

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MT. DIABLO UNIFIED SCHOOL DISTRICT,

v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2008090188

DECISION

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH), State of California, heard this matter on October 15 and 16, 2008, in Concord, California.

Mt. Diabolo Unified School District (District) was represented at hearing by Matthew P. Juhl-Darlington, Attorney at Law, Miller Brown & Dannis. Attorney Ernest Bell, Miller Brown & Dannis, was also present. Kenneth C. Ferro, Administrator of Alternative Dispute Resolution (ADR), was present during the hearing on behalf of the District.

Student's Mother represented Student during the hearing.¹ Neither Father nor Student attended the hearing.²

District's request for a due process hearing was filed with OAH on September 4,

¹ Mother and Father are collectively referred to as Parents.

² During a prehearing conference on October 10, 2008, Father's motion for a continuance was denied. At the outset of the hearing, Father telephoned OAH and left a message, relayed to the hearing site, that he would not attend the hearing.

2008. On September 25, 2008, OAH granted a continuance of the hearing. At hearing, sworn witness testimony and documentary evidence were received. District and Mother made oral closing arguments, the record was closed, and the matter was submitted for decision on October 16, 2008.

ISSUE

Does the District have the right to assess Student pursuant to the Assessment Plan of June 25, 2008, as amended, without parental consent?

CONTENTIONS

District contends that it is obligated by law to conduct Student's triennial assessment, which was scheduled for June 2007, and is therefore still due. In addition, District asserts that Student's current educational and functional circumstances, including out-of-date levels of performance, questionable classes, increased anxiety, and maladaptive behaviors, warrant reassessment. District also contends that it is obligated to assess Student because Parents requested reassessment in January 2008. District claims that its choice of Children's Health Council (CHC) in Palo Alto, California, to conduct a comprehensive multidisciplinary assessment is appropriate in order to obtain objective information about Student's current complex educational needs.

Mother contends that District's 2006 and 2007 assessments should be sufficient to determine Student's current needs, and that he should not be over-assessed. Mother further contends that CHC is not appropriate because the District should be required to conduct its own internal assessment of Student and CHC is too far away to be reasonably convenient to the family. Mother also argues that Children's Hospital of Oakland, or other local assessors, should be chosen to conduct any assessments.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is 17 years old and lives within the jurisdictional boundaries of the District with Parents, who are divorced and have joint physical and legal custody. Student attends 11th grade at Ygnacio Valley High School in the District. He first became eligible for special education and related services in preschool due to a pervasive developmental disability involving communication and behavior. Student is currently eligible for special education under the category of a speech and language disorder.

TRIENNIAL ASSESSMENT

2. Pupils with specified disabilities under the federal Individuals with Disabilities in Education Improvement Act (IDEIA) and California law are entitled to a free appropriate public education (FAPE). In connection with providing a FAPE, the local educational agency (LEA) shall reassess each pupil with an individualized education program (IEP) at least once every three years, and not more frequently than once a year, unless the parent and the LEA agree otherwise. A reassessment shall also be conducted if the LEA determines that the educational or related needs of the pupil warrant a reassessment, and if the pupil's parent or teacher requests one. For purposes of the reassessment, the IEP team is required to review existing assessment data and input from the parent, and determine whether additional data is needed to determine the education needs of the pupil.

3. Student was due for a three-year "triennial" assessment to update his IEP by June 2, 2007. For reasons not set forth in the record, the triennial assessment and related IEP meeting were not conducted.

4. At an IEP meeting on January 11, 2008, District Program Specialist Barbara Shulman presented Parents with a form entitled "Three Year Reevaluation Worksheet." The worksheet reflected that the June 2007 triennial had not been held. It listed the District's

prior assessments from 2006 and 2007, as follows: a June 2006 speech, language and auditory processing assessment; a November 2006 neuropsychological assessment; a February 2006 academic evaluation; a December 2007 San Diego Quick Reading Assessment and Informal Assessment of Elementary Reading; and a December 2007 assistive technology (AT) assessment. The District members of the IEP team decided that further data was necessary for the triennial in order to determine Student's current educational needs.

PARENTS' REQUESTS FOR ASSESSMENT

5. Mother signed the January 2008 reevaluation worksheet in agreement with the District's recommendation to assess Student. Father did not sign in the space provided on the form for agreement, but added words to request a "full scale evaluation" of Student in all areas related to his disability. District's form did not contain detailed information about what kind of assessments it proposed to conduct. It did, however, reflect the requests of both parents for an assessment.

