabilitative Credential.

the District can obtain the vision assessment report.

12. Ms. Melgares arranged a schedule with Parent for the remaining assessments to be completed. Parent indicated that December 2006 would not be a good month for the assessments to be completed; therefore, Ms. Melgares agreed that the assessments would be completed in January 2007 on Wednesdays between the hours of 4:00 p.m. and 7:00 p.m. The assessments would be done by persons who were familiar with the Student in order to lessen the stress on the Student.

13. On January 9, 2007, Student scratched his cornea, requiring a trip to the emergency room. On January 10, 2007, the District received both an email and a voicemail message from Parent canceling the assessments scheduled for that day, until further notice.

14. Parent testified that she did not intend to cancel the assessments indefinitely. Parent is not credible because she has never contacted the District to reschedule the assessments. Parent thought the assessment might harm the Student because it might disrupt the Student's schedule and cause him stress. District made arrangements to have the assessors work in the evening hours at the Student's home. District provided assessors who the Student had known for years. Robert Patterson has worked with Student for five years. Sallie Dashiell has worked with Student for 11 years. District has acted reasonably and appropriately.

15. Parent has consented to the December 14, 2004 assessment plan, as amended on September 1, 2006; therefore, the District is entitled to reassess Student. The District has shown that conditions warrant an assessment of Student. The District needs current information regarding Student in order to provide an appropriate educational plan.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. 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. Under the federal Individuals with Disabilities Act (IDEA) and companion state law, students with disabilities have the right to a free and appropriate public education (FAPE). (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's individualized education plan (IEP). (20 U.S.C. § 1401(a)(9); Cal. Code Reg., tit. 5, § 3001, subd. (o).)

3. Under IDEA and state law, a student with a disability is entitled to receive special education and related services until the age of 22. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56026, subd. (c)(4), 56040.) In California, a person who is 18 years or older is an adult. (Fam. Code, § 6501.)

4. IDEA and state law require that, in order to provide FAPE, a school district must develop an IEP that is reasonably calculated to provide the child with an educational benefit. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 203 [102 S.Ct. 3034, 3049].) The IEP must contain specified information including a statement of the child's present levels of academic achievement and functional performance, and a statement of measurable annual goals. (20 U.S.C. § 1414(d)(1)(A)(i)(I), (II); Ed. Code, § 56345, subds. (a)(1) & (2).) The district must review the child's IEP at least once a year in order to determine whether or not the annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4)(B)(i); Ed. Code, § 56341.1, subd. (d).)

5. In order to meet the continuing duty to develop and maintain an appropriate IEP, the school district must assess the educational needs of the disabled child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) In addition, the school district must conduct a reassessment of the special education student not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) The district must conduct a reassessment if the district "determines that the educational or related service needs, including improved academic achievement and functiona

performance, of the child warrant a reevaluation.” (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a).)

6. School districts must perform assessments and reassessments according to strict statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor. The district must select and administer assessment materials that appear in the student’s native language and that are free of racial, cultural and sexual discrimination. (20 U.S.C. § 1414(b)(3)(A)(i); 34 C.F.R. § 300.304(c)(1)(ii); Ed. Code, § 56320, subd. (a).) The district must administer assessment materials that are valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) The district must administer assessment materials that are sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); 34 C.F.R. § 300.304(c)(6); Ed. Code, § 56320, subd. (c).) Trained, knowledgeable and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.) A credentialed school psychologist must administer psychological assessments and individually administered tests of intellectual or emotional functioning. (Ed. Code, §§ 56320, subd. (b)(3), 56324, subd. (a).) A credentialed school nurse or physician must administer a health assessment. (Ed. Code, § 56324, subd. (b).)

7. In addition, to perform a reassessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the student and to decide whether modifications or additions in the child’s special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subds. (b)(2)(B) & (D).) The district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed.

Code, § 56381, subd. (c).)

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

9. Normally, before a school district performs an assessment of a child with a disability, the district must obtain parental consent for the assessment. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321, subd. (c).) However, the district need not obtain informed consent if the district can demonstrate that it took reasonable measures to obtain such consent and the student and/or the child's parents failed to respond. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f).) Instead, in the event that a parent or disabled student does not provide consent, the district may bring a due process complaint seeking an order that requires the child to present for the reassessment. (20 U.S.C. § 1415(b)(6)(A); Ed. Code, § 56501, subd. (a)(3); *Schaffer, supra*, 546 U.S. at pp. 52-53 [school districts may seek a due process hearing "if parents refuse to allow their child to be evaluated."].)

10. School districts have the right to conduct assessments and reassessments of students who request and receive special education and related services. A student who does not permit such testing is not entitled to receive benefits under IDEA and related state law. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Wesley Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178.)

DETERMINATION OF ISSUE

11. Based upon Factual Findings 1 through 15 and Legal Conclusions 1 through 10, the District is entitled to assess Student based upon the assessment plan dated December 15, 2004, as amended on September 1, 2006. The District cannot prepare an appropriate educational program for Student without current information concerning his academic skills and educational needs. The District cannot meet the statutory obligations for a reassessment without such current information. Student must make himself available for the proposed reassessment; otherwise, he is not entitled to receive special education and related services under IDEA and related state law.

ORDER

1. The District may conduct a reassessment of Student according to the assessment plan dated December 15, 2004, as amended on September 1, 2006.

2. If Student wishes to receive special education benefits at public expense, Student with the assistance of his parent, must make himself reasonably available for the proposed assessments recited in the December 15, 2004, as amended on September 1, 2006, assessment plan.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on the sole issue presented for decision in this case.

RIGHT TO APPEAL DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of the receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: March 19, 2007

A handwritten signature in cursive script that reads "Jacqueline Jones". The signature is written in black ink and is positioned above a horizontal line. To the right of the signature, there is a vertical red line that extends from the top of the signature down to the horizontal line below it.

JACQUELINE JONES

Administrative Law Judge

Office of Administrative Hearings

Special Education Division