SERVICE OF NOTICE OF ASSESSMENT PLANS

6. The assessment plan must be accompanied by a notice of the parent's rights and a written explanation of the procedural safeguards under the IDEIA and California law. The assessment plan must be in easily understood language and explain the types of assessments to be conducted. The parent has at least 15 days from the receipt of the proposed assessment plan to accept or reject the plan. An LEA can override a lack of parental consent if the LEA establishes at a due process hearing that assessment is needed. The LEA must also demonstrate at hearing that it has taken reasonable measures to obtain the consent of the parent, and that the parent has failed to respond.

7. An IEP meeting was conducted with Parents on March 11, 2008, and there is no evidence that assessment was discussed or that an assessment plan was delivered to them before or on that date.³

8. In late March 2008, District submitted an Assessment Plan to Parents that proposed tests to be conducted by the California Department of Education's Northern California Diagnostic Center of Fremont, California (Fremont Diagnostic). Parents did not sign or return the Plan. At an IEP meeting on June 12, 2008, Mother informed the team that she did not approve of Fremont Diagnostic to assess Student, and wanted another "independent assessor" to be selected.

9. Based on Parents' lack of consent to an assessment by Fremont Diagnostic, District's ADR Administrator, Mr. Ferro, contacted CHC in Palo Alto. CHC agreed to assemble a multidisciplinary team to assess Student for the District. On June 25, 2008, District prepared a new "Consent for Assessment Plan" (Assessment Plan). The June 2008 Assessment Plan proposes that personnel at CHC, on behalf of the District, assess Student in the following areas: (1) academic/preacademic achievement, (2) intellectual/cognitive development, (3) personality/emotional, (4) developmental/adaptive scales, (5) behavior, (6) communication development, and a (7) neuropsychological assessment. For each proposed area of assessment, the Plan identifies the standardized tests that an assessor may use, but does not limit the assessors to use any other relevant tests.⁴

³ Whether the District's delays in conducting the triennial assessment or in delivering an assessment plan to Parents resulted in procedural or substantive violations of the IDEA that denied Student a FAPE is not at issue in this proceeding.

⁴ District did not propose conducting another AT assessment and Mother does not contend that it should have.

10. On June 27, 2008, the District mailed the June 2008 Assessment Plan to Mother and Father by certified mail and by email to their separate addresses, along with a notice of prior written refusal,⁵ and a notice of parental rights and procedural safeguards. Mother timely received this mailing. The correspondence did not propose any travel arrangements for the family to go to Palo Alto for Student's assessment. The District's June 27, 2008 certified mail to Father was sent to his post office box address of record. It was returned unclaimed. On July 21, 2008, District staff therefore prepared and sent another letter to Father by certified mail and email, and enclosed a copy of the June 2008 Assessment Plan along with a notice of parental rights and procedural safeguards.

11. At some point, Mother became confused about the nature of the proposed assessment. Because the District had failed to assess Student prior to June 2, 2007, she thought that the assessment the District was offering Student was an independent educational evaluation (IEE), even though the District had not conducted its own assessment.⁶ She came to that conclusion because the District offered two "independent" assessors, Fremont Diagnostic and CHC, instead of its own staff to conduct the assessment.

12. On July 29, 2008, Mother sent an email to the District regarding her efforts to locate a different "independent evaluator." On August 1, 2008, the District had not received a returned signed Assessment Plan from Mother or Father, and therefore

⁵ The notice of prior written refusal was sent to address Parents' requests and concerns regarding programs and services which are not at issue in this proceeding.

⁶ If a parent disagrees with an assessment obtained by the public education agency, the parent has the right to obtain an IEE at public expense under certain circumstances. However, the IEE law is inapplicable in this case because District has not conducted its assessment yet.

prepared and sent another letter to each of them at their known addresses, enclosing another copy of the June 2008 Assessment Plan and notice of parental rights and procedural safeguards. In the letter, Ms. Schulman did not address Mother's apparent misunderstanding about an "IEE," but reiterated, without explanation, that CHC was selected to conduct the assessment.

13. On October 2, 2008, since the District had still not received a returned signed Assessment Plan from Mother or Father, the ADR Administrator, Mr. Ferro, prepared and sent another letter to each of them at their known addresses, enclosing another copy of the June 2008 Assessment Plan and notice of parental rights and procedural safeguards. In the letter, Mr. Ferro reminded Parents that the staff believed a comprehensive assessment by CHC in Palo Alto was warranted, and described the proposed assessments. In addition, Mr. Ferro's letter reiterated a prior verbal offer to have the District reimburse Mother, Father, and Student for the costs of meals, lodging, and roundtrip transportation to travel to Palo Alto. The evidence did not establish when District originally made the travel reimbursement offer. Nor did it reflect whether Parents ever communicated any concerns about the costs or distance involved to the District.

14. Based on the foregoing, beginning in March 2008, the District delivered notice of its proposed assessment plans to Parents, along with notice of parental rights and procedural safeguards many times. The District did not initially send Parents specific written information about the qualifications of the proposed assessors. Mother conducted research about the assessors. Parents objected to the proposed assessor in the March 2008 Assessment Plan, Fremont Diagnostic. Thereafter, the District proposed another assessor in the June 2008 Assessment Plan, CHC. The June 2008 Assessment Plan contained explanations of the types of assessments that would be conducted. The evidence established that the District made reasonable attempts to obtain parental consent to its assessment plans, including amending the plan to change the assessor, and

to propose reimbursing Parents for their costs. Therefore, service of notice of the June 2008 Assessment Plan on Parents complied with the law.

CIRCUMSTANCES WARRANTING REASSESSMENT

15. In addition to the District's statutory obligations to reassess Student based on both the overdue triennial and the parental requests as found above, District contends that Student's current educational and functional circumstances warrant reassessment. The District's proffered reasons include Student's unknown current levels of performance and his high school diploma track classes, which may be causing Student undue frustration, anxiety, and occasional maladaptive aggressive behaviors. In opposition, Mother contends that the District's 2006 and 2007 assessments should be sufficient to evaluate his current needs and deficits, and that Student should be given the opportunity to obtain a high school diploma.

16. Student has required the assistance of a full time one-to-one aide to access his education since at least fifth grade. He is generally compliant and hardworking. Student has an auditory processing deficit, and as a result of his unique needs arising from his disability, he requires accommodations and significant adult prompting. Student does not initiate conversation and is highly prompt-dependent. When his typically developing high school peers engage in complex verbal and nonverbal communications, Student often misinterprets what is going on. He may react with verbal or physical aggression toward peers when frustrated, and has been observed over the past year exhibiting notable anxiety.

17. District's full inclusion specialist, Sandra Lee Conley, is a licensed special education teacher with over 17 years experience in the District. For the 2007-2008 school year in 10th grade, Student was placed in a general education setting in a "full inclusion collaborative model," in which he took general education high school diploma track classes with significant accommodations in all classes, and modifications of curriculum in a history

class. Ms. Conley collaborated with Student's teachers and observed his struggles in the inclusion setting. Ms. Conley became concerned that Student's classes were inappropriate because his levels of academic achievement and functional performance were much lower than those required for the classes, and he was exhibiting frustration and anxiety.

18. As reflected in the District's proposed annual goals in December 2007, Student's last assessed levels of performance in reading were at a third or fourth grade level, writing was at a one-paragraph level, and arithmetic was at a fifth grade level (although he did well in pre-algebra). Student's performance levels for speech and language were not discernable from the goals, other than a notation that his vocabulary was in the first percentile for his age. Ms. Conley persuasively established that the District's informal reading assessments in December 2007 did not reflect Student's actual abilities because they were not thorough assessments. While his reading decoding may be at the third grade level, his reading comprehension may be at a second grade level. However, the proposed goal aimed at a fourth grade reading level. In addition, the performance levels for the other academic areas appeared to be based on outdated 2006 assessments.

19. During 10th grade, Ms. Conley and other District staff became concerned that Student was exhibiting increasing behaviors that showed he was anxious and frustrated in classes, in close proximity to peers, and when transitioning classes such as walking down the halls. In February 2008, District's Behaviorist Program Manager, Kara Oettinger, reviewed Student's records, spoke with District staff, including his case manager Tania May and Ms. Conley, and conducted an observation of him in a classroom in order to help propose a behavior support plan (BSP). Ms. Oettinger oversees the District's behavior analysts, and is a licensed and certified special education teacher with over ten years of education and experience. Ms. Oettinger observed that Student exhibited behaviors, including a low frustration threshold and attention difficulties, which suggest to her that he may have a disability on the autism spectrum. She did not observe any

aggressive behaviors. Ms. Oettinger persuasively explained that the District's current primary eligibility designation of a speech and language disorder may not be the accurate designation, and that Student should be reassessed in all areas of suspected disability in order to determine what his current needs are.

20. Ms. Conley and other staff reported to Ms. Oettinger that Student's behaviors included, frequently, inappropriate speaking and picking his arm until it bleeds, and infrequently, hitting or attempting to hit or injure other students. District staff reported concerns about Student's behaviors to Ms. May and Ms. Oettinger. The District's March 2008 BSP reported that Student's physical aggression was infrequent (only about five times per year), of brief duration, and moderate intensity. Members of the IEP team discussed their concerns regarding Student's behaviors with Parents at both the March 11, 2008 and June 12, 2008 IEP meetings. Parents did not agree with the BSP and disagreed with the school staff's concerns about Student's behaviors.

21. At both the March and June 2008 IEP team meetings, District staff recommended that Student should be taken off the high school diploma track, and be provided classes that are closer to his ability levels, in order to reduce his frustration, increase his access to educational benefit, and help him feel less overwhelmed and more successful. Ms. Conley does not think that Student is capable of earning a high school diploma because the subject content of the required courses is too complex for him, and the curriculum modifications he needs is not allowed for a diploma. For the 2008-2009 school year, Student is also enrolled in an Algebra class, Earth Science class and a U.S. History class, which she believes are inappropriate for Student's levels of functioning. Ms. Conley was persuasive that a reassessment of Student would provide current information to guide the IEP team about his true levels of performance.

22. Based on the foregoing, District staff believe that Student should be taking courses to remediate his functional and adaptive skills, and to help prepare him to function

independently as an adult, instead of working to try to pass the California High School Exit Exam (CAHSEE) or to obtain a high school diploma for which he may not be qualified. Mother believes that Student is capable of passing the CAHSEE and obtaining a high school diploma. She pointed to his first quarter grades for the 2008-2009 school year, where Student received an A grade in Algebra Skills, B grades in Earth Science and Literature, and a D grade in U.S. History. However, District staff believe that Student's grades did not reflect his true performance levels and would go down as the school year progressed.⁷

23. Craig Garabedian is a licensed educational psychologist, a credentialed school psychologist, and a neuropsychologist certified by the American Board of School Neuropsychology. He maintains a private psychology practice in addition to being the Director of Special Education for the Roseville Joint Union High School District. Mr. Garabedian has conducted many school-related psychological and neuropsychological assessments of pupils over the years. At the District's request, he reviewed Student's school records, including assessments.

24. Mr. Garabedian was persuasive that the December 2007 annual goals proposed by the District reflected levels of academic and functional skills which were significantly lower than those reasonably required for Student's classes for the 2008-2009 school year. Mr. Garabedian explained that the wide gap between Student's probable levels of functioning and the course work with which he was struggling would naturally lead to frustration, reduced effectiveness, and inappropriate behaviors. Based on his education, training, and experience, Mr. Garabedian established that the District's previous

⁷ For example, Ms. Conley established that Student is not yet doing Algebra in the class called "Algebra Skills," but that the class is reviewing pre-algebra. She anticipates that when the class actually starts doing Algebra, the abstract nature of the subject will be very difficult and frustrating for Student.

assessments of Student are out of date, fragmented, and insufficient to support informed determinations about his current levels of performance and unique needs. For example, District's 2006 neuropsychological assessment by Dr. Kristin Gross was two years old, out of date, and incomplete because it did not contain any academic assessment, although it did contain data suggesting that Student may be mildly mentally retarded. Mother was surprised at hearing to hear Mr. Garabedian's opinion that Student's cognitive functioning may be lower than she has previously understood. Mr. Garabedian was persuasive that a comprehensive assessment of Student is necessary at this time to determine what his current levels of academic and functional performance and capabilities are, and that it should address all areas related to suspected disability, including autism, pervasive developmental disorder, and mental retardation, in addition to speech and language.

25. Based on all of the foregoing, there is insufficient information about Student's current academic and functional levels of performance and capabilities. District has established that a comprehensive reassessment of Student is warranted in order to obtain information to aide the IEP team in determining Student's current educational needs and developing an IEP for him. In addition, the District's proposal to assess Student's behavior as a suspected area related to his disability is reasonable in light of consistent staff concerns about his levels of anxiety and frustration, although the evidence did not establish maladaptive aggressive behaviors.

NATURE OF THE PROPOSED ASSESSMENTS

26. Tests and assessment materials must be administered by trained and knowledgeable personnel in conformance with the instructions provided by the producers

of the tests.⁸ Assessments must be conducted by individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” The tests must be selected so as not to be racially, culturally, or sexually discriminatory.

27. Among other services, the CHC, located in Palo Alto, provides professional assessment services for children with a wide range of disabilities in multiple disciplines including psychiatry, psychology, neuropsychology, education, behavior management, speech and language therapy, and occupational therapy. It is not affiliated with the District and is an independent agency.

28. The District makes referrals for assessment by non-District personnel in special circumstances, including where the expertise is not available inside the District, or when a case is complex, suggesting multiple areas of suspected need, and it is determined that an integrated, comprehensive assessment by an independent agency would lead the District and the parents toward an appropriate result for the pupil. The District defines a comprehensive assessment as one involving more than one area of suspected need. In the past, the District and Mr. Ferro have referred about eight to ten pupils to CHC for a comprehensive assessment. In addition, they have reviewed a similar number of such assessments from CHC for pupils referred by their parents for assessment.

29. Mr. Ferro has over 41 years of education and experience in special education services, and has been with the District since 2000. He was persuasive that CHC has an excellent reputation as an independent assessment agency in the Northern California special education community. Mr. Ferro has found CHC’s comprehensive assessments to be performed by competent, qualified personnel, and to be professional, complete, and

⁸ Contrary to Parent’s assertion, the law does not require the District’s assessment to be conducted by District staff. Education Code section 56320 requires “trained and knowledgeable” personnel.

credible. He has personally worked with CHC Client Services Director Tom McPherson over the past five years regarding other pupil assessments and has found that CHC's assessments are geared to the pupil in the school environment, and are not merely medical assessments. For example, the CHC assessment team will observe the pupil in the school setting, and consult with teachers, parents, and service providers. In Mr. Ferro's experience, CHC's findings have been capable of being implemented in the educational setting if adopted by an IEP team.

30. The District believes a comprehensive assessment is appropriate for Student because he has complex needs and deficits that have not been assessed in an integrated fashion. Mr. Ferro and Mr. McPherson have conferred about the qualifications of the assessment team that CHC will put together to assess Student. CHC will follow the District's June 2008 Assessment Plan, and the assessment team it assembles will select and administer appropriate tests and assessments that are reliable for the purposes for which they are designed. All assessment tests will be performed by or under the supervision of CHC, under the lead of CHC neuropsychologist Nancy Sullivan, a qualified educational neuropsychologist. All members of the CHC assessment team will be licensed, credentialed, or qualified as required by California law. Although the June 2008 Assessment Plan does not specify auditory processing as a specific category to be assessed, Mr. Ferro credibly established that Student's auditory processing deficits will be included under the Plan's listed areas of assessment, including at least communication, expressive development, and language processing. CHC does not have an internal audiology department, and will retain qualified personnel to conduct auditory processing portion(s) of the assessment.

31. Mr. Ferro and the District were given an estimated cost of \$10,000 to \$15,000 for Student's comprehensive assessment, which would involve a period of about three or four days of actual assessment of Student in Palo Alto, in addition to the school

site observations and assessments. There was no evidence that Student would be adversely impacted by the length of time for the assessment aside from missing some school days.

32. Based on the foregoing, District's June 2008 Assessment Plan proposes assessment of Student by a competent educational assessment team at CHC in Palo Alto, using qualified and knowledgeable personnel who will administer appropriate tests and assessment materials, and therefore complies with the law. Since the Assessment Plan otherwise complies with the law, Parent's preference for other assessors, such as Children's Hospital of Oakland, need not be addressed.

TRAVEL COSTS

33. District requests an order upholding its assessment plan and requiring Parents to make Student available for assessment even though they have not consented to the plan. Parent contends that the assessment location in Palo Alto is too far away and burdensome.

34. The legal requirements for assessments do not expressly address the issue of the location of the proposed assessment. Requiring a parent to make his or her child "reasonably available" for assessment presupposes assessment within or reasonably near the geographical boundaries of the school district of the pupil's residence. By analogy, the law requires that transportation and other support services, as a designated instructional service, may be required by law in order to enable a pupil to obtain educational benefit. Thus, as an equitable matter, an LEA proposing an assessment location that involves significant travel should generally consider bringing the assessor to the school district, or the pupil to the assessor.

35. The evidence established that the presence of at least one parent would be necessary to care for Student during his travel to and from CHC in Palo Alto, and the conduct of assessments there. In addition, both Mother and Father would be interviewed

and included in the assessment process at the CHC facility, although for how long was not established. The distance between Student's homes in the District and CHC's office in Palo Alto is approximately 56 to 60 miles one way. Such travel would involve either the family's round trip travel for two to four hours per day, depending on traffic in a congested urban area, or overnight lodging for multiple days of assessment.

36. As found in Factual Finding 13, at some point between June and October 2008, the District amended its offer and verbally offered to reimburse Parents for the travel costs involved with going to Palo Alto for the assessment. In Mr. Ferro's letter of October 2, 2008 to Parents, the District formalized an offer to reimburse Parents for the roundtrip transportation, meals, and lodging costs for Mother, Father, and Student to travel to Palo Alto to the CHC office for the assessments.

37. There is no evidence that Parents responded prior to the hearing to provide any details to the District about their travel needs. However, Mother credibly established at hearing that her automobile does not have safe brakes for freeway travel and that, as a result of lower back pain from an injury in 1996, she cannot sit for more than 30 minutes at a time and needs to take frequent stops while traveling. She credibly represented that Father also has back problems requiring frequent travel stops, and that advancing the travel and lodging costs would pose a financial hardship for Parents.

38. During the hearing, Mr. Ferro and the District modified the nature of the offer to take care of the expenses of the assessment. The transportation offer now includes a driver and car to be provided by the District to transport the family to Palo Alto and home again. The District offers to make an advance purchase requisition to pay the hotel directly for the lodgings. In addition, the District now offers that Student would not suffer any adverse academic consequences occasioned by the travel and assessments. He would be given an excused absence for each school day missed due to the travel and assessments, and would not be penalized for any missed school classroom work or

assignments, or missed homework due to the travel and the assessments.

39. Based on all of the foregoing, the District's June 2008 Assessment Plan, as amended on October 2, 2008, and again at hearing to provide for the costs of travel, lodging and meals, complies with the law and reasonably provides funding for the family's incidental expenses in order to have Student assessed at the facility selected by the District in Palo Alto. Even if District's funding of the travel costs involved herein is not required by law, District agreed during the hearing to fund the costs.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. District, as the party requesting a due process hearing, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

ASSESSMENT

2. A child with a disability has the right to a FAPE under the IDEIA. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56500.) 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.) Thereafter, special education pupils must be reassessed not more frequently than once a year, and shall be reassessed at least once every three years, unless the parent and the LEA agree otherwise. (Ed. Code, § 56381.)

3. A reassessment shall be conducted if the LEA determines "that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment." (20 U.S.C. § 1414(a)(2)(A); Ed. Code, § 56381, subd. (a).) The LEA shall conduct a reassessment if the pupil's parent or teacher requests a new assessment. (Ed. Code, § 56381, subd. (a).) The pupil 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 pupil has a disability or an

appropriate educational program. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subd. (e), (f).)

4. While the law provides that an LEA has the right and obligation to conduct assessments, parental consent is required before an LEA may conduct assessments. (20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code, § 56321, subd. (c).) The assessment plan must be provided within 15 days of parental request. It must be accompanied by a notice of the parent's rights and a written explanation of the procedural safeguards under IDEA and California law. (Ed. Code, § 56321, subd. (a).) In addition, the plan must be in easily understood language and explain the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) 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).)

5. An LEA can override a lack of parental consent if the LEA establishes at a due process hearing that assessment is needed. (20 U.S.C. § 1414(a)(1)(C)(ii); Ed. Code, §§ 56321, 56329, subd. (c), 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, §§ 56381, subd. (f), 56506, subd. (e).)

6. Based on Factual Findings 2 and 3, and Legal Conclusion 2, the District is required by law to conduct a triennial assessment because it should have been conducted by June 2007, and is still due.

7. Based on Factual Findings 4, 5, 6, and 7, and Legal Conclusions 3 and 4, the District was required by law to present an assessment plan and conduct an assessment because Parents requested assessment on January 11, 2008. In March 2008, District provided an assessment plan to Parents, which was rejected. In June, July, August, and October 2008, the District sent Parents copies of the June 2008 Assessment Plan and notice of parental rights and procedural safeguards, and requested their consent to assessment.

8. Based on Factual Findings 9 – 14, and Legal Conclusions 3 and 4, District's service of notice of the June 2008 Assessment Plan complied with the legal requirements regarding giving Parents an explanation of all areas to be assessed related to Student's suspected disabilities, and the types of assessments to be conducted, the identity of the proposed assessment facility, and notice of parental rights and procedural safeguards. The District made numerous reasonable measures to obtain Parents' consent, including amendment of the proposal before and on October 2, 2008, by offering to change the assessment agency, and offering to reimburse Parents for the costs associated with travel to Palo Alto for the assessments.

9. Based on Factual Findings 15 – 25, and Legal Conclusion 3, Student's current academic and functional circumstances warrant a comprehensive reassessment because the assessment data regarding his complex needs is out of date and fragmented, Student has demonstrated notable frustration and anxiety at school, and there is insufficient current information regarding his unique needs in multiple suspected areas of disability, including behavioral, emotional and cognitive functioning.

NATURE OF THE ASSESSMENT

10. 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, subd. (a), (b).) Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" 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, subd. (g), 56322.)

11. Based on Factual Findings 26 – 32, and Legal Conclusion 10, the evidence established that CHC is a competent, reputable independent assessment agency that will assemble a multidisciplinary team of qualified and knowledgeable personnel, headed by a

qualified neuropsychologist, Dr. Sullivan, who would administer appropriate tests and assessment materials in all areas of suspected disability (other than AT) as set forth in the June 2008 Assessment Plan. Therefore, the Assessment Plan met the legal requirements, aside from the issue of the location of the facility and consequent impact on the family.

TRAVEL COSTS

12. The legal requirements for assessments do not expressly address the issue of the location of the proposed assessment. By analogy, the law requires that transportation and other support services, as a designated instructional service, may be required by law in order to enable a pupil to obtain educational benefit. (20 U.S. C. § 1401(26); Ed. Code, § 56363.) Similarly, transportation or travel costs may be necessary to enable a pupil to be assessed. As an equitable matter, an LEA proposing an assessment location that involves significant travel should generally consider funding the costs of bringing the assessor to the school district, or the pupil to the assessor.

13. Based on Factual Findings 33 – 39, and Legal Conclusion 12, District's June 2008 Assessment Plan did not originally address any travel arrangements involved in proposing assessment by a facility in Palo Alto. District amended the proposal on or before October 2, 2008, to reimburse Parents for their transportation, lodging, and meals, and the reimbursement offer was reasonable. Parents did not respond to give the District notice that reimbursement would not be a feasible method of funding the travel. However, upon learning at hearing that Mother's means of transportation and ability to finance advance payment of these expenses was problematic, the District again amended its proposal and agreed to directly fund the expenses.

14. Due to the distant location of the assessment facility, the District should fund the travel expenses for Student and Parents by some reasonable method, even if it is not otherwise required to do so by law. The evidence established that, based on the family's transportation and finance needs, advance funding of the costs of transportation, lodging

and meals to and from CHC is necessary to enable Student to be assessed. Since Student's need for a comprehensive assessment has been established (Legal Conclusions 6, 7, and 9), District's amended offer and agreement to directly pay for the family's incidental expenses because of the time and travel involved results in an equitable proposal.

15. Based on Factual Findings 1 – 39, and Legal Conclusions 3 – 14, District has established that reassessment is needed, and that it took reasonable measures to obtain Parents' consent. Because the June 2008 Assessment Plan, as amended, complies with the law, District is therefore entitled to override the lack of parental consent.

ORDER

1. The District may reassess Student pursuant to the proposed Assessment Plan of June 25, 2008, as amended, without parental consent.

2. The District shall pay for all costs associated with having Parents and Student attend the assessments in Palo Alto, California, including the costs of roundtrip transportation, meals and lodging if necessary. If the Parents fund any part of the transportation or expenses, the District must reimburse Parents within 30 days of receipt of proof of expenses.

3. The Parents shall make Student reasonably available for the reassessment.

PREVAILING PARTY

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

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. Or, a party may bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

